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THE SOUTHEASTERN REPORTER VOLUME 85

(100 N. C. 124)

TAYLOR et ux. v. MEADOWS et al.
(No. 323.)

(Supreme Court of North Carolina. April 28,
1915.)

1. EJECTMENT ¶9—TITLE OF PLAINTIFF—EVIDENCE.

Where an owner, conveying separate parcels of land, left undisposed of a strip between them, which on his death passed as intestate property, an heir could maintain ejectment on the theory of heirship.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. ¶9.]

2. TENANCY IN COMMON ¶55—ACTION AGAINST TRESPASSERS.

A tenant in common may, as against a trespasser who is a stranger to the common title, maintain an action to recover possession.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 140-156; Dec. Dig. ¶55.]

3. EJECTMENT ¶84—EVIDENCE—ADMISSIBILITY.

Where the complaint in ejectment alleged plaintiff's ownership generally, plaintiff can proceed on any title that he can establish by proof.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 230-234, 236; Dec. Dig. ¶84.]

4. DOWER ¶56—FAILURE TO ALLOT DOWER—EFFECT.

Until dower is allotted, title descends to the heirs of the owner dying intestate.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 178-188, 197, 198, 206; Dec. Dig. ¶56.]

5. EJECTMENT ¶84—TITLE OF PLAINTIFF—ESTOPPEL.

A plaintiff in ejectment, who insists on his right to recover on the theory that a deed conveyed the property to his coplaintiff, his wife, is not estopped from showing his ownership as heir of the deceased grantor.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 230-234, 236; Dec. Dig. ¶84.]

Appeal from Superior Court, Granville County; George Rountree, Judge.

Action by R. P. Taylor and wife against one Meadows and others. From a judgment for defendants, plaintiffs appeal. Reversed, and new trial awarded.

The action was to recover a narrow strip of land abutting 30 to 35 feet on Williamsboro street in the town of Oxford, on complaint by R. P. Taylor and wife, Bettie Taylor, alleging generally that they were owners of the land in controversy, describing it,

and that defendants were in the wrongful possession of the same, and answer of defendants denying the allegations. Among other testimony, the will of L. C. Taylor, father of male plaintiff, was put in evidence in terms as follows:

"(1) I appoint my son, Richard P. Taylor, executor of my estate.

"(2) After my death that all my just debts be paid, and if there is any money remaining that a neat monument be placed at the head.

"(3) That the balance be divided equally between Charles A. Taylor, Mrs. R. L. Hines, James A. Taylor and Richard P. Taylor.

"Leonidas C. Taylor."

In the opening portion of his honor's charge, he instructed the jury as follows:

"It is admitted that the land originally belonged to Dr. L. C. Taylor, and his will has been put in evidence. As I remember it, the will devised the property, or provided that the property should be divided among his children. There has been no evidence introduced before you as to whether or not that went to Mr. Taylor, or to any other of the heirs of Dr. Taylor. In the absence of that evidence, the burden being upon him, his title would fail upon that ground, and he would only be entitled to recover upon the ground of the deed from Crews, or deed to Mrs. Taylor. The question for you to decide is whether plaintiff has shown to you by the greater weight of the evidence whether this strip or any portion of it is covered by the deed from Crews to Taylor. If it is, answer the issue 'Yes'; if it is not, answer the issue 'No.' If you don't know how it is from the evidence, and your minds are left in doubt, you should answer it 'No.'"

On issues submitted, there was verdict for defendant. Judgment accordingly, and plaintiff excepted and appealed.

R. W. Winston, Jr., of Raleigh, for appellants. Hicks & Stem and B. S. Royster, all of Raleigh, for appellees.

HOKE, J. [1] There were facts in evidence tending to show that in 1880 Dr. L. C. Taylor, father of male plaintiff, owned a large lot of land in the town of Oxford, abutting on Williamsboro street, and in that year he conveyed a half acre of same, thereafter known as the prize-house lot, extending 135 feet along said street, and lying east of his residence lot, to Walter Biggs, and the lot has passed by successive conveyances to Kader Biggs, to J. M. Currin, and then, by commissioner's sale and deed, to defendant

Meadows, who is now in possession, claiming to be the owner and that his deeds cover the land in controversy; that in 1881 L. C. Taylor mortgaged the remaining portion of his land, or what he intended to be the remaining portion, the description not being by metes and bounds, and in 1893, on foreclosure sale, the land was conveyed to feme plaintiff, Bettie Taylor, purchaser at the mortgage sale, and in this deed there were descriptive words tending to show that the divisional line between the properties was regarded by the parties as the "yard fence of L. C. Taylor." There were further facts in evidence on the part of plaintiffs tending to show that the correct divisional line between the properties was 30 to 35 feet east of this yard fence, and leaving the strip of land in controversy on plaintiffs' side of the line, and also that the true location of the successive deeds, conveying the prize-house lot, beginning with that from L. C. Taylor, did not cover the land in controversy. On this testimony, the proof showing further that L. C. Taylor had died leaving male plaintiff and three others as his children and heirs at law, and the will making no disposition of the land, we are of opinion that reversible error was committed in restricting plaintiffs' right of recovery to the land conveyed to feme plaintiff under the foreclosure deed, for, although this deed may not have included the land sued for, there were facts in evidence permitting the conclusion that the male plaintiff, as heir of his father, was entitled to recover the land, or at least his interest in it.

[2-4] It is well established that a tenant in common, on denial of his ownership, may recover his interest, and, as against a trespasser who is a stranger to the common title, he may at times be allowed to recover the entire property. *Moody v. Johnston*, 112 N. C. 804, 17 S. E. 579; *Allen v. Salinger*, 103 N. C. 14, 8 S. E. 913. And, the allegations of ownership in the pleadings being general in their nature, the plaintiffs should have been allowed to proceed upon any title that they could establish on the testimony. *Davidson v. Gifford*, 100 N. C. 18, 6 S. E. 718. In the case cited the principle is stated as follows:

"When the complaint in ejectment does not set up any particular evidence of title in plaintiff, or that plaintiff claims under any specified title, the plaintiff is at liberty, on the trial, to prove title in himself, in any way he can, allowed by law."

And the position is not affected by the fact that Dr. Taylor's widow may also survive him, for, until dower allotted, the title descends to the heirs of the owner. *Fishel v. Browning*, 145 N. C. 71, 58 S. E. 759.

[5] It is alleged for defendant that the male plaintiff claimed on the witness stand that the deed to his wife covered the property in dispute, and testified to facts tend-

ing to show it, and insisted on his right to recover on that theory; that this may not be allowed to affect the result. The witness no doubt believed that the deed to his wife covers the property, and testified in that belief; but the fact that he did so should not be held as a retraxit or as an estoppel, preventing him from recovery on any title shown forth in evidence.

There is error in the ruling as indicated, and the issue must be submitted to another jury.

New trial.

(100 N. C. 244)

MERRITT v. DICK et al. (No. 285.)

(Supreme Court of North Carolina. April 22, 1915.)

1. APPEAL AND ERROR ¶724—ASSIGNMENTS—SUFFICIENCY.

Assignments of error which gave no indication of the errors complained of, and merely informed the appellate tribunal that the several groups included certain exceptions which could only be found upon recourse to the record, are insufficient under court rule 19, subsec. 2, providing that all exceptions relied on shall be grouped and separately numbered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. ¶724.]

2. APPEAL AND ERROR ¶748—BRIEFS—PERMISSION TO FILE.

Where plaintiff's original assignments of error were wholly defective, and, if it filed new ones, it would necessitate defendant filing an entirely new brief, permission to file new assignments will be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3058-3064; Dec. Dig. ¶748.]

3. PLEADING ¶236—AMENDMENTS—ALLOWANCE—DISCRETION.

Permission to file an amended answer rests wholly in the discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. ¶236.]

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by Sarah Ann Merritt against F. W. Dick and others, held upon these issues:

(1) Is the plaintiff, as tenant in common, the owner in fee of the lands in dispute, and described in the complaint and entitled to the possession thereof? Answer: No.

(2) Is the plaintiff's claim barred by the statute of limitations? Answer:

(3) What damages, if any, is plaintiff entitled to recover of the defendant? Answer:

From the judgment rendered, plaintiff appealed. Affirmed.

K. C. Sidbury, of Wilmington, and T. C. Wooten, of Kinston, for appellant. Davis & Davis and Bellamy & Bellamy, all of Wilmington, for appellees.

PER CURIAM. [1] The defendants move to dismiss this action under rule 19, subsec. 2, for a failure to properly assign error. The plaintiff assigned a number of additional assignments of error when the case was called for argument, and asked the court to con-

sider them, which motion was taken under advisement.

In the record proper the original assignments of error are as follows:

Assignments of Error.

Group 1 includes the first assignment.

Group 2 includes 3, 4, 5, 8, 10, 11, and 15.

Group 3 includes 12, 13, and 14.

Group 4 includes No. 16.

Group 5, No. 17.

Group 6, Nos. 22 to 40, inclusive.

It is manifest that these assignments are far from being a compliance with the rule. They give no indication whatever of the errors complained of, and would require an almost microscopical examination of the record to locate them.

[2] We feel constrained to deny the motion, as it would require the filing of an entire new brief upon the part of the defendants. Nevertheless, we have looked informally into the additional assignments of error filed at the time of the argument, and we think that they are without merit.

[3] A controversy in respect to the location of the grant seems to be one almost exclusively of fact, and seems to have been properly submitted to the jury. The only error properly assigned in the original record is to the action of his honor in permitting the defendants to file an amended answer. This was purely discretionary upon the part of the judge, and there is nothing in the record indicating that such discretion was abused.

No error.

(168 N. C. 642)

GAMBIER v. KIMBALL. (No. 369.)

(Supreme Court of North Carolina. April 22, 1915.)

1. TRIAL \Leftarrow 260 — REQUESTED INSTRUCTION—GIVEN INSTRUCTION.

In an action to recover on a contract to prepare plans, the defendant's requested instruction that if the plaintiff contracted to furnish the plans for a residence to cost not over a certain amount, and failed to furnish plans for such a residence, and admitted that defendant had paid him on account \$200, defendant could recover the same, was substantially given in a charge that if the plaintiff failed to comply with the terms of his contract, and induced defendant to advance sums amounting to \$200 or \$255, and failed to return such sums or to comply with his contract, the defendant was entitled to recover back the sum paid.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. \Leftarrow 260.]

2. TRIAL \Leftarrow 239—ACTION FOR SERVICES—INSTRUCTION—AMOUNT OF RECOVERY.

An instruction, in answer to interrogatory of juror, that it was within the physical power of the jury to divide the amounts claimed by the plaintiff and defendant, respectively, when followed by a statement that, if the jury found for plaintiff on the issue as to the amount due him, they would not answer the issue as to the amount recoverable by defendant on the counterclaim, was not erroneous, as permitting the jury to compromise the matters in controversy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 557-560; Dec. Dig. \Leftarrow 239.]

3. APPEAL AND ERROR \Leftarrow 1068—INSTRUCTION—HARMLESS ERROR.

Such charge, if erroneous, was not prejudicial to defendant, where the jury could not find any amount due the plaintiff under the instructions, without finding that the contract was as plaintiff claimed it to be, under which he was entitled to recover \$370, and where the jury reduced such amount by \$150.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. \Leftarrow 1068.]

Appeal from Superior Court, Guilford County; Devin, Judge.

Action by Richard Gambier against A. B. Kimball, with counterclaim by defendant. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover an amount alleged to be due on a special contract to prepare plans and specifications for a house which the defendant intended to build. The defendant alleged that the plaintiff had failed to perform his contract, and pleaded a counterclaim in the sum of \$200 for money advanced to the plaintiff, which he alleges the plaintiff promised to repay.

The plaintiff offered evidence tending to prove that he entered into a contract with the defendant to prepare plans and specifications for a house estimated to cost about \$9,000, and that the defendant agreed to pay him therefor \$240; that he prepared the plans and specifications, and that they were accepted by the defendant, and that the defendant paid him \$100; that thereafter the defendant decided to build a different house, and applied to the plaintiff to prepare other plans and specifications, which the plaintiff agreed to do, it being agreed in the second contract that the balance due on the first contract would be canceled and a new price agreed upon for the second plans and specifications; that these plans and specifications were accepted by the defendant, and he paid \$50 on the amount due; that thereafter the defendant decided he would not build according to these last plans and specifications, and applied to the plaintiff again to prepare plans and specifications for a bungalow, saying that he would certainly build this time; that the plaintiff agreed to prepare the plans and specifications as desired by the defendant and satisfy the balance due on the other contract for a commission of 3½ per cent. on the estimated cost of the building, which was \$12,000; that he prepared these plans and specifications, and that they were presented to and accepted by the defendant.

The defendant offered evidence tending to prove that the plaintiff approached him and told him that he understood that he was going to build, and asked permission to prepare plans and specifications; that he told the plaintiff the kind of house he wished to build and that he would not spend more than \$5,000 on the building, and that he desired plans and specifications for a house costing

no more than that sum, which the plaintiff agreed to prepare, saying that he could build the house which the plaintiff desired for \$5,000 and would guarantee that it could be done; that he told the plaintiff that he did not care to incur any unnecessary expense, and that he would agree to pay him $3\frac{1}{2}$ per cent. of the cost, on the assumption that the house would not cost more than \$5,000; that the plaintiff prepared plans and specifications for a house which could not be built for less than \$8,900, and that he thereupon declined to accept the plans and specifications; that the plaintiff prepared a second set of plans and specifications, which did not comply with his agreement, and which were not accepted; that the defendant then agreed that the cost of the house to be built should be advanced to \$7,500, and the plaintiff then agreed to prepare plans and specifications for a house, the size and character of which was agreed on, which could be built for a sum not exceeding that amount; that the plaintiff then prepared other plans and specifications for a house which could not be built for less than \$12,000, which the defendant refused to accept; that while negotiating with the plaintiff he advanced to him \$200 as a loan, under a promise to repay the amount if the plans and specifications were not satisfactory.

The jury, in response to the issue submitted to them, found that the defendant was indebted to the plaintiff in the sum of \$220. The defendant excepted to the refusal to give the following charge to the jury:

The court charges you that if you find from the evidence and by its greater weight that the plaintiff contracted with the defendant to design and furnish plans and specifications for a residence to cost not exceeding a limited amount, and failed to furnish such design or plans and specifications for a residence that could be built within the amount limited, and abandoned any effort to do so, the court charges you that the plaintiff admits that the defendant has paid him on account of said work the sum of at least \$200, then your answer to the second issue would be \$200 and interest.

After the jury had deliberated some time they asked for further instructions as follows:

The Court: Do you gentlemen desire some further instructions?

Juror: We want to know if we could answer that first issue the full amount, and give Mr. Kimball a counterclaim.

The Court: No; if you answer the first issue the full amount, that is finding that the contract is as contended by the plaintiff; then the defendant would not be entitled to anything back. If you answer the first issue \$370, you will not answer the second issue; but, if you answer the first issue "Nothing," you will then consider the second issue. If you find that the contract was as contended by the defendant, by the greater weight of the evidence, you would answer that such amount as you find he paid, under these issues; but, if you are not satisfied as to that, you would answer it "Nothing"—the burden being upon the defendant under the second issue.

The jury thereupon retired, and returned a second time for further instructions.

The Court: Is there any matter I can aid you about?

Juror: It might be if you would charge us again, it might be we could get together.

The Court: If it is a question of fact, I have no right or power, nor do I desire to express any opinion upon the facts.

Juror: Could we answer both issues "No"?

The Court: Yes. If you answer the first issue "No," you can answer the second issue "No." You can answer both "No," if you find the facts so to be. If you find the first issue "Yes," the amount claimed by plaintiff, you would not answer the second issue; but, if you answer the first issue "No," you can answer the second issue the amount claimed by defendant, or you can answer that "No."

Juror: If we answer the first issue "Yes," that means \$370.

The Court: Yes; that is the amount claimed by him, \$370; that is, if you are satisfied that it is correct.

Juror: We cannot split that, or anything?

The Court: That is within the physical power of the jury. If you find that the contract between them was that the plaintiff was to make out plans and specifications for $3\frac{1}{2}$ per cent. for a building upon the estimated cost, and the cost was \$12,000, and that was complied with, he would be entitled to recover \$370, and you are the judges of whether he has shown that. If he has shown that by the greater weight of the evidence, it would be your duty to answer it "\$370." If you are not so satisfied, you will answer it "No." Of course, the jury has the power to pass upon these matters. You are the sole judges of the evidence and the weight you will give to it. If you answer the first issue "Yes," you would not consider the second issue; but, if you answer it "No," you will answer the second, and the burden of that is upon the defendant. If you find he is entitled to recover back the \$200, or \$225, you will say so; and, if you do not think he is, you will answer "Nothing."

There was a judgment in favor of the plaintiff for \$220, and the defendant appealed.

R. R. King and Thomas S. Beall, both of Greensboro, for appellant.

ALLEN, J. [1] The prayer for instruction requested by the defendant was substantially given in the charge. In addition to telling the jury several times that the plaintiff was not entitled to recover anything, unless he proved performance on his part he instructed the jury as follows:

"If the jury shall find from the evidence and by its greater weight that the contract was that the plaintiff should furnish plans for a house not to exceed \$5,000, and the plaintiff failed to comply with the terms of his contract, and that while negotiations were going on, and before the defendant learned that the contract would not be complied with, the plaintiff induced the defendant to advance him various sums from time to time, amounting to \$200, or \$225, or whatever the jury should find it to be, upon the assurance and warranty that he would comply with the terms of the agreement, and the plaintiff has failed to return said sums, and he failed and refused to comply with his contract, the defendant would be entitled to recover back the sum so paid."

And again:

"If you answer the first issue '\$370,' you will not answer the second issue; but, if you answer the first issue 'Nothing,' you will then consider the second issue. If you find that the con-

tract was as contended by the defendant, by the greater weight of the evidence, you will answer that such amount as you find that he paid under these issues; but if you are not satisfied as to that, you will answer it 'Nothing'—the burden being upon the defendant upon the second issue."

[2] The part of his honor's charge excepted to when the jury returned for further instructions is in telling the jury in substance that it was within the physical power of the jury to divide the amount claimed by the plaintiff and the defendant, respectively; and this, standing alone, would be erroneous, but when read in connection with the context it does not reasonably bear the construction of a direction that the jury had the right to compromise the matters in controversy. The juror asked the presiding judge if the jury could split the amount claimed by the parties, and his honor said, it is true, "That is with the physical power of the jury;" but he immediately followed this statement with a clear and full instruction as to the duties of the jury in considering the evidence and in determining what their answers to the issues should be.

[3] If, however, it should be held that the charge was erroneous, it was not only not prejudicial to the defendant, but in his favor, and had the effect of reducing the claim of the plaintiff \$150. The jury could not find any amount due the plaintiff under the instructions of the court, without finding that the contract was as the plaintiff claimed it to be; and, if so, he was entitled to recover \$370, and the jury has reduced this sum to \$220.

No error.

(169 N. C. 246)

KEENAN v. NEW HANOVER COUNTY COM'RS et al. (No. 278.)

(Supreme Court of North Carolina. April 22, 1915.)

1. JUDGMENT ⇐710—JUDGMENT AS EVIDENCE—PARTIES.

In an action to recover damages against a board of county commissioners in their corporate capacity for entering plaintiff's land and taking a rock from his quarry, a judgment roll in plaintiff's action against certain other defendants was not competent evidence for the purpose of locating the division line between his land and that of a defendant, who was not a party to the former action and not bound by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⇐710.]

2. JUDGMENT ⇐710—JUDGMENT AS ESTOPPEL.

Nor was such judgment competent for the purpose of estopping such defendant in locating the division line between himself and the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⇐710.]

3. JUDGMENT ⇐710—PARTIES CONCLUDED—EVIDENCE.

Such judgment was competent as a mere link in the plaintiff's title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⇐710.]

Appeal from Superior Court, New Hanover County; Allen, Judge.

On petition for rehearing. Dismissed.

For former opinion, see 167 N. C. 357, 83 S. E. 556.

J. O. Carr and J. D. Bellamy, both of Wilmington, for appellant Rhodes. Kenan & Stacy, of Wilmington, for appellant Board of Com'rs of New Hanover County. Ricaud & Jones and E. K. Bryan, all of Wilmington, for appellee.

PER CURIAM. [1] This is a petition to rehear the above cause, reported 167 N. C. 357, 83 S. E. 556. On the trial the court permitted the introduction of a judgment roll in the case of Thomas J. Keenan v. City of Wilmington and Louisa G. Wright. We hold that the said judgment roll was not competent evidence for the purpose of locating the division line between the plaintiff's land and that of the defendant Rhodes; it appearing that Rhodes was not a party to the said action and not bound by the judgment.

[2, 3] Such judgment is not competent for the purpose of estopping Rhodes in locating the division line between him and the plaintiff. If it is to be used as a mere link in the plaintiff's chain of title, it is competent for that purpose.

The petition to rehear is dismissed.

(168 N. C. 606)

STATE BANK v. CUMBERLAND SAVINGS & TRUST CO. (No. 401.)

(Supreme Court of North Carolina. April 22, 1915.)

BANKS AND BANKING ⇐149—PAYMENT OF FORGED CHECK—DRAWEE'S RIGHT TO RECOVER.

Plaintiff bank, which, in the course of business, received through another bank a check purporting to be drawn on it and indorsed by a third person, whose signatures were both forged, and which had been cashed by defendant bank, in reliance upon the indorsement "all prior indorsements guaranteed" and the custom to take such checks relying upon the exercise of due diligence on the part of the bank first cashing it, could not recover the amount paid on the forged check, as it should know the signature of the drawer, its own depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 453, 454; Dec. Dig. ⇐149.]

Appeal from Superior Court, Scotland County; Lane, Judge.

Action by the State Bank against the Cumberland Savings & Trust Company. Demurrer to complaint overruled, and defendant appeals. Reversed.

Walter H. Neal, of Laurinburg, for appellant. Russell & Weatherspoon, of Laurinburg, for appellee.

CLARK, C. J. The complaint alleges that the defendant, a bank in Fayetteville, cashed a check, purporting to be drawn by the Wade Trading Company, on the plaintiff bank in

Laurinburg, and purporting to be indorsed by D. C. Jackson, but that the signature of the said drawer and said indorser were forged, and that thereafter in the course of business the said forged check was sent through a bank in Wilmington to the plaintiff with the indorsement, "All prior indorsements guaranteed," and that it was the custom and practice to take such checks relying upon the exercise of due prudence and diligence on the part of the bank which first cashed the check, and alleging that, the signature of the drawer being forged, the defendant should refund to the plaintiff the amount of said check which the plaintiff had paid by reason of the negligence of the defendant bank in failing to use due prudence and diligence in accepting and paying the said check. The defendant demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The judge overruled the demurrer, and the defendant appealed.

The drawee bank pays a check upon the faith of the genuineness of the signature of the drawer.

"When a drawee pays a check upon which the drawer's signature had been forged, he cannot, upon discovery of the forgery, recover back the amount if the party to whom he paid it was a bona fide holder. The drawee is held bound to know the signature of his drawer and the banker, even more, to know that of his depositor; and if they fail to discover the forgery before payment they must stand the loss." This is the heading of an extended note to be found in 17 Am. St. Rep. 890, citing very numerous authorities. This rule seems to have been established by Lord Mansfield in 1762 in *Price v. Neal*, 3 Burr. 1355, who said that:

"It was incumbent upon the drawee to be satisfied of the genuineness of the drawer's signature before accepting or paying the bill, and that if he made a mistake it was his neglect or misfortune, and not that of the drawer."

In *Bank v. Bank*, 10 Wheat. 333, 6 L. Ed. 334, decided in 1825, Mr. Justice Story, referring to *Price v. Neal*, supra, said:

"After some research we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted."

A proposition of mercantile law considered beyond question as correct by Mansfield and Story must be deemed settled unless changed by statute.

In *Bank v. Bank*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 1817, it is held:

"It is negligence for a bank to pay a forged check drawn on it in the name of one of its customers whose signature is well known to it, where the cashier does not examine the signature closely, which would have disclosed the forgery, but is thrown off his guard by indorsements on the paper. An indorser of a check does not warrant to the drawee, but only to subsequent holders in due course, the genuineness of the signature."

This last proposition seems to be now the well-settled law, though there were some

earlier decisions which would seem to indicate a liability on the part of the indorser who negligently pays a check without fully satisfying itself as to the genuineness of the signature of the drawer. The proposition which now obtains, almost universally, is thus laid down in *Howard v. Bank*, 28 La. Ann. 727, 26 Am. Rep. 105:

"The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. So, where a bank cashed a draft and afterward collected it of the drawee, and" the draft was a forgery, the drawee cannot recover the amount paid from the bank to which it was paid though "the latter had received the draft from an unknown holder without requiring his indorsement."

In *Bank v. Savings Inst.*, 62 Barb. (N. Y.) 101, and *Bank v. Boutell*, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519, it is held:

"The holder of a check or draft, presenting it to the drawee for payment, owes . . . it no duty to inquire into the genuineness thereof."

The drawee bank has no right to assume that the holder has made such investigation. Failure of a bank to follow the usage or practice adopted for its own security of requiring evidence of the payee's identity before receiving on deposit the check drawn on another bank does not excuse the drawee bank from its duty to examine its customer's signatures to checks presented by another bank or other holder in due course. See, also, numerous citations 10 L. R. A. (N. S.) 57-59.

The same proposition is fully discussed and held in *Bank v. Bank*, 30 Md. 11, 96 Am. Dec. 567, and notes, a very carefully considered case. In *Howard v. Bank*, 28 La. Ann. 727, 26 Am. Rep. 105, it is held, as above stated, that the drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder.

In *Morse, Banks* (4th Ed.) § 463, it is said, quoting many cases:

"A bank cannot recover money paid on a forgery of the drawer's name from the person to whom it was paid. The bank is bound to know the signature of the drawer."

Morse, supra, cites, among other authorities, *Bank v. Bank*, 10 Vt. 141, 33 Am. Dec. 188, which was exactly like the present case, in that the signature of the drawer was forged and the drawee bank in action against the cashing bank asked for instructions that if the jury should find that the cashier of the purchasing bank received the check, without due circumspection or the exercise of due diligence in ascertaining its genuineness, or the title of the person presenting it, the drawee bank was entitled to recover, but the court held that it was only necessary that the cashing bank should appear to have received the check in ordinary course of business and in good faith.

In 5 Cyc. 541, there is quoted in the notes the following proposition:

"A factor who has received drafts from his principal drawn on him, which have been discounted by a bank, and he has paid them, must

stand the loss of those which are discovered to be forgeries."

The latest and fullest discussion of the subject will be found in 3 Ruling Case Law, § 244, with full citations of the more recent authorities. The law is thus summed up:

"Where a bank receives in good faith for collection a check upon another bank, the signature of the drawer of which is forged, and receives payment and pays over the proceeds to its customer, the drawee bank cannot recover from the collecting bank the money so paid to it. In order, however, that the collecting bank may claim protection, it must have been a bona fide holder, but the mere fact that the collecting bank receives the check from a stranger does not itself prevent it from claiming protection as a bona fide holder."

Where the cashing bank acts in good faith, the drawee cannot recover the amount which it has paid on the forged check. The drawee should know the signature of the drawer, its own depositor, better than the holder. The drawee cannot plead a custom that would entitle it to pay such draft without the signature being genuine.

The demurrer should have been sustained. Reversed.

(169 N. C. 248)

MOWERY v. MOWERY. (No. 408.)

(Supreme Court of North Carolina. April 28, 1915.)

APPEAL AND ERROR ¶731—ASSIGNMENT OF ERROR—FORM AND SUFFICIENCY.

Defendant appealing from an order allowing plaintiff alimony pendente lite, upon the ground that the affidavits and evidence were insufficient to support the finding of fact, should have assigned error by pointing out the particular finding of fact not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8017-8021; Dec. Dig. ¶731.]

Appeal from Superior Court, Anson County; Rountree, Judge.

Action by Helen Mowery against M. W. Mowery for divorce a mensa et thoro, heard on plaintiff's motion for alimony pendente lite. Order and judgment allowing alimony to defendant pendente lite, and defendant appeals. Affirmed.

This is a civil action, tried at the superior court of Anson county, for divorce a mensa et thoro, heard on a motion of the plaintiff for alimony pendente lite by Rountree, J. From the order and judgment rendered, the defendant appealed.

H. H. McLendon and John W. Gullede, both of Wadesboro, for appellant. Robinson, Candie & Pruette, of Wadesboro, for appellee.

PER CURIAM. The only assignment of error set out in the record is in these words: "The defendant assigned as error the judgment rendered herein." It is contended by the defendant that the affidavits and evidence offered upon the motion for alimony are insufficient to support the findings of fact made by the judge.

No such assignment of error is set out in the record. If the appellant desired to present such a contention, he should have assigned his error by pointing out the particular finding of fact, which is not supported by the evidence.

Nevertheless we have examined the affidavits, and find that his honor's findings were fully sustained, and they warrant the order allowing alimony to the plaintiff pendente lite.

Affirmed.

(169 N. C. 318)

STATE v. GIBSON. (No. 305.)

(Supreme Court of North Carolina. April 22, 1915.)

1. INDICTMENT AND INFORMATION ¶172—ISSUES, PROOF, AND VARIANCE.

Under Const. art. 1, §§ 11-18, giving accused the right to be informed of the accusation against him by indictment, and providing that no person shall be convicted, except on the charge made, the evidence must correspond with the indictment and sustain it at least in substance before there can be a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 539; Dec. Dig. ¶172.]

2. FALSE PRETENSES ¶38—INDICTMENT—EVIDENCE—VARIANCE—"MONEY."

Under Revisal 1905, § 3432, making it an indictable offense to obtain by false pretenses any "money," goods, property, or other thing of value, or any note, with intent to defraud, variance between an indictment charging accused with obtaining by false pretenses a specified sum of money, and the proof that he, by false representations, procured a note executed by prosecutor, is fatal, for a note is not "money" which is any lawful currency, whether coin or paper, issued by the government as a medium of exchange.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. ¶38.]

For other definitions, see Words and Phrases, First and Second Series, Money.]

3. CRIMINAL LAW ¶970—ARREST OF JUDGMENT — VARIANCE BETWEEN CHARGE AND PROOF.

A variance between an indictment and the proof cannot be taken advantage of by motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. ¶970.]

4. INDICTMENT AND INFORMATION ¶199 — VARIANCE BETWEEN CHARGE AND PROOF—WAIVER.

A variance between an indictment and the proof is waived, where there is no objection thereto before verdict.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 638; Dec. Dig. ¶199.]

5. INDICTMENT AND INFORMATION ¶133 — VARIANCE BETWEEN CHARGE AND PROOF — MANNER OF RAISING OBJECTION — MOTION TO NONSUIT.

A motion to nonsuit is a proper method of raising the question of variance between an indictment and the proof, for it challenges the right of the state to a verdict on its own showing.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. ¶133.]

6. FALSE PRETENSES §13—OBTAINING SIGNATURE TO WRITTEN INSTRUMENT—STATUTORY PROVISIONS.

A party is indictable under Revisal 1905, § 3433, for obtaining a signature to any written instrument, the false making of which would be punishable as forgery.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. § 17; Dec. Dig. §13.]

Appeal from Superior Court, Rockingham County; Lyon, Judge.

S. A. Gibson was convicted of crime, and he appeals. Reversed, and verdict set aside, and bill of indictment dismissed as of nonsuit.

The defendant was charged in the court below with obtaining money under false pretenses, upon the following indictment:

"The jurors for the state upon their oaths present: That S. A. Gibson, late of the county of Rockingham, wickedly and feloniously devising and intending to cheat and defraud Wm. S. Martin, on the 23d day of October, A. D. 1912, with force and arms at and in the county aforesaid, unlawfully, knowingly, designedly, and feloniously did unto Wm. S. Martin falsely pretend that Thomas Knight, T. H. Barker, and A. F. Tuttle had consented to become sureties for said S. A. Gibson on a note for the sum of three hundred and fifty dollars, and that he (said S. A. Gibson) had to get another on the note with said Thomas Knight, T. H. Barker, and A. F. Tuttle, and that their signatures would be secured on said note before its transfer or disposal. Whereas in truth and in fact said Thomas Knight, T. H. Barker, and A. F. Tuttle had not consented to become sureties for said S. A. Gibson on a note for three hundred and fifty dollars. By means of which said false pretense he (the said S. A. Gibson) knowingly, designedly, and feloniously did then and there unlawfully obtain from the said Wm. S. Martin the following goods and things of value, the property of Wm. S. Martin, to wit, three hundred and fifty dollars, with intent then and there to defraud, against the statute in such case made and provided, and against the peace and dignity of the state.

"S. P. Graves, Solicitor."

W. S. Martin, the prosecutor, testified:

"At the time of the alleged offense I lived in the town of Leaksville, Rockingham county, and was engaged in the livery business. The defendant came to me at my office and asked me to go on his note with T. H. Barker, Thos. Knight, and Dr. Tuttle, for the sum of \$350; that he (S. A. Gibson) had seen Barker, Knight, and Tuttle, and that they had agreed to sign the note with me. I told Gibson to get the other men to sign it, and I would sign it. Gibson said he wanted to use the note that evening, and that, if I would sign it then, he would go immediately and get the signatures of the others. I knew T. H. Barker, Thos. Knight, and Dr. Tuttle. They were residents of the same town, and I knew of their solvency. The note was to run three months, being dated October 23, 1912. I would not sign the note alone, and relied upon the statement made to me by the defendant that the three parties named had promised to become sureties or indorsers thereon. Upon these representations made to me by the defendant, I signed the note, and never knew but that they were sureties thereon until I was notified by the Bank of Leaksville, in which the note had been discounted, of its maturity, and a demand was made upon me for payment thereof, when I discovered that my name alone appeared as surety; none of the others (Barker, Knight, nor Tuttle) having signed it. I took up the note

upon the demand of the bank, by the renewal thereof in my own name, and became solely responsible for its payment."

There was evidence by three witnesses, A. F. Tuttle, Thomas Knight, and F. T. Barker, that they had not promised or agreed to sign the note as sureties, and no one of them had promised to sign it as surety. There was also further evidence as to how the note was taken up in the bank by the prosecutor.

The defendant moved for a nonsuit, under the statute (Public Laws of 1913, c. 73), because the state had failed to make out a case against the defendant upon all the evidence. The motion was overruled, and defendant excepted. There was a verdict of guilty. Defendant moved in arrest of judgment. Motion overruled. Judgment on the verdict, and defendant appealed.

P. W. Glidewell, of Reidsville, and Manning & Kitchin, of Raleigh, for appellant. Attorney General Bickett and T. H. Calvert, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] It is an elementary rule in the criminal law that a defendant must be convicted, if at all, of the particular offense alleged in the bill of indictment. He has the constitutional right to be informed of the accusation against him "by indictment, presentment or impeachment," and no person shall be convicted of any crime but by the unanimous verdict of a jury upon the charge so made. Const. art. 1, §§ 11, 12, 13. The evidence, therefore, must correspond with the charge and sustain it, at least in substance, before there can be a conviction.

[2] The defendant contends that the evidence in this case does not so correspond with the charge and does not, in law, support it, but that there is a fatal variance between the two. If this be so, the verdict was wrong and cannot stand. He is charged in the bill with obtaining money, to wit, \$350, by a false pretense, while the proof tends to show only that, while he made the false representation knowingly and correctly, he did not obtain money by reason thereof, but was induced to part with the note, which he signed for the defendant, and which he afterwards "took up" with another note signed also by himself, and that he has never paid any money on the note, and certainly none to the defendant. All the defendant got was a note signed by the prosecutor; how it was done and to whom payable does not appear. The defendant never got any money from the prosecutor. What he did get, we presume, was paid by the bank to him. There was a fatal variance between the allegation in the bill and the proof. It is the general rule that the thing obtained by a false pretense, as in the case of the thing stolen in larceny, must be described with reasonable certainty, and by the name or term usually employed to describe it. McLain's Cr. Law, § 595;

State v. Reese, 83 N. C. 637. A promissory note must be described as such, and not as money. 3 Bish. New Cr. Proc. p. 1691, § 732(3). We never properly speak of such a note as "money" or as "so many dollars." Money is any lawful currency, whether coin or paper, issued by the government as a medium of exchange, and does not embrace, within its meaning, a note given by one individual to another or otherwise put in circulation. Our statute in regard to larceny, embezzlement, and false pretenses makes the distinction clearly and unmistakably. It makes indictable the obtaining, by a false token or other false pretense, "any money, goods, property, or other thing of value, or any bank note, check, or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state, or any of the United States, or on any treasury warrant, debenture, certificate of stock, or public security, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation." Revisal, § 3432. It will be seen from this provision of the statute that it classifies those things, the obtaining of which by a false pretense is made criminal, and carefully distinguishes between them, and assigns to each its own proper name and designation, as something separate and distinct from the others. It was held in Commonwealth v. Howe, 132 Mass. 250, 258, that an averment of obtaining a sum of money by false pretenses is not supported by proof of obtaining a certificate of deposit of a bank, as the property should have been more accurately described and by its usual name, and that variance was not cured by their statute of Jeofails and amendments. And to like effect it was held in Carr v. State, 104 Ala. 43, 16 South. 155, that, to warrant a conviction under an indictment which charges the defendant with having embezzled or fraudulently converted to his own use money, the evidence must show that the money came into the possession of the defendant; and the proof that the defendant received only a check, and not money, will not sustain a verdict of guilty.

Illustrations of the strictness of the rule may be found in many of the cases on the subject. Berrien v. State, 83 Ga. 381, 9 S. E. 609, where it was held that an indictment for falsely and fraudulently mortgaging a "dark bay mare mule" was not supported by proof that the defendant mortgaged a "mouse-colored mare mule named Mag," as he would not be protected by an acquittal or conviction in a future indictment for having fraudulently mortgaged a mule of the latter description. Barclay v. State, 55 Ga. 179. Also as to a like variance in the description of a note. Wallace v. State, 79 Tenn. (11 Lea) 542. And as to a fatal variance between a description of "United States

legal tender notes" and "national bank notes." People v. Jones, 5 Lans. (N. Y.) 340. To the same effect, Harris v. State (Tex. Cr. App.) 30 S. W. 221. In Commonwealth v. McManiman, 15 Pa. Co. Ct. R. 495, the charge that defendant robbed the prosecutor of a promissory note was held not sustained by proof that he robbed him of "money" or "so many dollars." That is our case with the terms reversed, and the rule should apply conversely. Where the defendant was charged with obtaining a clay-bank mare by a false pretense as to the qualities of a "sorrel horse," and the proof was that he got a "saddle horse," we held it to be a material variance; Justice Hoke saying that:

"Under the authorities * * * there would seem to be a clear case of variance between the allegation and the proof, and the jury should have been so instructed." State v. Davis, 150 N. C. 851, 64 N. E. 498, citing State v. McWhirter, 141 N. C. 809, 53 S. E. 734; State v. Corbett, 46 N. C. 264.

So it was held in State v. Hill, 79 N. C. 656, that a charge that defendant had injured a "cow" was not proved by showing an injury to an "ox." See, also, State v. Ray, 92 N. C. 810; State v. Miller, 93 N. C. 511, 53 Am. Rep. 469.

The differences in the above cases between "allegata and probata" were not as marked or as substantial as is the difference in this case between "money" and "a promissory note." They are two distinct things, each having its well-known meaning and name in the parlance of the people, as well as in the law. An action for "money" would not permit of a recovery for a note, without amendment. You cannot amend an indictment, at least against the will of the defendant. You must abide by its terms, and prove the charge as it is laid in the bill.

[3-5] A variance cannot be taken advantage of by motion in arrest of judgment. State v. Foushee, 117 N. C. 766, 23 S. E. 247; State v. Ashford, 120 N. C. 588, 26 N. E. 915; State v. Jarvis, 129 N. C. 698, 40 S. E. 220. It is waived if there is no objection to it before the verdict is rendered, as those cases show. But a motion to nonsuit is a proper method of raising the question as to a variance. It is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. In other words, the proof does not fit the allegation, and therefore leaves the latter without any evidence to sustain it. It challenges the right of the state to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as matter of law, that the state has failed in its proof.

[6] The judge should have sustained the motion and dismissed the indictment, but this will not prevent a conviction upon another indictment for obtaining the notes by a false pretense, and this follows from what we have

said. A party is indictable under Revisal, § 3433, for obtaining a signature to any written instrument, the false making of which would be punishable as forgery. The evidence offered at the trial proved an indictable offense, but not the one alleged in the bill. We presume the solicitor will send a bill with averments agreeing with the proof he can make, and the court may hold the defendant to answer another indictment.

The judgment is reversed, the verdict set aside, and the bill of indictment dismissed as of nonsuit.

Reversed.

(169 N. C. 247)

BURRIS v. BURRIS. (No. 407.)

(Supreme Court of North Carolina. April 28, 1915.)

APPEAL AND ERROR ¶264—ABSENCE OF EXCEPTIONS — PRESUMPTIONS — FINDINGS OF JURY.

In the absence of exceptions to the evidence or the charge, it must be assumed on appeal that special findings of the jury are correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533-1535; Dec. Dig. ¶264.]

Appeal from Superior Court, Anson County; Lane, Judge.

Action of claim and delivery by W. A. Burris against J. N. Burris, wherein J. A. Parker interpleaded and after a new trial ordered Harrell Bros. Company were made parties. From judgment against him, the interpleader, J. A. Parker, appeals. Affirmed.

There was a judgment against the interpleader, J. A. Parker, for the sum of \$208.34, from which he appeals.

The following are the issues and findings of the jury:

(1) Was the note and mortgage transferred by Harrell Bros. Company to J. A. Parker, as alleged? Answer: Yes.

(2) What amount, if anything, is the defendant J. N. Burris due J. A. Parker? Answer: \$15.83 and interest from January 27, 1912.

(3) What was the value of the property sold under mortgage by J. A. Parker? Answer: \$300.

(4) What amount, if any, is due plaintiff on his note and mortgage given by J. N. Burris? Answer: \$194.36 with interest from December 28, 1910.

(5) Was the property bought by J. A. Parker at the said sale? Answer: Yes.

Walter E. Brock and Robinson, Caudle & Pruette, all of Wadesboro, for appellant. H. H. McLendon, of Wadesboro, and I. R. Burleson, of Albemarle, for appellee.

PER CURIAM. In the brief of the appellant, the several exceptions relating to the admissibility of evidence are withdrawn. The only assignment of error is as follows:

"The court erred in rendering judgment as set out in the record." We must assume, in the absence of any exceptions to the evidence, or to the charge of the judge, that the findings of the jury are correct. That being so, we are of opinion that such findings fully warrant the judgment rendered.

No error.

(168 N. C. 646)

LLOYD v. SOUTHERN RY. (No. 320.)
(Supreme Court of North Carolina. April 22, 1915.)

MASTER AND SERVANT ¶97—ACCIDENTAL INJURIES.

Where an employe's hand was on top of a tie to depress it so that the end might pass under the rail, and the tie was shoved with such force by the men at the end that his hand was caught and injured, the injury was the result of an accident, relieving the employer from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. ¶97.]

Clark, C. J., dissenting.

Appeal from Superior Court, Orange County; Rountree, Judge.

Action by James M. Lloyd against the Southern Railway. From a judgment for plaintiff, defendant appeals. Reversed.

This is a civil action, tried at December term, 1914, superior court of Orange county, his Honor Judge Rountree presiding, upon these issues:

(1) Was the plaintiff injured by the negligence of the defendant company, as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff, by his own negligence, contribute to his injury? Answer: Yes.

(3) What damages, if any, is the plaintiff entitled to recover? Answer: \$500.

In apt time the defendant moved to nonsuit, which motion was overruled. From the judgment rendered, the defendant appealed.

E. S. Parker, Jr., of Graham, for appellant. John W. Graham and A. H. Graham, both of Hillsboro, for appellee.

BROWN, J. The plaintiff introduced evidence tending to prove that on the 26th day of September, 1913, he had been in the employ of the railway company about 19 months, doing work of the kind he was engaged in on that day; that he and four other men were engaged in the work of taking out old ties and putting in new ones under the rails on the trestle across Haw river; that the ties were about 11 feet long, and that they were thrown down across both rails. There were two men on the scaffold on the west side of the rails and two men on the east side, and that plaintiff was in the center of the track. The tie was first pulled back west until the east end dropped down just inside the east rail. Then the plaintiff, putting his hands on the tie, and the two men west, joined together in pushing the tie east under the east rail until the western end of the tie would drop down just inside the west-

ern rail, when the tie would be pushed back west by the joint effort of the plaintiff and the two men to the east of the east rail until it was in position.

The plaintiff testified:

"I have no explanation to make other than I had my hand on the tie to bear it down, and it went over, and the end flew up and caught my hand."

On cross-examination he testified that two men named Mitchell and Watson were on the west side of the track, and that he was in the middle, and that all three caught hold of the tie and shoved it across, and that it went too far and caught his hand and mashed his fingers. He testified that he was shoving the tie, but that the real strength that pushed the tie came from the men to the west.

We are of opinion that the injury received by the plaintiff was the result of an accident, pure and simple. It was an unusual effect of a known cause, and therefore not expected, and almost impossible to guard against. In work of that kind the amount of human strength expended in pushing the ties cannot be regulated with mathematical accuracy. The work was simple and required no more than ordinary skill and experience. It is such an accident as might happen to one engaged in many different kinds of labor. It may happen to the farm laborer, to the house builder, as well as to the railroad employé.

This case is governed by the principles laid down in *Brookshire v. Electric Co.*, 152 N. C. 669, 68 S. E. 215; *Simpson v. Railroad Co.*, 154 N. C. 51, 69 S. E. 683. It is very much like *Lassiter v. Railroad Co.*, 150 N. C. 483, 64 S. E. 202, in which the plaintiff in that case was injured while unloading rails from a flat car, caused by a rail bounding back in an unusual and unexplained way and striking him. As said by Mr. Justice Douglas in *Bryan v. Railroad*, 128 N. C. 387, 38 S. E. 914:

"The employer is not responsible for an accident simply because it happens, but only when he has contributed to it by some act or omission of duty."

We see nothing in this case upon which to base the charge of negligence. The motion to nonsuit is allowed.

Reversed.

CLARK, C. J. (dissenting). The plaintiff was not intentionally injured, of course, by his fellow servants, but there is evidence that his injury was not "purely an accident." The evidence shows that he was not injured by any unforeseen circumstance, but because his coemployés, though looking at him and knowing that his hand was on the top of the tie to depress it so that the end might go under the rail, negligently and carelessly shoved the tie with unnecessary and sudden force, so that he did not take his hand out in time to prevent the injury. The jury found that he was guilty of contributory negligence doubtless because he might have been quicker in taking his hand off the tie. But

the jury found, as authorized by the act of 1913 and the charge of the court, that the greater negligence was on the part of his coemployés.

On the motion of nonsuit, the evidence must be taken more strongly in favor of the plaintiff. But in any aspect of the evidence, if there is any to make it an accident, this was a matter for the jury, and they have found by the preponderance of the evidence, and under a correct charge by the judge, that the injury was not an accident, but that it was due to the negligence of plaintiff and his fellow servants, but in the larger degree to the latter.

In *Rushing v. Railroad*, 149 N. C. 160, 62 S. E. 892, this court held:

"Motion for nonsuit was properly denied. The case was properly one for the jury."

And added:

"The court * * * correctly charged, though excepted to: 'If the jury should find, by the greater weight of the evidence, that while the plaintiff was carrying the log he stumbled and fell, and, while down, his fellow servants, when they could have prevented the injury by holding the log, negligently and carelessly threw down their end of the log, when, by the exercise of ordinary prudence, they could have held it and prevented the injury, then it would be chargeable to the negligence of the defendant's employés; and, if this negligence of fellow servants was the proximate cause of the injury, the jury would answer the first issue, "Yes."'"

The present case is stronger for the plaintiff, because he did not fall, but was in his proper place with his hand on top of the tie in the discharge of the duty assigned him to depress it so that the tie might pass under the rail, and he was injured by the sudden, unexpected, and unnecessary exertion of too much strength by his coemployés in pushing the tie in a manner to prevent his taking his hand out of the way, which assuredly he would have done if notified. Otherwise he would have been injured solely by his own negligence, which the jury negated.

In *Buchanan v. Railroad*, 84 S. E. 52, at this term, Hoke, J., says:

"In *Russell v. Railroad*, 118 N. C. 1098 [24 S. E. 512], and in cases before that time, it was declared to be the correct principle that if, on a given state of facts, two men of fair minds could come to different conclusions as to the existence of negligence, the question must be determined by the jury."

In *Forsyth v. Oil Mill*, 167 N. C. 180, 83 S. E. 320, Brown, J., says:

"It is well settled that the court cannot direct a nonsuit and give judgment in favor of a defendant, on whom no burden rests, when there is more than a scintilla of evidence tending to prove plaintiff's contention, or when there is evidence from which a reasonable person might draw a deduction sustaining the plaintiff's contention."

In the case at bar a jury of 12 impartial men found not only a scintilla but by the preponderance of evidence that this was not an accident, and that the injury was due to the negligence of the defendant; and the learned judge who tried the case drew the deduction, as "a reasonable person," that

there was evidence of negligence, submitted the case to the jury on the issue of negligence, and refused to set aside the verdict on an allegation that it was against the weight of the evidence. The 13 men who heard this cause and saw the bearing of the witnesses on the stand, and who were charged with the duty of passing upon the weight to be given their testimony, must be presumed to be "reasonable persons."

In *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340, Walker, J., says:

"The court properly refused to nonsuit the plaintiffs. There was evidence to support their contentions, which upon such a motion must be viewed most favorably to them"—citing *Snider v. Newell*, 132 N. C. 614, 44 S. E. 354; *Bivings v. Gosnell*, 133 N. C. 574, 45 S. E. 942; *Boddie v. Bond*, 154 N. C. 359, 70 S. E. 824; *Ball v. McCormick*, 162 N. C. 471, 78 S. E. 303.

The same judge in *Walters v. Lumber Co.*, 165 N. C. 392, 81 S. E. 455, said:

"Upon the motion to nonsuit, which was refused, there was evidence of defendant's negligence, which should be construed most favorably for the plaintiff."

The jury here found that both the plaintiff and defendant were negligent. There was no accident.

The fellow-servant act (Rev. 2646) is discussed and its history given in *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817. In *Sigman v. Railroad*, 135 N. C. 181, 47 S. E. 420, the court said:

"The fellow-servant law applies to all railroad employes, whether injured in running trains or rendering any other service."

And on page 184 of 135 N. C., on page 421 of 47 S. E., said:

"The plaintiff was injured by the negligence of a fellow servant while working upon and repairing a bridge of the defendant."

That case was approved in *Nicholson v. Railroad*, 138 N. C. 519, 51 S. E. 41, where it is said:

"Such business is a distinct, well-known business, with many risks peculiar to itself, and all the employes in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the service of an 'operating railroad,' are classified and exempted from the rule which requires employes to assume the risk of all injuries which may be caused by the negligence of a fellow servant."

The doctrine of assumption of risk has been eliminated by the fellow-servant act (*Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817; *Cogdell v. Railroad*, 129 N. C. 398, 40 S. E. 202; *Mott v. Railroad*, 131 N. C. 237, 42 S. E. 601), in which it is held that it is "error to submit an issue as to assumption of risk when the cause of action is injury to railroad employes."

Laws 1913, c. 6, § 3, provides that in actions for damages against the "common carrier to recover damages for injuries to, or the death of, any of its employes, such employes shall not be held to have assumed the risk of his employment in any case where

the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe, or the death or injury was caused by negligence."

This action is not brought under the federal act but under the above state statute. The plaintiff put his hand on the cross-tie in the regular course of his employment, and as he was instructed to do, to bear it down and guide it so that the end would go under the rail, and the force which shoved it too far came entirely from the two men at the west end of the cross-tie. It was not an accident merely because the injury "was unusual and unexpected," because almost all injuries from negligence are thus caused. It is rarely, indeed, that an injury is caused intentionally by a fellow servant.

His honor charged the jury, and he is sustained by the evidence, that the plaintiff contended from the evidence that the jury should find:

"That usually and ordinarily in shoving the ties they are only shoved in far enough to go by one rail, so that the tie could drop down and be pulled back under the other rail, but that, on this occasion, careless and negligent employes without regard to the possible injury to the plaintiff, shoved the tie so far that it went too far and tilted over and mashed his hand, and that the ordinarily prudent man, situated as the fellow workmen on the west side of the plaintiff, ought to have apprehended, and would have apprehended, as reasonable men, that the injury would result from shoving that tie in the manner in which they did." The judge then gave the contention of the defendant, and the jury found with the contention of the plaintiff.

The evidence was submitted to 12 impartial jurors, who found, by preponderance of the evidence, that the plaintiff was injured by the negligence of his fellow servants in the manner described, whose negligence was greater than his, and there must have been sufficient evidence to justify "a reasonable person" in so thinking as the learned judge submitted the issue to them, and also refused to set aside the verdict on the alleged ground that it was against the weight of the evidence.

(139 N. C. 1)

ATLANTIC & N. C. R. CO. v. WAY et al.

(No. 180.)

(Supreme Court of North Carolina. April 22, 1915.)

PUBLIC LANDS § 164—LAND UNDER WATER—ENTRY—RIGHTS.

Before Acts 1854-55, c. 21, lands covered by navigable waters were not subject to entry as other lands. That act, now found in *Revisal* 1905, § 1693, provided that persons owning lands on any navigable stream might, for the purpose of erecting wharves, make entry on lands covered by water, and obtain title as in other cases, but that they should, in no respect, obstruct navigation. In 1857 lands covered by water were entered and granted by the state. Many years thereafter a sea wall was built, and the lands were reclaimed. *Held*, that as the entrymen obtained only an easement, it could not, in the absence of evidence showing the

character of the use and their ownership of the dominant estate, be held that the reclaimed lands were not subject to entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. ¶164.]

Appeal from Superior Court, Carteret County; Peebles, Judge.

Action by the Atlantic & North Carolina Railroad Company against B. P. Way and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This is a proceeding to protest entry No. 4463 of a piece of land described as follows:

"All that certain part of reclaimed land filled in to the sea wall of Morehead City, lying in the town of Morehead City east of Seventh street and south of Arendell street, beginning on Seventh street at the southwest corner of lot No. 8 in square No. 7, and running thence south along what is called Seventh street on the land of the town of Morehead City to deep water or harbor line of Bogue Sound, thence east 100 feet, thence north parallel with Seventh street to the southeast corner of said lot 8 in square No. 7, thence west along the line of said lot No. 8 one hundred feet to the beginning, being the reclaimed land of the former water front of lot No. 8 in square No. 7, in the plan of the town of Morehead City, and the water front thereof to deep water or harbor line."

The court submitted this issue to the jury:

"Is the land described in the entry filed in this case vacant land and subject to entry thereof and grant from the state?"

The entry of the defendants embraced lots 6 and 7 in square No. 7, as shown on the map of Morehead City. It was admitted that on May 24, 1856, a grant was issued by the state to John M. Morehead and Wm. H. Arendell for "the land lying around Shepherd's Point between high-water mark and the deep water of Bogue Sound, Newport river and Calico creek," which covered the land in dispute. This land, covered at that time by the waters of Bogue Sound, was conveyed by John M. Morehead and others, on July 2, 1857, to the Shepherd's Point Land Company, and the enterer claims to have acquired title by mesne conveyances from that company to lot No. 8, which lies in square No. 7, between lots 6 and 7 and lots 9 and 10, the last two lots (9 and 10), which are now claimed by the protestant, being, at the time the deed of Morehead and others to the land company was executed, partly covered by the waters of said sound and partly dry land. The tracks of the protestant are laid in Arendell street, immediately back and north of lots 9 and 10, with a sidewalk intervening. Arendell street is one of the public streets of Morehead City, and protestant has its right of way thereon for its full width. Lots 9 and 10 and lot 8 and lots 6 and 7, in the order named, lie south of Arendell street and the sidewalk, in the direction of Bogue Sound, and at the time of the grant to Morehead and Arendell, and the deed of Morehead and others to the land company, they were covered by its waters at high tide, except a small part of lots Nos. 9 and 10 on their northern side. At low tide, all of lots 9 and

10, 8 and 6 and 7 were exposed, except a small part at the lower end of lots 6 and 7. In 1902 lot No. 8 was filled in with oyster shells, which caused an accretion of the land to form, and a fish and oyster house were built thereon. This was done by A. T. Laval-ette, under whom the enterer claimed lot No. 8, and who held a deed for said lot and claimed under the land company, and a wharf was constructed from these buildings across lots 6 and 7 and far enough out for boats to reach the wharf at low tide. Lot No. 8, after it was filled in as described, was above high-water mark with ordinary tides, but would be covered by "an extremely high tide." In 1913, a concrete sea wall was built in front of these lots and of the town, and the space between it and high land was filled in with dirt and silt from dredgings made by the United States government in Bogue Sound channel. The land is now above water and is dry land. This sea wall, built for the purpose of filling in the space back of it to high land, "was paid for by Morehead City and individual owners of property." It is stated in the case that the protestant—

"bought some parts of block 7 from the Shepherd's Point Land Company and has been in possession of it for 10 years, and that all property in Morehead City and adjacent thereto, not otherwise occupied, has been in the possession of the said land company for a great many years."

It also appears that after the space between the sea wall and high land had been filled in, a street was opened, presumably by the city, along and by the side of the wall, known as Evans street, and lots 6 and 7 now face on that street. There are 16 lots in block 7. It is also stated that a grant was issued by the state for "all of this land," covering lots 6 and 7, to the Shepherd's Point Land Company in 1857. The waters of Bogue Sound are navigable. The court held that, it having been admitted that the grant to Morehead and Arendell covered lots 6 and 7, which defendants had entered, a second grant of the same land would be void, and the land was not therefore the subject of entry, and, this being so, he would instruct the jury to answer the issue, "No." The defendants, in deference to this ruling of the court, refrained from offering any further testimony or defense. The court then instructed the jury to answer the issue, "No," if they believed the evidence, and defendants excepted. The jury answered the issue, "No."

Guion & Guion, of New Bern, and E. H. Gorham, of Morehead City, for appellants. Moore & Dunn, of New Bern, and J. F. Duncan, of Beaufort, for appellee.

WALKER, J. (after stating the facts as above). The instruction of the court, to which the enterer deferentially submitted and refrained from further developing his

case, was erroneous. The deduction from this opinion of the court as to the effect of the grant No. 83 to Morehead and Arendell was necessarily that the protestant was entitled to recover, or to have his protest sustained. If the grant conferred an absolute and unrestricted title to the bed of the sound, the opinion was correct, but in the case of *Shepherd's Point Land Company v. Atlantic Hotel Company*, 132 N. C. 517, 44 S. E. 39, 61 L. R. A. 937, a construction was put upon this very grant, No. 83, to Morehead and Arendell, and it was held that it conveyed only an easement for the purposes specified in the statute (Code, § 2751), which has since been amended (Revisal, § 1696). Under Revisal, § 1693 (Rev. Code, c. 42, § 1; Acts 1854-55, c. 21), lands covered by navigable waters were not the subject of entry as other lands, but this was changed by Acts of 1854-55, c. 21, so that entries were permitted under certain restrictions and only for the purposes indicated. The act provided as follows:

"Persons owning lands on any navigable sound, river, creek or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, may make entries of the lands covered by water, adjacent to their own, as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. When any such entry shall be made in front of the lands in any incorporated town, the town corporation shall regulate the line on deep water, to which entries may be made."

By Public Laws of 1893, c. 17, the words, "to which entries may be made," were changed so as to read, "to which wharves may be built." The right to enter land covered by navigable water, even for the restricted uses and purposes, was, of course, an exception to the established policy of the state, which had existed for many years, and a statute like this, which is special in its nature, should not be carried in meaning beyond a strict construction of its language, and should be confined in its operation to the specified purposes. The right thus to enter land under navigable water was confined to riparian proprietors, the words being, "persons owning any lands on any navigable sound, river, creek or arm of the sea" may so enter land, but for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, and the entry can extend only to "deep water." They are also confined to straight lines, and must not obstruct or impair navigation. It is true the statute provides that they may thus enter the land covered by navigable water "and obtain title as in other cases," but this means no more than that a grant should issue for the land, and the expression does not carry with it the meaning that the title shall be the same as in other cases where grants are issued for patentable lands. This

could not be so, as the statute expressly restricts the nature of the grant and defines the interest or estate thereby conveyed, and, as said in *Land Co. v. Hotel Co.*, supra, the words of the grant must be considered as if the words of the statute, restricting the use of the land to the purpose of erecting wharves, had been written into it. One object of the grant was to afford foundations for wharves, and it conveyed an easement to use the land for the purpose specified in the statute. It was so held in *Land Co. v. Hotel Co.*, supra, and it was further held in that case that the easement was incidental to the ownership of the banks or shores of the body of water, whether river or sound, and was inseparable from the riparian proprietorship. The court further says:

"If the construction contended for by the plaintiff is correct, no purchaser of a town lot fronting on the waters could have erected a wharf, pier, or bathhouse, or enjoyed many other privileges incident to his riparian ownership, without the consent of the owners of the navigable waters, and the *Shepherd's Point Land Company* could now levy tribute upon the commerce, business, and pleasure of the citizens of the town. The right of navigation would be of little value if a corporation, after selling the lots with water fronts, could prevent the building of wharves and enjoying other privileges. If this were the purpose and policy of the Legislature, why restrict the grant to the purpose of 'erecting wharves on the side of deep water thereof next to their lands'? and why restrict the privilege to 'persons owning land on any navigable waters'?"

The plaintiff, in that case, claimed under this very grant, No. 83, which described the land covered by navigable water around Morehead City from high to low water mark, or from the shore to the deep-water line. It was held, as we will see, that having lost the ownership of the shore, the rights under the grant passed to the riparian owner, for the court further said:

"We are of the opinion that the grant to Morehead and Arendell of square 83 operated to give to them an exclusive right or easement therein as riparian owners and proprietors to erect wharves, etc.; that when they ceased to be the owners of the land, by conveyance to the *Shepherd's Point Land Company*, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to square No. 1; that such easement passed to the defendant company, and the plaintiff has no such title to the soil under the navigable water as entitles it to maintain this action."

The court cited *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. 541, and quoted with approval the language of Chief Justice Smith, as follows:

"The survey, and we assume the entry which it must follow, * * * declare that it [the land] is for wharf purposes, and this is the only use for which the grant could issue."

The case of *Florida v. Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189, was also cited, and this passage taken from it:

"In construing this act, not only are we to keep in view the real nature of the subject-matter, but it is to be judged in the light of the rule applicable to all grants by the government,

which is, that they are to be strictly construed or to be taken most beneficially in favor of the state and against the grantee. The plan of the act is that the title of the submerged land should be vested in the riparian owner for these uses and purposes. The state, *for the considerations above mentioned*, divests herself and invests the riparian owner with the title to the land."

This court thus commented upon the extract:

"*These considerations* are for the purpose and end that commerce may be benefited by the building of wharves, piers, etc. And the grant in this case is one of the class in which the subject of the grant, as long as it is of that character to be used or built [upon] for the benefit of commerce, is apparent and controlling. The court held that the right acquired was confined to the purposes set forth in the act."

This court also referred to several cases in which it was held that the use to which the land was to be applied controlled and restricted the estate granted, as in *Robinson v. Railroad Co.*, 59 Vt. 426, 10 Atl. 522, where it was held that the grantee acquired only an easement when land was granted for a plank road, and *Flaten v. Moorehead*, 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195, when land was conveyed "for use as a public park," where the court said:

"It is not incumbent upon us at this time to determine the precise nature of the estate conveyed by this instrument, whether a new easement was acquired by the village or an estate on condition or in trust. But we are obliged to consider the clause in connection with the remainder of the deed, and to give it the effect intended, if that can be discovered and is reconcilable with the main purpose of the parties."

If considered as an easement merely, as decided in *Land Co. v. Hotel Co.*, the interest conveyed by the grant is necessarily incident to the ownership of the shore. It was so held in *Zimmerman v. Robinson*, 114 N. C. 39, 19 S. E. 102, where the court said:

"Riparian rights, being incident to land abutting on navigable water, cannot be conveyed without a conveyance of such land, and such lands covered by navigable water are subject to entry only by the owner of the land abutting thereon."

This being the conclusion of the court in the *Land Company Case*, that only an easement passed, it follows that the judge was in error when he intimated otherwise, and afterwards held that the land itself passed, so that a second grant therefor could not issue. If only an easement passed, the question arises whether it has been lost or abandoned in any way and as to what are the rights of the parties in the newly made or reclaimed land. We confess that the present state of the evidence is so uncertain, indefinite, and unintelligible that it would not be safe to pass upon the important matters involved without a full disclosure of the facts, and we might do great injustice to one or the other of the parties by undertaking now to decide them. It may appear more clearly and fully at the next trial what is the extent of protestant's right or easement in *Arendell*

street, and how and when acquired, and what is the status of the sidewalk with reference thereto. Is it included in the right of way or not? And also how and when protestant acquired title to lots 9 and 10, if it is so owned, and how and when the enterer acquired title to lot 8, if he has done so, and whether the protestant consented or contributed to the expense of building the wall and of filling in the space behind it with the dredgings from the channel of the sound. Has the enterer acquired title to lot 8 by adverse possession, or in any other way, and, if so, did it extinguish the protestant's easement in the land formerly covered by water in front of lots 9 and 10, or how are his rights affected thereby and by the building of the sea wall and the conversion of that part of the bed of the sound into dry land? These are important questions, which should not be decided without a full knowledge of the facts and upon a mere consideration of the nature of the grant No. 83 to Morehead and *Arendell*.

As has been done before in like cases, we direct that the verdict and judgment be set aside, in order that the facts may be found, upon proper issues submitted to the jury, or otherwise, as the parties may agree, and that the case may be tried to a definite conclusion upon its real merits. If the case should return to this court, it may become necessary to decide more precisely what is the nature of the estate or interest which passed by the grant from the state, but this will depend largely upon the facts then before us, as it may prove to be immaterial upon those facts whether it is an easement merely or an estate upon condition subsequent—a determinable or base fee. What we have said concerning that interest is sufficient to dispose of this appeal, without any more definite expression of opinion in regard to it. It is sufficient, for the present, to say that the judge was in error when he took the other view of it.

New trial.

(158 N. C. 608)

SNIDER v. CITY OF HIGH POINT. (No. 361.)

(Supreme Court of North Carolina. April 22, 1915.)

MUNICIPAL CORPORATIONS §733—TORTS—LIABILITY.

Where a city's charter invested it with power to enact ordinances to abate nuisances, the city, in burning garbage, was acting in a governmental capacity, and so was not liable for the death of a child whose clothing caught fire, though its servant was negligent; there being no right of action given by statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549, 1561; Dec. Dig. §733.]

Appeal from Superior Court, Guilford County; W. A. Devin, Judge.

Action by Thomas Snider, as administrator

of Addle Snider, against the City of High Point. From a judgment for defendant, plaintiff appeals. Affirmed.

There was evidence tending to show that, on June 6, 1914, the intestate, a child between 9 and 10 years old, while playing around a trash pile which had been fired by employes of defendant, caught on fire, and was so severely burned that she died the following day; that the agent and employes of defendant, by permission of the owners, were engaged in hauling the trash, refuse, and garbage from the city, consisting of paper, rags, beef bones, rotted potatoes, bananas, etc., out on a 40-acre tract of land within the corporate limits of the city of High Point, and setting fire to same. On the occasion in question, there were several children near where the pile was fired, including the intestate and others about the same age, and the man, Ephraim Davis, who was doing the work, having set fire to the trash, went on back to the city, leaving these children at or near the pile, and the clothing of intestate caught, and she was burned, as stated; that the 40 acres was posted land, and the trash was dumped somewhere near the center, and about 200 yards, in direct line, from home of plaintiff, and with a field, fence, and deep ravine between; and that it was 300 yards from any public road, but a path leading from plaintiff's house, in an indirect way, ran near the pile.

On motion entered in apt time, there was judgment of nonsuit, and plaintiff excepted and appealed.

T. B. Galloway, of High Point, and John A. Barringer, of Greensboro, for appellant. Peacock & Dalton, of High Point, and Brooks, Sapp & Williams, of Greensboro, for appellee.

HOKE, J. (after stating the facts as above). On perusal of the facts in evidence, there may be some question as to the existence of negligence on the part of defendant's employes; but, if this be conceded to plaintiff on account of his evidence tending to show that there were several young children near the pile at the time the same was fired, we think the judgment of nonsuit must be sustained, because the acts complained of were in pursuance of authority conferred by law for the public benefit, and comes within the principle that, unless a right of action is given by statute, a municipality may not be held liable to individuals for failure to perform or negligence in performing duties which are governmental in their nature. *Keenan v. Commissioners*, 167 N. C. 356, 83 S. E. 556; *Harrington v. Town of Greenville*, 159 N. C. 632, 75 S. E. 849.

In *Keenan's Case*, an action for wrongful trespass upon realty, Associate Justice Brown, delivering the opinion, said:

"Can the action be maintained against the county for the tort of its officials? It is well settled that counties are instrumentalities of

government, and are given corporate powers to execute their purposes, and are not liable for damages for the torts of their officials in the absence of statutory provisions giving a right of action against them"—citing *White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534; *Jones v. Com.*, 130 N. C. 452, 42 S. E. 144; *Hitch v. Com.*, 132 N. C. 573, 44 S. E. 30.

And in *Harrington's Case* the court said:

"It is well recognized with us that, unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for 'neglect to perform or negligence in performing duties which are governmental in their nature,' and including generally all duties existent or imposed upon them by law solely for the public benefit"—citing *McIlhenny v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; and *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451.

The city of High Point, by its charter (Laws 1909, c. 395, § 5), is invested with the power and charged with the duty to enact and enforce all ordinances necessary to protect the health, life and property of its citizens, to prevent and summarily abate and remove nuisances, to preserve and enforce good government, order, and security of the city, and to protect the lives, health and property of all its inhabitants; and, recurring to the evidence as to the character of this trash pile, the acts of defendant's agents come clearly within the purview of the authority thus conferred and the principles of the decided cases on the subject.

True, in some recent decisions of the court, as in *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377, *Hines v. Rocky Mt.*, 162 N. C. 409, 78 S. E. 510, recoveries against the municipality were sustained, but this was by reason of wrongful acts which were held to amount to a "taking of the property" and coming within the constitutional principle that a man's property may not be taken from him either for a public or private purpose except on compensation made, pursuant to law.

The more general principle with the suggested limitations upon it are stated in *Hines' Case* as follows:

"Where a municipality, acting in accordance with the authority conferred by its charter, and for sanitary purposes, organizes, through its proper officers, and directs a general cleaning up of the town, and in thus acting attempts to fill up a large hole in an unimportant street, partly to get trash and rubbish out of the way, and partly for the better use of the street, and a suit is brought for damages against the city for the creation of a nuisance, alleging that garbage refuse, causing foul stench and odors, was thrown into this hole, causing sickness, etc., to the plaintiff and his family residing near, held, the acts complained of were governmental in their character.

"2. The principle that a city may not be held liable in damages for its authorized acts of a governmental character which create a nuisance is subject to the limitation that neither a municipality nor other governmental agency is allowed to establish and maintain a nuisance causing appreciable damage to a private owner without liability to the extent of the damage done to his property; for such is regarded and dealt with as a taking or appropriation of the property to the extent of the damage thereto,

and such an interference with the rights of ownership may not be made, or authorized, except on compensation first made pursuant to law.

3. The principle upon which a recovery may be had of a municipality for damages arising from a nuisance caused by it in the exercise of a governmental function applying only to instances that amount to a taking of private property for a public use, the damages recoverable are restricted to the diminished value of the land, and does not include damages by reason of sickness, etc., caused by such nuisance to the owner or his family, considered as a direct element thereof."

And, applying these principles, the order of nonsuit must be sustained; the facts showing, as stated, that the acts complained of were in the "performance of duties existent or imposed by law solely for the public benefit."

Affirmed.

WALKER and ALLEN, JJ., concurring in result.

(188 N. C. 651)

MILLS v. HOUSEL. (No. 412.)

(Supreme Court of North Carolina. April 22, 1915.)

1. ATTACHMENT \S 209—SERVICE BY PUBLICATION—SUMMONS.

Summons is not required where service is by attachment of property and publication; so that it is no ground for dismissal of the action that, summons in fact being issued by the justice, it was, contrary to Revisal 1905, \S 1445, not made returnable within 30 days after its issue.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. $\S\S$ 675-687, 690, 691; Dec. Dig. \S 209.]

2. ATTACHMENT \S 209—DEFECTIVE PUBLICATION—DISMISSAL.

The court having acquired jurisdiction by attachment, there should not be a dismissal because service by publication was not duly made, but the remedy is by ordering a new publication.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. $\S\S$ 675-687, 690, 691; Dec. Dig. \S 209.]

3. ATTACHMENT \S 209—PUBLICATION—COMMENCEMENT—"ON EXPIRATION."

"On expiration," in Revisal 1905, \S 762, requiring personal service of summons to be made within 30 days after the granting of attachment, or, personal service being impossible, that "on the expiration of the same time," service by publication be commenced pursuant to an order, means "after" the 30 days.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. $\S\S$ 675-687, 690, 691; Dec. Dig. \S 209.]

4. APPEARANCE \S 24—EFFECT OF DEFENDING ON THE MERITS.

Defendant, by defending on the merits, waived for all subsequent time all objections not set out in the special appearance, including one that publication of summons was not seasonably begun.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. $\S\S$ 118-143; Dec. Dig. \S 24.]

Appeal from Superior Court, Anson County; Lane, Judge.

Action by Sadie Mills against W. E. House. From a judgment of dismissal by the

superior court, on appeal from a justice, plaintiff appeals. Reversed.

Walter E. Brock and Lockhart & Dunlap, all of Wadesboro, for appellant. Cox & Taylor, of Wadesboro, for appellee.

CLARK, C. J. This is an action by plaintiff for \$50 due her for services as stenographer to the defendant and \$5 in stamps used on his correspondence. The summons was issued by a justice of the peace July 10, 1911, returnable September 9th. The defendant having left the state, service was had by attaching property of the defendant (\$75 in money) and publication of notice. At the trial before the justice, the defendant entered a special appearance and moved to dismiss the action because it appeared the summons was returnable more than 30 days from the issuance of the same. Revisal, \S 1445. This was overruled. The defendant then moved that the attachment be dismissed because the affidavit did not set forth grounds of belief that defendant had left the state in order to defraud the plaintiff. Motion overruled. The defendant then denied the debt, but, upon the evidence, the justice rendered judgment in favor of the plaintiff for \$55, and interest from June 28, 1911, and for costs. The defendant appealed.

On the trial in the superior court the defendant entered a special appearance and moved to dismiss the action because the summons issued by the justice was made returnable more than 30 days thereafter, to wit, on September 9, 1911, and further because the warrant of attachment was issued July 10, 1911, but the order of publication of summons was not obtained till August 10, 1911, being more than 30 days after the warrant of attachment was obtained. The motion to dismiss was allowed, and the plaintiff appealed.

[1] The motion to dismiss because the summons was made returnable more than 30 days after its issue (Revisal, \S 1445) should have been denied, because, where the service is by attachment of property and publication, no summons is required. *Best v. Mortgage Co.*, 128 N. C. 352, 38 S. E. 923, cited and affirmed by Walker, J., in *Grocery Co. v. Bag Co.*, 142 N. C. 174, 55 S. E. 90; and by Allen, J., in *Currie v. Mining Co.*, 157 N. C. 217, 72 S. E. 980. The defendant further moved to dismiss because the summons by publication was ordered August 10th, being one day more than 30 days after the issuance of the warrant of attachment on July 10th. This motion should have been denied.

[2] 1. The court acquired jurisdiction of the action by the service of the attachment upon the property of the defendant. If the notice was not duly served by the publication, it was "error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to

obtain service of the summons by publication, for it is possible that the defect may be cured by amendment." Branch v. Frank, 81 N. C. 180. The remedy is not to dismiss the attachment, but by ordering a republication, for, as the defendant is a nonresident, to dismiss the attachment may deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment can be had. Price v. Cox, 83 N. C. 261; Penniman v. Daniel, 93 N. C. 332. In Finch v. Slater, 152 N. C. 156, 87 S. E. 264, it is held that, where the court has acquired jurisdiction by attachment of property, the time for serving summons by publication, when it has not been properly made, can be extended in the discretion of the court.

[3] 2. Revisal § 762, requires that personal service of the summons must be made "within 30 days after the attachment granted"; but, when personal service cannot be had, the same section provides:

"Upon the expiration of the same time, service of summons by publication must be commenced pursuant to an order obtained therefor, and if publication has been, or is thereafter commenced, the service must be made complete by the continuance thereof."

It will thus be seen that publication is not required to be made, like personal service of summons, "within 30 days after the attachment granted," but upon expiration of the 30 days. That means "after" the expiration of the 30 days, and this publication was begun on August 10th, the day after the expiration of the 30 days, and strictly conforms to the statute. Indeed, in Currie v. Mining Co., 157 N. C. 217, 72 S. E. 980, the point seems to have been made that it was error to make the publication within the 30 days.

[4] 3. At the return day of the summons and trial before the justice of the peace the defendant entered a special appearance on the two grounds, which are above set out, but neither of them was upon this proposition that the publication of the summons was not begun in proper time. The objections made on the special appearance being overruled, the defendant then defended upon the merits. In doing so he waived all objections except those set out in the special appearance. The objection as to the publication of the summons not being one of them, that was waived, therefore, by the defense on the merits. Cape Lookout Co. v. Gold, 187 N. C. 65, 83 S. E. 3. Had the defendant made the point at that time of insufficient publication, the justice of the peace would doubtless have extended the time and ordered the republication, as he had authority to do. Price v. Cox, supra, and other cases above cited.

Of the two grounds urged before the justice of the peace, only one was presented in the trial in the superior court, to wit, that the summons was returnable more than 30

days after its issuance, which ground was properly overruled, as above stated. The only other ground presented in the superior court is that the publication of the summons was not begun 30 days after the issuance of the warrant of attachment. This ground also, for the reasons above stated, cannot be sustained. It was made for the first time in the superior court at November term, 1914, more than three years after the beginning of the action, when it should have been made, if at all, at the trial before the justice, with opportunity to him to order a republication, if, indeed, it was necessary to begin such publication "within" 30 days, instead of "after the expiration" of said time. Revisal, § 762.

In dismissing the action and rendering judgment against the plaintiff there was error. The case must be tried on its merits. Reversed.

(168 N. C. 658)

H. W. LITTLE & CO. v. ATLANTIC COAST LINE R. CO. (No. 404.)

(Supreme Court of North Carolina. April 22, 1915.)

CARRIERS \S 129—DAMAGE TO GOODS—MEASURE OF DAMAGES.

Where goods are damaged in shipment, the measure of the consignee's damages is the difference between their value as actually delivered and as they should have been delivered, with such other damages as naturally and proximately resulted from the injuries with interest, and that rule is not changed by the fact that the shipper of the goods repaired the injury, without cost to the consignee, if such repairs were not made for the benefit of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 545-551; Dec. Dig. \S 129.]

Appeal from Superior Court, Anson County; Lane, Judge.

Action by H. W. Little & Co. against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

Plaintiffs ordered 23 buggies, shafts, and wheels from Henderson-Hull Company, at Valdosta, Ga., on July, 1907, and they were delivered to defendant to be shipped to the plaintiffs at Wadesboro, N. C. When they arrived at the latter place, they were in a badly damaged condition, caused by defendant's negligence. The only question presented is the one relating to the measure of damages. The buggies were repaired by the Valdosta company, the cost of repair being \$50, but that company made no charge against plaintiff for the same, releasing that amount to the plaintiffs. The court charged the jury that as the injury to the buggies was admitted, and the receipt of the same for shipment by the defendant, as carrier, to the plaintiff, "the (defendant) company would be liable for the damage sustained while it was transporting the property, and the measure of damages would be the difference in

the market value of the buggies at the time they were delivered to the defendant for shipment, and their market value when the repairs had been made on them by the plaintiffs," but that they were not entitled to have the \$50, cost of repairing by the Valdosta company, considered in making the estimate of the damages, and the jury would disregard that part of the evidence and confine themselves to the rule already stated. The jury returned this verdict:

"Is the defendant indebted to plaintiffs, and, if so, in what amount? Answer: Nothing."

Judgment was entered upon the verdict in favor of defendant, and plaintiff appealed.

Robinson, Caudle & Pruette, of Wadesboro, for appellant. Coxe & Taylor, of Wadesboro, for appellee.

WALKER, J. (after stating the facts as above). There was some evidence as to the amount of damages agreed upon between the plaintiff and the local agent of the defendant at Wadesboro, but we have discovered no evidence of authority in him to make any such agreement, and we lay that matter out of the case. There was error in the charge as to damages. The court should have given the ordinary rule as to damages in such cases. It is thus stated in *Hutchinson on Carriers* (3d Ed.) § 1362:

"Where the goods have not been lost or destroyed during the transportation, but are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the measure of damages is the difference, after deducting the cost of transportation, between their value as actually delivered, and as they should have been delivered, and with such other damages as have naturally and proximately resulted from the injury. Under the latter head, the owner would be entitled to recover for reasonable expenses in seeking to reclaim the goods, or in restoring them to their former condition, or endeavoring to reduce the loss to its lowest amount."

And interest could be allowed by the jury. If the goods had been restored to their original value by the repairs, the measure of damages would, of course, be the reasonable cost of the repairs; if not fully restored, then the reasonable cost of repairs, plus the difference in value of the buggies as restored and their original value. But the usual rule is the one laid down by *Hutchinson on Carriers*, § 1362. It can make no difference to the defendant how the repairs were made. If the Valdosta company saw fit to repair the buggies, cost free, to plaintiffs, it is no concern of defendant, as it was not done for its benefit, and it does not lessen its liability. It must make good the loss sustained by its negligence, in any event. Where the damaged goods are fully restored, so that there is no loss in value, the reasonable cost of repair may be the measure of damages. The fact that it cost \$50 to repair the goods would be some evidence upon the question of damages as going to show the loss in value,

provided the charge for repairs was a reasonable one. The court erred in not stating the correct rule upon the measure of damages, and for this error another jury will be called.

New trial.

(168 N. C. 663)

EDWARDS v. YEARBY. (No. 318.)

(Supreme Court of North Carolina. April 22, 1915.)

ADOPTION ~~§~~22—INHERITANCE BY ADOPTED PARENT—RIGHTS OF NATURAL FATHER.

Under Revisal 1905, § 177, authorizing adoption of children and giving the child an inheritable right, the natural father of an adopted child will inherit over the adopted father; the statute of descent giving the natural father a right to inherit from the child.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. § 41; Dec. Dig. ~~§~~22.]

Appeal from Superior Court, Durham County; Daniels, Judge.

Action by W. H. Edwards against Adolphus H. Yearby. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action heard on case. From the facts presented it appeared that W. Y. Edwards, an infant of five years, died in Durham seised and possessed of one-third interest in a certain lot in said city, without leaving brother or sister, and the property is claimed by plaintiff, W. H. Edwards, the legitimate and natural father of the deceased child, and by the defendant, who was the adopted father, and also the natural uncle, of the child. In reference to the title to this one-third interest and how the same was acquired by the deceased child, the facts further show that:

"Sarah Yearby, a widow, owned the land in controversy in fee, and died intestate, leaving as her sole heirs at law W. M. Yearby, Ora Yearby, and A. H. Yearby, the defendant. Ora Yearby married the plaintiff, W. H. Edwards, in 1901. Of this union two children were born, to wit, William Y. Edwards and Ruth L. Edwards. In March, 1907, the plaintiff, W. H. Edwards, and his wife, finding that they could not live together happily as man and wife, entered into a contract of separation. The plaintiff, W. H. Edwards, conveyed certain property to W. M. Yearby, trustee, for the support of his wife, Ora Y. Edwards, and his two infant children, William Y. Edwards and Ruth L. Edwards. Soon thereafter Ora Y. Edwards died intestate, leaving as her sole heirs at law her two children, William Y. Edwards and Ruth L. Edwards. Shortly after this Ruth L. Edwards died. In May, 1907, W. M. Yearby duly adopted William Y. Edwards with the consent of the plaintiff, who was duly made a party to said proceedings, and William Y. Edwards was taken to the home of W. M. Yearby and cared for by him, and was thereafter known as William Yearby. On May 20, 1907, the same day of the adoption, W. H. Edwards conveyed to William Y. Edwards all of his interest in the land in controversy. Some time after the adoption of said William Y. Edwards the said child died seised of a one-third undivided interest in the land in controversy, leaving his adopted father, W. M. Yearby, and his natural father, W. H. Edwards, the plaintiff. The question therefore to be determined is whether the one-third undi-

vided interest in said land descends to the adopted father, W. M. Yearby, or to the natural father, W. H. Edwards."

There was judgment for plaintiff, and defendant excepted and appealed.

Bryant & Brogden, of Durham, for appellant. Baggett & Baggett, of Lillington, and Sykes & Sheppard, of Durham, for appellee.

HOKE, J. Our statutes (Revisal, c. 2) provide for the adoption of infant children for life or a lesser term, and in section 177 the effect of such adoption is stated as follows:

"Such order," of adoption "when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it: Provided, such child shall not so inherit and be so entitled to the personal estate, if the petitioner specially set forth in his petition such to be his desire and intention: Provided further, for proper cause shown in said petition the court may decree that the name of such child may be changed to that of the petitioner."

From a perusal of the section it appears that, while the proceedings, during the minority or for the life of the child "establish the relation of parent and child between the two with all the duties, powers and rights belonging to such relationship," when the statute professes and undertakes to deal with the question of the devolution and transfer of property by descent or distribution, it confers the hereditary qualities on the child only, and not on the adopted parent. "It shall enable the child to inherit the real estate and to take the personal property" as if the actual child of the person adopting it. Our general statute on descents of real property, founded on and, to a great extent, embodying the principles of the common law, would give this property to the natural father (Revisal, c. 30, rule 6); and, this present law of adoption having in express terms conferred the right of inheritance only on the child, it should, by correct interpretation, be confined to that, and create no other interference with the general law than the statute itself declares. Black on Interpretation of Laws, p. 146; Lewis' Sutherland (2d Ed.) § 491.

Speaking to the position and the general policy upon which it is properly made to rest, Rodgers on Domestic Relations, § 463, says:

"As statutes conferring the rights, duties, and liabilities of natural children upon those adopted thereunder are in derogation of the common law, they must not be construed to enlarge or confer any rights not clearly given. Upon the principle, therefore, it is clear that an adopting

parent could not inherit from an adopted child unless this be clearly authorized by the statute. Indeed, out of an abundance of caution, the statutes on the subject in some states expressly provide that the adopting parent shall not inherit from the child adopted. This is done to prevent designing persons from getting the estate of the child through the process of adoption. It would be to the interest, from a financial standpoint, of a quasi parent who has adopted a child being an heir to a fortune, large or small, and who has no descendants who could take the inheritance in preference to a parent, to bring about the death of the child for the purpose of succeeding to the inheritance. Under such a condition of things, the quasi parent might neglect the child in sickness, or otherwise be the means, directly or indirectly, of bringing about the death of the adopted child. For these and like reasons, the doctrine of ascent of property from an adopted child to its new parent is not, and should not be, favored in law."

The question does not seem to have been hitherto presented to this court, and there is some variety of ruling on the subject in other jurisdictions, owing largely to differing phraseology of their statutes; but the view we adopt is supported, we think, by correct principles of interpretation, and is in accord with many authoritative decisions elsewhere construing laws which more nearly resemble our own, many of them expressed in terms much more favorable than ours towards the rights of the adopted father. *Heidecamp v. Railway*, 69 N. J. Law, 284, 55 Atl. 239, 101 Am. St. Rep. 707; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Upson v. Noble*, 35 Ohio St. 655; *White v. Dotter*, 73 Ark. 130, 83 S. W. 1052; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617; 20 Cent. L. Journal, 343; *In re Estate of Namauu*, 3 Hawaii, 484.

In the state of Massachusetts, while the adopted father is allowed to inherit, to a certain extent, their statute, amended for the purpose in 1876, explicitly provides that:

"The adopted parents and their kindred in blood may now inherit from the adopted child such property as the child has acquired by gift or inheritance from the adopted parent or kindred of such parent."

And the same principle which now prevails, by decision, in Indiana, has been thus far confined to such property as the child acquired from the adopted parent or the kindred of such parent. *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788. In the case of *In re Jobson*, 164 Cal. 312, 128 Pac. 933, 43 L. R. A. (N. S.) 1062, holding that the natural father does not inherit, the California statute (Civ. Code, § 228) provides that on adoption, the child shall be regarded and treated, in all respects, as the child of the parent adopting him, and thereafter the adopting parent and the child "shall sustain towards each other the legal relation of parent and child, and have all the rights * * * of that relation." This without further or specific provision on the right of inheriting property, and in that case two of the judges dissented in favor of the natural father.

And in *Warren v. Prescott*, 84 Me. 483, 24

Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370, the statute (Rev. St. c. 67, § 35) provided that, in adoption, "the child becomes, to all intents and purposes, the child of his adopters, the same as if born in lawful wedlock," with two exceptions, which were held not to make in favor of the natural parent.

But we do not consider it necessary or desirable to pursue the many and various cases bearing directly or indirectly on the question presented. Much of the apparent conflict, as stated, will be found to arise from the differing laws applicable, and we think it safe to rest our decision on the provisions of our own statute, which, by correct interpretation, confers the right of inheritance on the adopted child, and not on the adopted father.

For the reasons suggested in the citation from *Rodgers*, supra, there is doubt if any change in our law on the subject is to be desired; certainly not beyond the modification as it prevails in the legislation of Massachusetts and in the state of Indiana, as construed by the later decisions. But, if it is otherwise, the changes required must be referred to the General Assembly, for this question of the devolution of property by descent and distribution is one coming entirely within its province. In *re Garland Will*, 160 N. C. 555, 76 S. E. 486; *Hodges v. Lipscomb*, 128 N. C. 57, 38 S. E. 281.

There is no error, and the judgment in plaintiff's favor must be affirmed.

Affirmed.

(160 N. C. 46)

STEMMLER v. RANDOLPH & CUMBERLAND RY. CO. (No. 402.)

(Supreme Court of North Carolina. April 28, 1915.)

1. RAILROADS ⇐480—OPERATION—FIRES—BURDEN OF PROOF.

In an action against a railroad for the negligent burning of plaintiff's lumber, where it appeared that the lumber had been piled near defendant's right of way, which its servants had been engaged in burning off, the burden of proof was upon defendant to show that it exercised due care and used all reasonable means to prevent the spread of the fire, since its act in burning its right of way was in the discharge of a duty imposed by law, while the proof of any efforts to prevent the spread of the fire was almost entirely in the keeping of defendant's servants.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1709-1716, 1733; Dec. Dig. ⇐480.]

2. RAILROADS ⇐484—OPERATION—FIRES—QUESTION FOR JURY.

In an action against a railroad for having caused the burning of plaintiff's lumber piled near its right of way, under the evidence, question of defendant's negligence held for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1740-1746; Dec. Dig. ⇐484.]

Appeal from Superior Court, Moore County; Rountree, Judge.

Action by T. W. Stemmler against the Randolph & Cumberland Railway Company to

recover damages for the destruction of the plaintiff's lumber, caused by fire alleged to have been set out by the defendant's servants on the right of way and communicated to the plaintiff's lumber, located close to the right of way. At the conclusion of the evidence, the court sustained a motion to nonsuit, and the plaintiff appeals. Reversed.

U. L. Spence and H. F. Seawell, both of Carthage, for appellant. Geo. H. Humber, of Carthage, for appellee.

BROWN, J. The evidence in this case tends to prove that the section foreman and hands of the defendant were engaged in burning off the defendant's right of way near Parkwood; that the lumber of the plaintiff was piled near the right of way at said place, and that the hands fired the debris on all sides of said lumber, and then left one William Graffenreed, a section hand, to watch the fire and protect the lumber, the section foreman and other hands going away to fire other parts of the right of way, and that said Graffenreed left the lumber unprotected and went away, and fire soon sprang up in the lumber, and most of it was consumed thereby; that there were no other persons about the lumber or along the right of way, except the section foreman and hands engaged in firing the right of way. There was further testimony as to the value of the lumber.

[1] We think his honor erred in sustaining the motion to nonsuit. The defendant was engaged in the discharge of a duty imposed by law of keeping its right of way free from combustible matter. To do so necessitated the burning of its right of way. It was the defendant's duty to exercise reasonable care when it puts out such a dangerous agency as fire. We think the burden of proof is necessarily on the defendant to show that it exercised such care and used all reasonable means and precaution to prevent the fire from spreading from its right of way and injuring the property of adjacent owners.

The proof of what the defendant did in order to prevent the spreading of fire from its right of way is almost exclusively within its own knowledge and that of its agents and servants. The plaintiff had no knowledge of when the fire was set out and no opportunity to guard his property. The plaintiff had no knowledge of what precautions were taken by the defendant; therefore, we think it reasonable to hold that the defendant should assume the burden of satisfying the jury that it took all reasonable precautions when its agents and servants undertook to burn off its right of way. It is said in the Book of Books that:

"If fire break out and catch in thorns, so that the stacks of corn, or the standing corn, or the field, be consumed therewith; he that kindled the fire shall surely make restitution." Exodus, 22, 6.

Inasmuch as the defendant was engaged in the discharge of a duty, we will not hold it to the rule laid down in the Holy Writ, because that would be to make it an insurer, but we think it just and consistent with well-established precedents that in a case of this kind the defendant should assume the burden of proof to satisfy the jury that it used all due precautions to prevent the spread of the fire and injury to adjacent property. It is incumbent on the company burning off its right of way always to guard the fire along its right of way and to take all proper precaution to prevent its spreading as long as the fire exists. *Brister v. Railroad*, 84 Miss. 33, 36 South. 142; 33 Cyc. 1329.

[2] There is evidence in this case that the defendant's servants started the fire on the right of way; that it was not properly guarded by them; that it surrounded the plaintiff's property, in consequence of which the plaintiff suffered damage. This evidence may not be sufficient to induce the jury to find the defendant guilty of negligence, but it should have been submitted to them under proper instructions.

New trial.

(76 W. Va. 70)

KERSEY v. KERSEY et al.

(Supreme Court of Appeals of West Virginia.
March 23, 1915.)

(Syllabus by the Court.)

**TRUSTS §102—ENFORCEMENT IN EQUITY —
ACQUISITION OF PROPERTY.**

Where one obtains the legal title to property through the influence of a relation of confidence and trust, under such circumstances that he ought not in equity and good conscience to hold and enjoy the same as against the other party to the relation, equity will impress the property with a trust in favor of the latter.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 153; Dec. Dig. §102.]

Appeal from Circuit Court, Mercer County.

Suit by W. W. Kersey against J. L. Kersey and others. From decree for plaintiff, the defendant named appeals. Affirmed.

Sanders & Crockett and Russell S. Ritz, all of Bluefield, for appellant. French & Basley and Harold A. Ritz, all of Bluefield, for appellee.

ROBINSON, P. By this suit two brothers are in contest over the ownership of a laundry. The plaintiff says that the plant and business is his. The defendant quite as insistently says that it belongs to him. Each denies that the other has any right. Yet the record plainly enough establishes that the claim of each is so broad as not to be just, and that the chancellor did not very far miss the mark of sound equity when he rendered a judgment herein not unlike the proverbial one of Solomon.

The object of the bill is to have the defendant enjoined from interfering with the

plaintiff's possession and management of the property and business and to have the plaintiff declared to be the sole owner thereof. The defendant, claiming to be the sole owner of all the property and business, was proceeding to oust the plaintiff therefrom when the suit was instituted. The court has decreed to each a particular interest. The defendant has appealed.

It is essential that we state from the record only such of the facts as show the true relation of the parties to each other, and their relation to the property involved. This will disclose the meat of the case.

W. W. Kersey, the plaintiff, and one Bentley, as partners, several years ago built up a laundry business in Bluefield. Having acquired real estate and mortgaged the same, they found it essential to the promotion of the enterprise that they turn it into an incorporated company. Of the capital stock of fifteen thousand dollars, each took shares to the amount of five thousand. The remaining stock, amounting to five thousand dollars, was to be sold to others. Three of these shares were sold to the defendant J. L. Kersey, who at that time was a justice of the peace at Bluefield. Other small amounts were placed here and there, until there remained twenty-three shares unsold in the treasury of the company. Friction arose between W. W. Kersey and Bentley. It developed into an effort on the part of each to get control of the corporation by buying sufficient additional stock, so as to oust the other from participation in the management. Discovering that Bentley was seeking to obtain control, W. W. Kersey sought the aid of his magistrate brother. Things were so managed by them through the aid of a third party that the remaining twenty-three shares as well as two of Bentley's shares passed into their control, being taken over in the name of J. L. Kersey. This gave them a majority of the stock. But it was Bentley's turn next. Four shares of his stock as well as four shares of W. W. Kersey's stock had been pledged as collateral to a note in bank. When the note matured, Bentley brought about a sale of the collateral, so that a brother-in-law of his became the purchaser of the same. Bentley did this by keeping from W. W. Kersey the fact that the note had matured and that a sale of the collateral was pending. Prior to this, J. L. Kersey had removed from Bluefield to Hinton, where he was managing a hardware business. Again W. W. Kersey sought the advice and aid of his brother. Legal proceedings against the sale of the collateral were begun. J. L. Kersey came to Bluefield to assist his brother in regaining control of the business. He sought to purchase shares of the stock from other parties, but did not succeed far enough to regain control for his brother as against Bentley. Soon thereafter Bentley suddenly died. Later, J. L. Kersey succeeded in getting in

from Bentley's brother-in-law the eight shares of stock which he had purchased at the sale of the same as collateral. Thus, again the laundry business was in complete control of the Kersey interests. By the death of Bentley the enterprise was freed from the friction that had previously existed between those interests and the Bentley interests. The Kersey stock prevailed, a new board of directors was elected, and the remaining Bentley interests were excluded from the management.

For several months thereafter W. W. Kersey continued the business. His brother, living at Hinton, rendered only such aid as his situation afforded. That he had become the adviser of his brother toward saving the enterprise from control by the Bentley interests, and the manager of the financial affairs tending to that end, plainly appears. But it quite as clearly appears, that he had been drawn into all this out of a desire to protect his brother and save the business to the latter as against the Bentley interests. Brotherly interest, rather than attractive financial investment, brought him into the matter. He was not a laundryman. At no time was he directly connected with this laundry business.

While J. L. Kersey was regaining control of the stock, he deemed it best to take from W. W. Kersey a transfer of the stock which the latter held. He states that his reason for this was that he did not believe his brother competent to handle the financial affairs, and that in order properly to handle them, it was necessary for him to have the stock in his name. He says that his brother was leaving the stock certificates lying around where anyone could obtain them. So at the request of J. L. Kersey, his brother transferred to him forty shares, retaining only five. As the stock then stood, it was considered worthless in actual money value. Still J. L. Kersey executed his note to W. W. Kersey for a sum representing the stock. It is conceded that the understanding between the parties was that the note was not to be paid, that the stock was to be returned to W. W. Kersey if they were successful in making it valuable, and that in any event the note was to be destroyed. That J. L. Kersey held the forty shares of stock in trust for his brother can not be gainsaid. He took it over to aid the efforts into which he had been drawn for the protection of his brother, as well as to aid efforts which by reason of his having been drawn into the matter were now necessary for his own protection. In a sense he had become the partner of his brother. The primary object of that in the nature of a partnership between them was to protect W. W. Kersey from being ousted by the other interests and thus losing all efforts and money he had put in the business. Later their joint relation developed into one having for its object the saving of the efforts and money they had both put in on the former score.

They were working together, for one another. The relation was one of mutual trust, confidence, and protection—one not unnatural for brothers.

Though the Kerseys obtained control of the laundry plant and business, large indebtedness secured by deed of trust liens was hanging over the same. This indebtedness for a time they carried. Later, the property was allowed to go to sale under the deeds of trust. It was bought on behalf of the Kerseys, as we decide from the record, though J. L. Kersey claims that it was purchased for himself, while W. W. Kersey claims that it was purchased wholly on his behalf. It was bought at a very advantageous figure. Indeed the Kerseys planned that the sale should come their way and succeeded well in that regard. All other interests were of course foreclosed by the sale. The purchase gave them the property independent of all others, so that they might take a new start with much more hope of saving the efforts and money they had theretofore invested. The title was taken in the name of Pollock, an officer of the bank which advanced the amount necessary to pay the purchase money. In other words, the title was held by Pollock as security for the loan. Writings in this behalf attested that when the money was fully paid, Pollock was to transfer the title to J. L. Kersey. The note for the loan was given in his name. It is upon this purchase in the name of J. L. Kersey and the giving of an obligation therefor in his name, that he bases his claim as sole owner of the property.

After the purchase of the property the laundry business was continued under the direct management of W. W. Kersey as before. J. L. Kersey continued in business at Hinton. Thus matters went on from the latter part of 1911 to the early part of 1913. The relation which had grown up between the parties in regard to the laundry, continued. The correspondence between them during this time shows the same brotherly desire to aid each other in making the business a success. At no time did J. L. Kersey say anything or assume any part that would lead W. W. Kersey to think that he claimed sole ownership, or that the latter was merely in the employment of the former. The business began to be successful, and W. W. Kersey from the proceeds thereof was meeting payments on the purchase money loan.

During the year 1913 some questions arose between the parties as to their respective interests. In a letter, W. W. Kersey said to his brother:

"I also think that we should come to some understanding about the business and incorporate, as the shape things are in at present, might place me in an embarrassing position, should anything happen to you financially or otherwise."

Clearly we see that he had reference to the fact that title to the property was held by J. L. Kersey. In reply to this, J. L. Kersey said:

"In regard to personal settlement, I think it is the thing to do, and will ask that you go over the plant and property and figure out the best way to arrange it and tell me your plans and I will come over next month and fix it up. I believe to incorporate new company would be safest and best way to do it and issue stock for each one's interest."

Here is a plain admission that W. W. Kersey had an interest in the "plant and property." Prior to the writing of these letters, J. L. Kersey, writing to his father about the purchase of the real estate at the sale under deeds of trust, said:

"Before the sale took place I made arrangements with Mr. Mann to put up the money to buy it in at sale, and allow us to pay his Bank \$100.00 per month until we paid off the amount of money borrowed. I consider this real estate deal the only one that saved the business for us. * * * The purchase and terms of payment on the building was arranged entirely by me, and I know positively that through a plan that I carried into effect on day of sale of the building that we got it for \$1300.00 less than it would have otherwise cost."

In another connection, speaking of W. W. Kersey he says:

"Will has threatened several times the past 3 years while we were having financial troubles to desert the plant and leave the country, and through fear of this I have pledged all I had to finance and save the business and now when the storm is over, tell me I have no interest in it, and not so much as thank me for saving him, or his original investment, in which I had one half interest, which has been concealed to this day by Will."

In this letter he also tells his father that in a recent meeting with his brother the latter had "denied that there was ever any partnership existing," and had claimed to own the business as a whole.

The parties made no adjustment of the matter. Things went on as before until the early part of 1914. Up to that time, W. W. Kersey out of the proceeds of the business had paid more than half of the note given for the purchase money. J. L. Kersey did not put his individual money into the purchase taken in his name. The business was paying off the purchase money loan. But now differences between the brothers caused a complete break of the mutual helpfulness that had existed between them during the troublous times of the laundry enterprise. Like men do, but as brothers never should, each became insistent in his claim and extended it further than was actually just, in resistance to the claim of the other. W. W. Kersey took the position that J. L. Kersey had simply been acting for him in every transaction, and brought this suit to settle his title as sole owner of the property and business. Then it was that J. L. Kersey for the first time claimed to be the sole owner of the property and business. He meets the claim of the plaintiff by saying that he holds title to the property by his purchase at the sale, that he entered into no agreement to hold the title for the plaintiff, and that if there had been such verbal agreement in that regard as is alleged, the same is invalid

under the statute of frauds. By the decree the court has virtually found the parties to have been partners in the purchase of the property and the business carried on subsequently thereto. On a basis of the stock held in the old company by each, which they set out to shield by the purchase of the property and a continuation of the business, the decree gives $\frac{40}{100}$ to the plaintiff and $\frac{60}{100}$ to the defendant. Though the plaintiff says he did not get his due proportion, he is content with the decree. The defendant, however, by this appeal continues his contention for the sole ownership of the property and business.

It is true that by the original bill the plaintiff sought to make a case upon the theory that by an express verbal agreement the defendant acted in the purchase of the property solely for the plaintiff. But by the amended bill the plaintiff sufficiently asks the court to decree him such interest as the case may entitle him to. The argument that this makes a new case is not tenable. The amended bill is in place. Such rights as the plaintiff has, may properly be decreed to him. The defendant submits that no agreement on his part to hold title for the plaintiff has been established, and that even if such agreement appeared, it is not enforceable under the statute of frauds, which has been pleaded. True it is, that the express agreement alleged in the original bill, that the defendant was to take and hold title to the property as a whole for the plaintiff, has not been established. If it had been established, and the case was merely based on that, with no such equity as we find appearing, it may be that the statute of frauds would apply. The rights of the plaintiff, however, present themselves to us in different phase from any based on an express agreement. Out of the facts and circumstances an implied trust arises in favor of the plaintiff. The statute of frauds, relied on by the defendant, is not involved. It can have no application to such a trust as we find here.

That the defendant purchased and took title to the property and business in behalf of both himself and his brother, is clear. That he did it in furtherance of mutual protection against total loss upon their previous investment in the old company, is equally clear. The defendant evidently so recognized it all along, before the purchase and after. We have seen that in letters to his brother and to his father he considers that in the purchase of the property he acted for both. These letters prove how he understood the matter at the time he was purchasing and taking the title. Besides, the circumstances which led up to the purchase are of themselves sufficient to prove that the defendant could have had no other intention when he bought in the property and took title in his own name, than the car-

rying out of a plan impliedly agreed upon by him and his brother whereby they might mutually save themselves from the loss of their interests in the old company. There is not a circumstance to indicate that he intended otherwise. In view of his former readiness to come into this affair of the laundry, a business not in his line, and to act therein for the protection of his brother as against threatened ousting by strangers, we can not in reason accuse him of intention to practice the very same arts of ousting on his brother that he had sought to shield that brother from.

Out of the circumstances under which the property was purchased both of the parties were bound in reason and good faith to each other to intend that the purchase was made for their mutual advantage and protection. Each had an equity in the property before the sale. For a long time they had worked together to the end that their investments might be saved. Each had the right to believe that the other was still acting to the same end. Nothing had transpired to alter the relation. In confidential reliance on each other, one with ability to solve the financial difficulties and the other with ability to run the laundry business when the financial difficulties were solved, they were working together to the end that what each had put into the old company would be saved by a purchase of the plant and a continuation of the business by them. There is not an inference that either one of them meant to deprive the other of the hope of such end at the time the purchase of the plant was made, nor for months thereafter. In the old affairs they had acted as partners for their mutual good. In the purchase and continuation of the business they were still so acting. Jointly they were holding on, continuing and building up their original equities therein. They were more than partners; they were brothers. The relationship between them was a confidential one—a trust.

When the defendant took title to the property he was a trustee for the plaintiff. His trusteeship extended over the property he purchased. It came within the scope of the object of their joint dealings together. Not only was he a trustee because of the relation to which we have referred above, but he held forty shares of the plaintiff's stock as trustee, for the very object of protecting it. We have seen that this stock came into his keeping merely as a trustee to hold and protect the same. He could not buy in the property for himself and thereby shield his own investment alone, when he had assumed by the transfer of his brother's stock to him to protect it also. He was still under that trust. Equity will not permit him to violate it. The fact dwelt upon in the argument that all the stock became valueless by the sale can not avail here. In one sense the

stock did become valueless. In an equitable sense it did not. The purchase protected the investment, though the stock representing the investment lost its form.

Under the circumstances appearing herein the holdings in *Henderson v. Henrie*, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628, Ann. Cas. 1912B, 318, and similar cases, do not apply. We have not merely the taking of title by one on express verbal agreement to hold for another. This case involves an equity in the plaintiff—a trust clearly arising in his favor in the very property held by the defendant. Applicable here is the following:

"If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he can not equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 155.

As we have said, the relation between the parties was not unlike that between partners. Impliedly there arose a sort of partnership agreement between the plaintiff and the defendant, the object of which we have already set forth. Within that object came the purchase of the property. The relation between the parties was such that the one could not act within the scope of the implied agreement or toward the end sought without acting for the other as well as himself. Where the purchase of certain real estate is within the object of a partnership, the partner who buys and takes title therefor in his own name does so for the partnership, even though he invests his own funds. Any other view would allow him to violate the fiduciary relation. If he does undertake so to violate it, "a court of equity imposes the trust so as to nullify the breach of confidence." 13 Harvard Law Review, 458. It is elementary that one partner must exercise scrupulous good faith toward the other in all matters within the scope of the partnership. That principle applies as well to other similar confidential relations.

The defendant has the legal title through the influence of confidence and trust. The parties were not dealing with each other at arm's length. The case is not simply one of the violation of a verbal agreement to hold title for another. In such case, equity follows the law. But this case involves a wholly independent equity. To allow the defendant to deny the plaintiff any interest in the property would be to sanction a fraud on the part of the former. It would convert a confidential relation into an implement of fraud. In no way will a court of equity countenance fraud. Upon the whole this case is determinable by the principle that where one obtains the legal title to property through the influence of a relation of con-

fidence and trust, under such circumstances that he ought not in equity and good conscience to hold and enjoy the same as against the other party to the relation, equity will impress the property with a trust in favor of the latter. *Perry on Trusts*, § 166.

The case is so clearly within the infinite variety of justice which a court of equity administers that we have no doubt as to the stability of the decree complained of on this appeal. It appears that the plaintiff was entitled to a larger interest than the decree gives him. But he does not complain, and we have no province in that particular. An order will be entered affirming the decree.

LYNOH, J., absent.

(78 W. Va. 96)

FRYMIER v. LORAMA R. CO. (No. 2635.)
(Supreme Court of Appeals of West Virginia.
March 30, 1915.)

(Syllabus by the Court.)

1. TRIAL. ¶156—DEMURRER TO EVIDENCE.

Under rules applicable to new trials, the court may on motion of the party injuriously affected set aside a demurrer to evidence joined in by the demurree, and award him a new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 354-356; Dec. Dig. ¶156.]

2. NEW TRIAL. ¶96, 99—GROUNDS—SURPRISE—EVIDENCE.

But good ground for such action, after verdict, is not shown by affidavit showing surprise at the evidence of the adversary party on the issues joined, and affidavits of other witnesses whose evidence by proper diligence might have been obtained, and whose evidence is substantially cumulative of other testimony introduced on the trial. A party so surprised if he would protect his interests must at once move for a continuance, suffer a nonsuit, or take some other steps to protect his interests, and not take the chances of an adverse verdict and thereafter resort to a motion for a new trial as a means of correcting his mistake.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 172, 190-194, 201, 207; Dec. Dig. ¶96, 99.]

3. APPEAL AND ERROR. ¶1178—DISPOSITION OF CAUSE—ERRONEOUS RULING ON DEMURRER.

Where on demurrer to evidence and voluntary joinder therein by the demurree the trial court, on motion of the demurree, erroneously permits withdrawal of the joinder, and on grounds of surprise, and newly discovered evidence, erroneously sets aside the demurrer to the evidence and awards the demurree a new trial on all issues, this court on reversal of the judgment will remand the case to the circuit court for judgment on the demurrer to the evidence, and for further proceedings to be had therein.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. ¶1178.]

Error to Circuit Court, Ritchie County.

Action by R. E. L. Frymier against the Lorama Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

S. A. Powell, of Harrisville, and Thos. P. Jacobs, of New Martinsville, for plaintiff in error. Adams & Cooper and R. S. Blair, all of Harrisville, for defendant in error.

MILLER, J. In an action on the case for negligently setting out the fire which destroyed plaintiff's oil well derrick, tank house, oil tank, and oil therein, and other oil well equipments, the defendant below, demurring to the evidence, assigns and relies on the following as errors calling for reversal of the judgment: (1) Permitting the plaintiff to withdraw his joinder in said demurrer; (2) reading the affidavits of John Denning and B. W. Peebles in support of plaintiff's motion to withdraw said joinder and to set aside the demurrer; (3) failure to take the case on said demurrer and render judgment thereon; (4) giving to the jury plaintiff's three several instructions, and (5) setting aside the whole of the proceedings on said demurrer and awarding plaintiff a new trial.

On the demurrer to the evidence and the instructions complained of, the jury rendered a conditional verdict for the plaintiff, if the law on the demurrer should be for him, and \$1,400.00 damages, and for the defendant if the law thereon should be for it. Upon the return of said verdict demurrant entered a motion to set the same aside, (a) because contrary to the law and evidence; (b) because of erroneous instructions given, and (c) because the amount of the verdict was excessive. And on the argument of the demurrer to the evidence and defendant's motion to set aside the verdict, at a subsequent term, plaintiff joined in said motion to set aside the verdict, and entered his motion to withdraw his joinder, supported by the affidavits aforesaid, which the court permitted him to file, and thereupon set aside the demurrer and awarded a new trial on all issues.

It is argued on behalf of defendant company that, as plaintiff joined in its motion to set aside the verdict, and as neither party complained of the ruling of the court thereon, it was the duty of the court below to have empanelled a jury to re-assess the damages, and to have entered such judgment on the demurrer to the evidence as would have been proper. But notwithstanding this proposition of counsel, we are asked to reverse the judgment below permitting withdrawal of plaintiff's joinder, and to pronounce judgment upon the demurrer in its favor and that the plaintiff take nothing by his action. Our opinion is that unless both parties are bound by the court's action on their motion for a new trial neither should be bound thereby. True the purpose of defendant's motion for a new trial was not intended to disturb its demurrer to the evidence; but to obtain a new trial on the question of damages, and on the ground that the amount of the verdict was excessive. On the other hand the

evident purpose of plaintiff in joining in defendant's motion for a new trial was in aid of his motion to withdraw his joinder in the demurrer, and to set aside the demurrer and for a new trial on all the issues, based on surprise and the newly discovered evidence of the witnesses Denning and Peebles.

As we understand it the proposition of defendant's counsel now is that we should reverse the judgment below, disregard the verdict of the jury, and pronounce judgment in its favor on the demurrer to the evidence, because, as they view the evidence, the alleged negligence of the defendant has not been proven.

As we view the evidence the motion of the demurrant to set aside the verdict as excessive was not well founded. The verdict as to the amount of damages finds full support in the evidence, and no evidence has been pointed out in the briefs or arguments of counsel supporting the contrary view. Nor do we find error in plaintiff's instructions justifying the court in setting aside the verdict. The trial court might have ignored the verdict of the jury, for the time being, and pronounced judgment on the demurrer to the evidence, and, if in favor of the demurrant, judgment of nil capiat could have been entered; but, if for the demurree, another jury could have been empanelled to assess the damages, if found excessive.

Wherefore, we are of opinion that the controlling questions presented here are, first, did plaintiff present a proper case for withdrawal of his joinder to the demurrer, and for a new trial based on newly discovered evidence, and if not, second, was negligence of the defendant shown entitling plaintiff, on the demurrer to the evidence, to judgment thereon, and for the amount of the damages assessed by the jury?

[1] On the first question it is well settled by our decisions, that on such proper showing as would entitle a party to a new trial, if the verdict of the jury was against him, the trial court has jurisdiction to set aside the demurrer to the evidence and award him a new trial, and that the rule applicable to new trials is properly applied in such cases, and that the rule of new trials is applicable also where the case has not been properly developed and the court can see that other evidence in fact exists, and that through some misconception of the law applicable to the case, or through some surprise, accident, or oversight, justice demands a new trial, and that the party injured be permitted to fully present his case. *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Cook v. Raleigh Lumber Co.*, 82 S. E. 327; *La Belle Iron Works v. Quarter Savings Bank*, 82 S. E. 614, 620; *Fairfax's Adm'r v. Lewis*, 11 Leigh (38 Va.) 233.

As already noted, plaintiff's only ground for withdrawing his joinder, and for a new trial, was surprise and the newly discovered evidence of Denning and Peebles. The sur-

prise was occasioned by the evidence of defendant's witness Charley Taylor, to the effect that on the morning of the day plaintiff's property was destroyed he noticed some smoke back and south of plaintiff's well, next to a clearing on Denning's farm, and next to Denning's house. He was one of defendant's trainmen, and swore that he observed this smoke while running from Pennsboro to Harrisville, and as he crossed the railroad bridge over Hughes River and while rounding the hill between the river and the long trestle in the vicinity of the well. His evidence on cross-examination also tended to show there was a clearing on the Denning farm, a pine brush thicket which had been or was being cleared out, but he could not testify positively that clearing was being done there on the day of the fire, or that the smoke he saw actually came from that clearing. But he described the smoke as apparently coming from that direction. He testified also that there was a road running up from under the long trestle and on the Davis farm, and between the well and the Denning land. He had never been up there and did not know how far the well was from the clearing referred to. This evidence was the only evidence tending to account for the origin of the fire, otherwise than from the locomotives of the defendant operated in the vicinity of and near to the well, and the setting out of fire by them in the vicinity of the well on that day.

[2] The rule of our decisions based on surprise and newly discovered evidence is, that the new evidence must have been discovered since the former trial; that by reasonable diligence such evidence could not have been secured before the trial; that the evidence is material and not merely cumulative, corroborative or collateral, and such as ought on another trial to produce an opposite result on the merits. *Carder v. Bank*, 34 W. Va. 38, 41, 11 S. E. 716, and cases cited.

Has plaintiff brought himself within these rules is the question presented. We are of opinion that he has not done so. We think plaintiff must reasonably have anticipated that defendant would endeavor to show if possible that the fire destroying his property originated from sources other than the negligent operation of its locomotives. We must assume that plaintiff investigated the cause of the fire about the time his property was destroyed. Peebles was his representative, and was present at the well on the morning of the day of the fire, and was well acquainted with all the facts surrounding the well at that time; and, though summoned by defendant, plaintiff could not be excused, after verdict, for failure to summon this witness, or procure his evidence before submitting the case to the jury. Besides, after Taylor testified, plaintiff did introduce one or two witnesses to prove that there was no clearing going on on the Den-

ning farm the day of the fire. One witness living in the neighborhood, and well acquainted with conditions, swore that according to his recollection one Rymer had cleared the pine thicket some two or three years before the fire in question, and before Denning purchased the farm, that though Denning had done some clearing after he purchased the farm, witness was pretty sure he had done no clearing in the spring of 1911, just before plaintiff's property was burned in May of that year. There is little difference between this evidence and that contained in the affidavit of Denning relied on for a new trial. He admits he had a small portion of his land cleared in the early spring of 1911, but says that before May 22, 1911, the day of the fire, the clearing had been completed, the land burned off, plowed and planted in corn, and he thought the corn had been worked once prior to that date; that he was present at the well on the day of the fire, arriving there when the derrick was about to fall in; that there was no fire at any place on his farm that day which by any possibility could have set out the fire destroying plaintiff's property; that he observed the road spoken of by Taylor, over the Davis land, and between his land and the plaintiff's well, and that he observed no signs of fire beyond or east of that road. The witness Peebles and other witnesses could have observed the same facts at and immediately after the fire. Plaintiff himself was a witness and swears that he was at the well the evening of the fire and he then had the same opportunity to see and observe the conditions then surrounding the well, and as to whether there were any evidences of fire east of the road running through the land. He could have been recalled and could probably have proved all or substantially all that it now appears Denning would prove. Besides, when a party is surprised, and knows of evidence he should then, as a general rule, protect himself by asking a continuance, or taking a nonsuit, and not take the chance of an adverse verdict, and then resort to a motion for a new trial as a means of correcting his mistake. *Henderson v. Hazlett*, 83 S. E. 907.

Plaintiff having voluntarily joined in the demurrer to the evidence, and having now determined that the court below erred in permitting him to withdraw that joinder, the question comes, what disposition shall we make of the case on this hearing? The court below has not as yet acted upon the demurrer to the evidence, except to set it aside to let in the new evidence. In advance of its action thereon shall we now proceed as requested by counsel for defendant company to consider the demurrer, and pronounce such judgment as we might think proper? Possibly, as an original proposition, we might take a different view of the evidence from the trial court, and as the judge,

who sees and hears the witnesses, is better able to judge of the weight and credibility of the testimony, than an appellate court would be, the parties would by original judgment here be deprived of the benefit of original action by the trial court, and the prevailing party of the benefit of the judgment in his favor on writ of error here. Our decisions all call for original action by the trial court, as a prerequisite to appellate jurisdiction. *Armstrong v. Town of Grafton*, 23 W. Va. 50; *Woods v. Campbell*, 45 W. Va. 203, 32 S. E. 208; *Kesler v. Lapham*, 46 W. Va. 203, 33 S. E. 289; *Bartlett v. Boyles*, 66 W. Va. 327, 66 S. E. 474. Besides it is suggested by plaintiff's counsel that original action here upon the demurrer to the evidence might deprive him of the right to take a nonsuit, if so advised, and his rights be prejudiced in that way. *Thrasher v. Ballard*, 33 W. Va. 285, 290-293, 10 S. E. 411, 25 Am. St. Rep. 894.

[3] We are of opinion that under our practice we ought not to pronounce final judgment on the demurrer here until the trial court has acted. Defendant's counsel cite *Smith v. South Penn Oil Co.*, 59 W. Va. 204, 53 S. E. 152, in support of their motion for judgment here. But the case is inapt. In that case the court below had pronounced judgment on the demurrer. True we reversed that judgment for error therein and then proceeded to pronounce judgment here, but there the lower court had given its judgment on the demurrer. The only case we have found which at first blush might seem to justify defendant's motion for judgment here is *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 337. In that case, however, the court was reviewing the judgment below refusing to compel joinder in a demurrer by the demurree. It, therefore, became necessary for the court to consider the evidence, and finding error in the judgment below, proceeded to pronounce judgment on the demurrer to the evidence in favor of the demurrant. No precedent is cited by the Virginia court for this practice. But regarding that as proper practice in such cases, it hardly furnished a precedent for a case like the one at bar. The court below in that case in pronouncing the judgment complained of was necessarily compelled to consider the evidence far enough at least to determine whether it was such as to require joinder in the demurrer thereto, and to that extent the court below must necessarily have pronounced judgment thereon. In this case here we have no judgment of the trial court of any kind on the demurrer to the evidence. If the Virginia case promulgates a correct rule of practice, it is not entirely applicable to the case in hand.

For the reasons aforesaid, we are of opinion to reverse the judgment, reinstate the demurrer and the joinder of plaintiff therein, and to remand the case for further pro-

ceedings to be had therein in the circuit court according to the directions indicated and further according to the rules and principles governing in such cases.

(76 W. V. 21)

PRITCHARD et al. v. PRITCHARD et al.
(No. 2456.)

(Supreme Court of Appeals of West Virginia.
March 30, 1915.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION ¶70—RELEASE BY HEIR—EFFECT.

A paper executed by a grandson at the request of his maternal grandfather, and while his mother and father are still living, and purporting to release as an heir all his claim on all estate owned by his parents, in consideration of a farm promised him by his grandfather at his death, will not be effective as release of his own or the right of his widow and heirs at his death to take by inheritance his share in the estate of his mother dying intestate, although a part or all of her estate came by devise from her father, the releasor's grandfather.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 213; Dec. Dig. ¶70.]

2. DESCENT AND DISTRIBUTION ¶70—RELEASE BY HEIR—VALIDITY AND EFFECT.

A grandfather, while the grandchild's parent is still living, will not be permitted, by procuring such a release from his grandchild, to interrupt the law of descents and distributions, and to cut off his grandchild's right to take by inheritance his due proportion of his parent's estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 213; Dec. Dig. ¶70.]

Appeal from Circuit Court, Pocahontas County.

Suit by L. E. Pritchard and others against C. E. Pritchard and others. From a decree for plaintiffs, defendants appeal. Modified and affirmed.

L. M. McClintic and F. R. Hill, both of Marlinton, and A. M. Pritchard, of Charleston, for appellants. Price & McNeel, of Marlinton, for appellees.

MILLER, J. Plaintiffs and defendants are the heirs and grantees of some of the heirs of the late Mary F. Pritchard, deceased, and S. C. Pritchard, her husband, seeking partition of a tract of 554 acres devised to said Mary F. Pritchard by her father, the late Archibald McCallister.

[1] The question of importance presented for decision is whether on the face of the bill and exhibits the appellees, Norval Pritchard, Neal Pritchard, Walter Pritchard, Blanche Pritchard, Mary Pritchard and Elsie Pritchard, children and heirs, and Eudora Pritchard, widow of R. M. Pritchard, deceased, are entitled to the share in said land, which but for a certain paper executed by him at the request of his grandfather, Archibald McCallister, the said R. M. Pritchard

would have inherited from his mother, the said Mary F. Pritchard.

Notwithstanding the said paper, pleaded as a release by the said R. M. Pritchard, binding his widow and heirs, of all right, interest and estate in said tract, the decree appealed from admitted said appellees, his heirs, to share in said partition, and to take per stirpes the share of their father in said tract, and denying to appellants the relief prayed against them based on said contract.

Said contract or release is as follows: "Know all men by these presents: That, I, R. M. Pritchard of Healing Springs, County of Bath, State of Virginia, son of S. C. and Mary F. Pritchard, of Dunmore, County of Pocahontas, State of West Virginia, as an heir do release all my claim on all estate owned by my parents, in consideration of a farm promised me by Archibald McCallister my grandfather of Indian Draft, County of Alleghany, State of Virginia, at his death. This release is given as per request of above mentioned Archibald McCallister. I have hereunto set my hand and seal this the 16th day of February, 1889.

"[Signed] R. M. Pritchard. [Seal.]"

It will be observed that this paper does not purport to be a release to any one, or in favor of any one. It is a paper executed by grandson to grandfather, at the request of the latter, and purports to "release all my claim on all estate owned by my parents, in consideration of a farm promised me by Archibald McCallister my grandfather." It does not identify "all estate owned by my parents" as the land or estate to be or that was acquired by them by devise from Archibald McCallister, nor the "farm promised me" as the one devised to him by the will of his grandfather. It says "all estate owned by my parents", present tense.

But the bill alleges that at her death Mary F. Pritchard was seized and possessed of said 554 acres, more or less, willed to her by her father Archibald McCallister, January 21, 1889, and there is no allegation that she then or at any other time owned any other land. It is alleged that said R. M. Pritchard took possession of the farm mentioned in said paper and so devised to him at the death of his grandfather and lived upon and disposed of the same, and that the farm so devised to his mother should be partitioned among her other children, and that the claim of the widow and children of said R. M. Pritchard to an interest in said land constituted a cloud on the title of the other partitioners which should be removed.

[2] It is well settled law that a release like the one involved here, when executed between parent and child, if fair and for a present advancement of money or land out of the parent's estate will operate as a release of all right of the child to share in the division and partition of the residue of the estate of the parent dying intestate.

Roberts v. Coleman, 37 W. Va. 143, 16 S. E. 482; Coffman v. Coffman, 41 W. Va. 8, 23 S. E. 523; Squires v. Squires, 65 W. Va. 611, 64 S. E. 911; Quarles v. Quarles, 4 Mass. 680. And it is well settled also that the same rule applies as between grandparent and grandchild when the parent is dead at the time of the contract or release and the grandchild is then a prospective heir of the grandparent and would then be entitled to take by inheritance immediately from the grandparent. Thornton on Gifts and Advancements, pp. 540, 541, sec. 551, and cases cited in note 1, p. 541. And these and other authorities support the proposition that such a contract between parent and child, when the child in consideration thereof is advanced and dies before his parent, will bind his heirs and bar them from participating as heirs in the estate of the grandparent. In such case it is said the effect of the release is the same as if the one advanced should die without children or heirs to take his share in his parent's estate.

The basic reason for upholding such contracts, gathered from these authorities and the statutes on the subject is, that the law favors equal distribution of a decedent's estate. Our statute on advancements, section 13, chapter 78, serial section 8913, Code 1913, which, like the statute of most of the other states, is based on the English statute of distribution, 22 and 23 Car. II, chapter 10, supports this view. 4 Kent's Com. (4th Ed.) 479, star page 418.

But we do not find that the law of advancements, or of release between parent and child, has ever been carried to the extent of upholding such a contract of release between grandparent and grandchild during the life of the child's parent, so as to cut off the right of the child to inherit or participate in the distribution of his parent's estate. Such a contract as the one under consideration is in effect a release of one's prospective interest in his parent's estate to a third person, which the law does not sanction. 3 Washburn, Real Prop. (6th Ed.) section 1916; Davis v. Hayden, 9 Mass. 514; Thornton on Gifts and Advancements, section 551; 1 Story, Eq. Jur. (13th Ed.) section 339; In re Thompson's Estate, 26 S. D. 576, 128 N. W. 1127, Ann. Cas. 1913B, 446, and note 451. In the second point of the syllabus in the case last cited, it was decided that the statute of South Dakota declaring that a mere expectancy of an heir apparent is not an interest, and that a mere possibility not coupled with an interest may not be transferred, was merely declaratory of the common law, "so that a release by an heir in the lifetime of the ancestor of his interest in the estate of the ancestor is inoperative." In the many cases cited in the note none are found applicable to the concrete case presented here, the release of a grandson

at the request of his grandfather of his right to inherit or take by inheritance an interest in his own parent's estate. Some of the cases involve transactions between grandparent and grandchild, but unless we have overlooked some case, none of them relate to transactions between persons so related during the life of the grandchild's parent.

It is assumed by appellants that the farm "promised me" referred to in the paper in question was the farm devised to R. M. Pritchard by the will of his grandfather, and that the "estate owned by my parents", referred to therein, was the farm devised to his mother Mary F. Pritchard. But there is nothing in the record except certain *ex parte* affidavits sought to be introduced here, and the fact that R. M. Pritchard and Mary F. Pritchard were each given farms by said will, showing or tending to show these facts. But assuming the fact to be as contended by appellants, the result would be the same. While the law does permit a prospective heir to release his interest in his parent's and in his grandparent's estate, if his parent be dead and he would inherit directly from the grandfather, the law will not permit a grandparent to control the law of descents and distributions of the parent's estate, even though a part or the whole of that estate may come by devise or inheritance from the grandfather.

The clerical errors in the decree complained of and the error therein omitting the name of John R. Hevener, grantee of W. J. Pritchard, from among those decreed the right to participate in the partition of said land, correctible by the record, may all be corrected when the case goes back to the circuit court for execution of said decree, and when so corrected the decree will in all other respects stand affirmed.

And the appellees substantially prevailing here will recover of appellants their costs incurred in this court.

(76 W. Va. 80)

LEWIS, HUBBARD & CO. et al. v. TONEY et al.

(Supreme Court of Appeals of West Virginia.
March 30, 1915.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY — 180 — RIGHTS OF SURETY — PAYMENT OF DEBT — DEED OF TRUST.

In a suit to enforce liens against a debtor's land, to which all persons interested are parties, a surety protected by a deed of trust, given by the debtor on his land to "indemnify and save him harmless," has a right, after the debtor's default and before payment of the debt by himself, to a decree directing the enforcement of the trust and application of the proceeds to the discharge of the debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 520-523; Dec. Dig. § 180.]

2. PRINCIPAL AND SURETY §190—RIGHTS OF SURETY—ENFORCEMENT OF DEED OF TRUST—DISPOSITION OF PROCEEDS.

It is error, in such case, to decree payment of the proceeds to the surety before he has paid the debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 568-577; Dec. Dig. § 190.]

3. EQUITY §410—REPORT OF COMMISSIONER—GROUNDS OF EXCEPTION—WAIVER.

A party to a cause, who appears before a commissioner and excepts to his report, but not on the ground of want of notice of the taking of evidence by him, will not be heard to complain for that reason, after a decree upon the report.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905-919; Dec. Dig. § 410.]

4. EQUITY §410—SUPPLEMENTAL REPORT OF COMMISSIONER—GROUND OF EXCEPTION—WAIVER.

A party on whose motion a supplemental report is made, to correct omissions and errors, and who excepts to it, cannot complain, after decree thereon, of matters not embraced in his exceptions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905-919; Dec. Dig. § 410.]

5. MORTGAGES §494—ENFORCEMENT—DECREE—REQUISITES—JUDICIAL SALE.

In a suit to enforce vendor's liens, judgment liens, and liens created by trust deeds given to secure payment of debts, providing, in case of default, for a sale of the land for cash, it is not error to decree a sale of the land without ascertaining its rental value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1441-1445; Dec. Dig. § 494.]

Appeal from Circuit Court, Raleigh County.

Suit by Lewis, Hubbard & Co. and others against James Toney and others. From a decree for plaintiffs, defendants appeal. Modified and affirmed.

J. E. Summerfield and J. W. Maxwell, both of Beckley, for appellants. File & File, of Beckley, for appellees.

WILLIAMS, J. From a final decree of the circuit court of Raleigh county, ascertaining the liens upon their land and decreeing a sale thereof to satisfy same, James Toney and Emily, his wife, have appealed. No brief is filed on their behalf. In their petition for an appeal they assign six errors:

First. That it was error to decree a lien for \$277.79 in favor of M. J. Meadows and, H. A. Dunn. This sum was decreed to be a lien on the land of Emily Toney. It was created by deed of trust, executed by herself and husband, on April 9, 1911, to J. M. Anderson, trustee, to indemnify and "save harmless" said Meadows and Dunn as indorsers on a note made by the grantors to the Raleigh County Bank for \$250, bearing date April 9, 1911, and payable 120 days after date. The commissioner reported this note unpaid. Appellants claim that is no evidence that Meadows and Dunn, or either of them, paid the note, and that it was error to decree in their favor.

[1, 2] As a general rule, a surety has no right of action against his principal until

he has paid the debt. But where his principal has given him a mortgage or deed of trust to indemnify him against loss or damage, he has a right, in equity, to have it applied in discharge of the debt, to relieve him from payment of it. The trust deed in question expressly provides that, "If default be made in the payment of said note or any part thereof when it shall have become due and payable by the parties of the first part, of it [or if] the said parties of the third part [Meadows and Dunn] shall be required to pay any part of said note at its maturity," then the trustee shall sell the property for cash at public auction, at the front door of the courthouse. By the terms of the deed the sureties are indemnified against having to pay the note, and it was therefore not necessary for them to pay it, or any part of it, to perfect their right against their principal. Default having been made in payment of the note, they had a right, in a court of equity, to have the indemnity applied directly in payment of it. In such case equity treats the sureties as holding the indemnity in trust for the creditor. Brandt on Suretyship (3d Ed.) § 242; 32 Cyc. 242; Call v. Scott, 4 Call (Va.) 402; Tankersley v. Anderson, 4 Desaus. (S. C.) 44; McKnight v. Bradley, 10 Rich. Eq. (S. C.) 557; Constant v. Matteson, 22 Ill. 546; Thurston v. Prentiss, 1 Man. (Mich.) 193. It was error, however, to decree the trust lien in favor of Meadows and Dunn; they not having paid the note. It should have been decreed to the Raleigh County Bank, to be applied on the note on which Meadows and Dunn were indorsers. Appellants are not discharged by the decree from their obligation to pay the note. If the sureties should fail to apply the money to the payment of it, appellants are still liable to the bank. True, appellants did not except to the commissioner's report for this reason, but the error appears on the face of the report, and they may take advantage of it in this court without exceptions. Windon v. Stewart, 48 W. Va. 488, 37 S. E. 603; Bank of Union v. Nickell, 57 W. Va. 57, 49 S. E. 1003.

[3] Second. That it was error to admit the depositions of certain witnesses, named, because appellants had no notice of the time and place of their taking, and no opportunity to cross-examine the witnesses. The depositions were taken before the commissioner to whom the cause was referred, and were returned with his report. James Toney's deposition was also taken and returned. Whether all the witnesses appeared at the same time, or at different times, does not appear. Although appellants filed written exceptions to the report, none of them relate to want of notice. To be availing, exceptions to a commissioner's report for error not appearing on the face thereof must be taken before a decree is rendered upon

the report. Shenandoah Val. Nat'l Bank v. Shirley, 26 W. Va. 563. Furthermore, the commissioner says, in his report, he gave "due notice." This is *prima facie* true, and there is no evidence that notice was not given. The decree of reference did not provide the manner of giving notice, and no one, who did not actually appear before the commissioner and have opportunity to except to his report, is complaining.

[4] Third. That it was error to hear the cause on the original and supplemental reports, because the commissioner gave no notice of the time and place of his sitting and because the supplemental reports were not retained by him for 10 days for inspection and opportunity to take exceptions. The commissioner filed his report in open court on the 25th of February, 1913, and on appellants' own motion it was recommitted to him, "to make a supplemental report pertaining to some matters inadvertently left out of the original report by said defendant" (James Toney), and the commissioner was required to make his supplemental report on that day. The recommitment was made on appellants' motion for the purpose of ascertaining and allowing him certain credits which had not been proven when the case was before the commissioner, but which, it was shown and admitted by the parties, he was entitled to. The corrections he desired to have made were made, and there was no necessity for the supplemental report to be retained by the commissioner for further inspection and opportunity to except. It was returned and filed on the following day, the 26th of February, and, although written exceptions were filed by appellants to both the supplemental and the original reports, none of them relate to this assignment, which we hold is not well taken. Moreover, all the parties were in court when the recommitment was made.

[5] Fourth. That it was error to decree a sale, without having ascertained in the manner provided by law, that the land would not rent for enough in five years to pay the liens. No evidence had been taken on this point by the commissioner. The court permitted plaintiff to amend its bill at bar by inserting therein an allegation that the land would not rent for enough in five years to pay the liens, and then recommitted the cause to the commissioner the second time, to ascertain that fact and make immediate report. The commissioner heard testimony the same day, and reported that the rents for five years would not be sufficient. Appellants appeared in court and excepted to the report on the ground that they had no notice of the taking of the proof, and the court struck out the evidence on that point, and, notwithstanding, decreed a sale of the lands. A complete answer to this assignment, we think, is the fact that only some of the liens were judgment liens. Others were vendor's liens, and trust deed liens to secure debts in payment of which appel-

lants had defaulted, stipulating for cash sales. Plaintiff's lien, for the enforcement of which, together with other liens, it brought this suit, was of the latter class. It is not necessary in such case to ascertain the rental value; the debtors themselves having agreed to a sale for cash. *Stafford v. Jones*, 73 W. Va. 299, 80 S. E. 825. The right to have land rented is a privilege accorded the debtor, and applies to the enforcement of judgment liens, not to trust deed liens wherein he has agreed to a sale in case of his default.

The foregoing is also a sufficient answer to the fifth and sixth assignments.

The decree will be modified here, so as to require the \$277.79, decreed to M. J. Meadows and H. A. Dunn, to be applied on the note held by the Raleigh County Bank on which they are indorsers, and, as so modified, it will be affirmed.

(143 Ga. 383)

BROWNLEE v. PRICE et al. (No. 311.)
(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

INTERLOCUTORY INJUNCTION—RECEIVER.

There was no abuse of discretion in refusing to grant an interlocutory injunction and to appoint a receiver in this case.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by M. E. Brownlee against H. H. Price and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. A. Hunt and J. F. Gollightly, both of Atlanta, for plaintiff in error. Samuel H. Sibley, of Union Point and Jones & Chambers, E. R. Black, and Marcus McWhorter, all of Atlanta, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 383)

SWIFT FERTILIZER WORKS v. KENNEDY. (No. 310.)
(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

GRANT OF NONSUIT.

There was no error in granting a nonsuit in this case.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Action by the Swift Fertilizer Works, for use, etc., against J. J. Kennedy. Nonsuit granted, and plaintiff brings error. Affirmed.

W. H. Gurr, of Dawson, for plaintiff in error. M. C. Edwards, of Dawson, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(169 N. C. 251)

OBSERVER CO. v. REMEDY SALES CORPORATION. (No. 438.)

(Supreme Court of North Carolina. May 5, 1915.)

1. CORPORATIONS \S 521—**ACTION—SUFFICIENCY OF EVIDENCE—ADMISSIONS—QUESTION FOR JURY.**

In an action against a corporation on an advertising account, an admission of the correctness of the account by the corporation's secretary, treasurer, and general manager is sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2094-2098; Dec. Dig. \S 521.]

2. CORPORATIONS \S 519—**ADMISSIBILITY OF EVIDENCE—ACTS OF AGENT.**

In an action on an advertising account, a letter directing that the advertisement be changed, and that it be charged to defendant corporation, is competent in connection with evidence tending to show the authority of the writer to bind the corporation or ratification by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2085, 2088-2089, 2091, 2093; Dec. Dig. \S 519.]

3. APPEAL AND ERROR \S 1051—**HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE—FACT OTHERWISE ESTABLISHED.**

The admission of hearsay testimony that an individual had been manager of a corporation was harmless where the books of the corporation, admitted in evidence, showed the election of such person as manager.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4161-4170; Dec. Dig. \S 1051.]

4. TRIAL \S 29—**MISCONDUCT OF JUDGE—COMMENT.**

A statement by the trial judge during the argument for a nonsuit in an action against a corporation on the ground that the authority of an alleged agent had not been established that one man could represent several corporations was true, and could not affect the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 80-83, 508; Dec. Dig. \S 29.]

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by the Observer Company against the Remedy Sales Corporation to recover the amount of an account for advertising. Judgment for plaintiff, and defendant appeals. Affirmed.

The letter referred to in the opinion was as follows:

"Kittrell, N. C., 8-23, '13.

"Attached find copy for change in Mrs. Joe Person's advertisement to occupy 5 inches as per your contract with her. Kindly charge the advertising since July 5th to Remedy Sales Corporation and render me bill for Mrs. Joe Person's account to that time.

"Yours very truly, Guy V. Barnes."

Flowers & Jones, of Charlotte, for appellant. Thaddeus A. Adams, of Charlotte, for appellee.

PER CURIAM. We have carefully examined the exceptions relied on by the defendant, and find no reversible error.

[1] The admission of the correctness of the account when it was presented to the de-

fendant by Mr. Powers, who was then its secretary, treasurer, and general manager, was sufficient to carry the case to the jury, and there was other evidence tending to sustain the plaintiff's claim.

[2] The letter of Guy V. Barnes was competent, but its effect was dependent upon the evidence introduced to show his authority to bind the defendant or of ratification by the defendant.

[3] The statement by Powers that he understood that Barnes was manager of the defendant company prior to the time he became manager was objectionable as hearsay; but no harm came to the defendant from the refusal to strike out this evidence, because the books of the company were admitted in evidence, and they showed that Barnes had been manager, and the date of his election.

[4] The statement of his honor during the argument of the defendant for a judgment of nonsuit that one man could represent one-half dozen different corporations was true, and, in any event, could not have affected the verdict.

No error.

(169 N. C. 68)

PARKER v. CHARLOTTE ELECTRIC RY. CO. (No. 439.)

(Supreme Court of North Carolina. May 5, 1915.)

ELECTRICITY \S 16—**INJURIES INCIDENT TO USE—DEFECT CAUSING INJURY.**

An electric railway company, maintaining about 12 inches beneath a bridge feed wires, is not liable for injury to a boy of 13 years getting down on his knees on the floor of the bridge and reaching his hand between the lower railing and flooring and touching a feed wire, for the company could not reasonably foresee the accident resulting from the boy's own independent act.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. \S 9; Dec. Dig. \S 16.]

Appeal from Superior Court, Mecklenburg County; Thomas J. Shaw, Judge.

Action by Robert Parker, by his next friend, W. P. Parker, against the Charlotte Electric Railway Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Brevard Nixon, E. T. Cansler, J. D. McCall, and C. B. Fetner, all of Charlotte, for appellant. Osborne, Cooke & Robinson, of Charlotte, for appellee.

BROWN, J. This action is brought by the plaintiff, a boy of 13 years of age, to recover damages for an injury sustained on account of his touching an electric feed wire of the defendant. The evidence proves that this feed wire ran under a bridge maintained by the defendant over a cut between the city of Charlotte and the village of Hoskins.

The cars of the defendant ran underneath this bridge, and under it are its trolley wires and feed wires. The feed wire is about

12 inches below and underneath the bridge. Several boys were playing on this bridge; the plaintiff being among them. One of the boys reached down through the floor of the bridge, endeavoring to touch the feed wire. He failed to do so, and some one dared the plaintiff to touch it. The plaintiff got down on his knees on the floor of the bridge, reached his hand between the lower railing and floor, and succeeded in touching the feed wire, and received a shock, from which he was injured. Upon this state of facts, we think his honor properly sustained the motion to nonsuit.

The case differs very materially from *Benton's Case*, 165 N. C. 354, 81 S. E. 448, where an uninsulated wire was allowed to run through the top of a tree, which boys were in the habit of climbing. It would seem that the defendant in this case had exercised every possible care in the disposition of its wires, and had no reason to expect that a 13 year old boy would lay down on the bridge and endeavor to touch them.

The injury to the plaintiff evidently resulted from his own independent act in purposefully getting the wire within his reach; and, under the circumstances, such action could not have reasonably been foreseen. *Trout v. Electric Co.*, 236 Pa. 506, 84 Atl. 967, 42 L. R. A. (N. S.) 713.

Affirmed.

(168 N. C. 660)

HEDGECOCK v. TATE et al. (No. 363.)

(Supreme Court of North Carolina. April 22, 1915.)

1. EXECUTORS AND ADMINISTRATORS ⇐137—POWERS OF EXECUTORS—OPTION CONTRACTS.

An executor, vested with no power to sell land, has no power to give an option to sell land.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 557-559, 606½; Dec. Dig. ⇐137.]

2. PRINCIPAL AND AGENT ⇐155—PERSONAL LIABILITY OF AGENT.

An agent, assuming to act under authority conferred by the principal, when in fact he has no authority, is personally liable to one dealing with him in good faith, relying on apparent authority; but he is not liable to one having actual knowledge of want of authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 574-582; Dec. Dig. ⇐155.]

3. EXECUTORS AND ADMINISTRATORS ⇐137—CONTRACTS WITH EXECUTORS—PERSONAL LIABILITY.

One obtaining an option contract from an executor, with knowledge that he would have to obtain a deed from the heirs at law of testator, cannot hold the executor personally liable on the contract.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 557-559, 606½; Dec. Dig. ⇐137.]

Appeal from Superior Court, Guilford County; Devin, Judge.

Action by J. M. Hedgecock against A. E.

Tate and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

This is a civil action, brought to recover damages for failure of the defendants to comply with the terms of an option. The following is a copy of the option:

"This agreement, made this 1st day of March, 1913, between A. E. Tate et al., administrators of Rev. J. B. Richardson, deceased, of Guilford county, and state of North Carolina, parties of the first part, and J. M. Hedgecock, party of the second part, witnesseth: That in consideration of the sum of \$1.00 paid by the party of the second part to the parties of the first part, the receipt of which is hereby acknowledged, the said parties of the first part hereby agree, upon receipt of the sum of \$100 per acre, under survey to be made on or before the 1st day of January, 1914, to sell and confirm to the said party of the second part at an option, and execute to him a deed in fee simple with the usual covenants of warranty, the following described property, to wit: All of the land lying west of the city of High Point, adjoining the lands of J. M. Hedgecock, E. T. Corbett, the Jones heirs, Frank Proctor, and W. P. Hedgecock and others. This tract is known as the Jones tract, and contains about 25 acres. This option is to be taken up on the 1st of August: Provided, J. M. Hedgecock sells his present farm. Otherwise, option to remain in full force until January 1, 1914.

"It is understood and agreed that, in case the party of the second part does not pay or tender to the parties of the first part the purchase price, one hundred dollars per acre aforesaid, on or before the date above limited, then this agreement shall be void.

"In witness whereof, said party of the first part hath hereunto set his hands and seals the day and year first above written.

"[Signed] A. E. Tate, Adm'r. [Seal.]
J. B. Richardson Estate. [Seal.]"

John A. Barringer, of Greensboro, and T. H. Calvert, of Raleigh, for appellant. W. P. Bynum, of Greensboro, and Roberson & Barnhardt, of High Point, for appellees.

BROWN, J. This case embraces two causes of action—one for specific performance against all the defendants; the other for damages for breach of contract against A. E. Tate, individually; both causes being based upon a certain option given to the plaintiff by A. E. Tate, as administrator of J. B. Richardson, deceased.

[1] The plaintiff cannot enforce specific performance of the option, because there is nothing to show, in the first place, that the executors to the will of J. B. Richardson are given power to sell land. Even if they were vested with the power to sell land, it has been held that that does not give the executors any power to give an option to purchase. *Trogden v. Williams*, 144 N. C. 194, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

[2] The plaintiff is not entitled to recover on the other cause of action against the defendant Tate for damages, for the reason that it appears upon the face of the written contract that the defendant Tate did not contract personally. But the plaintiff seeks to avoid this by contending that the defendant Tate undertook to act as an agent for

others without authority. It is true that a person who assumes to act as agent for another impliedly warrants that he has authority to do so. If it turns out that he lacks such authority, he may be held personally liable to the one with whom he deals, in good faith, relying on such implied warranty. But this rule, which renders the agent personally liable who acts without authority, is based upon the supposition that the want of such authority is unknown to the person with whom he deals. If such person has actual knowledge of the lack of authority, he cannot hold the agent liable. As is said in 31 Cyc. page 1550:

"Thus, where all the facts touching the agent's authority, or its source, are equally within the knowledge of both parties, who act thereupon under a mutual mistake of law as to the liability of the principal, the agent cannot be held."

[3] In this case, the evidence shows that the plaintiff had full knowledge of the capacity in which the defendant Tate acted, which knowledge rebuts any presumption of an implied warranty of authority. The plaintiff testifies that he drew up the option, and further says:

"I am a lawyer; have had a license for 18 or 20 years. I know that Mr. Tate was one of three executors of the will; the other two being the widow, Mrs. Richardson, and the son, O. N. Richardson."

The plaintiff further testified:

"I do not recall positively whether he said they would have to sign the deed, or whether they would sign it, or would not sign it. There was something said about the heirs. He never told me he had any power of attorney. I did not ask him if he had power of attorney. He said that he had been handling the estate, it might not have been exclusive."

Again the plaintiff says:

"I knew then I was to get my deed, not from Mr. Tate, but from the heirs at law of J. B. Richardson."

These statements and admissions of the plaintiff show conclusively that the contract was not, and was not intended to be, the personal obligation of the defendant Tate, and, further, that the plaintiff had full knowledge of all the facts and circumstances connected with the transaction, and showing that Tate was acting, not for himself, but for the heirs at law or devisees of his testator.

Affirmed.

(169 N. C. 41)

HALL FURNITURE CO., Inc., v. CRANE BREED MFG. CO. (No. 368.)

(Supreme Court of North Carolina. April 28, 1915.)

SALES \S 267—IMPLIED WARRANTY OF QUALITY—CONDITION OF FITNESS FOR USE.

Plaintiff ordered a secondhand hearse which defendant replied it could furnish, stating that it could not warrant its condition, and that it might be best for the buyer to inspect it himself. The buyer did not so inspect, but paid the defendant for the hearse, which was discovered, upon delivery, to be defective and unfit for use. Held that, although in the sale of personal property there is no implied warranty of quality, it was a condition of defendant's contract

that he furnish an article fit for use, and, though it negated any warranty of quality, he was still liable for failure to furnish an article reasonably fit for use.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 760, 761; Dec. Dig. \S 267.]

Appeal from Superior Court, Guilford County; Devin, Judge.

Action by the Hall Furniture Company against the Crane Breed Manufacturing Company. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover \$100 which the plaintiff paid to the defendant as the purchase price of a secondhand hearse, which was shipped to the plaintiff after the payment of the money and before he had seen the hearse. The plaintiff refused to accept the hearse because, as he alleged, it was worthless. The contract of sale was entered into by correspondence. On February 27, 1913, plaintiff wrote the defendant: "We are in the market for a good secondhand funeral car—light weight preferred." On March 1, 1913, defendant answered saying:

"We are glad to hear * * * that you are in the market for a good light weight secondhand black funeral car. Accordingly, we inclose herewith the following designs: * * * R. J., 710, is a light weight, secondhand four column black car which we have stored with one of our customers in Tennessee. It has steel tires on it and the general condition of it is pretty good. * * * Simply inclose your check for whichever one you want."

This letter inclosed a cut of R. J., 710. On March 5, 1913, plaintiff wrote:

"If the 710 you speak of in Fayetteville, Tenn., is in good condition, and like the cut you sent us, and will take any size casket—all complete—we will send you check for one hundred dollars for the same."

On March 7th defendant wrote plaintiff:

"Of course you understand we do not guarantee any secondhand vehicles, but from what our representative writes regarding this, we are inclined to think that it is worth every dollar we ask for it. [Price asked was \$150.] Your offer now of \$100 is considerably less than what we expected to realize out of it, but as we have quite a stock of secondhand cars on hand at the present time, and do not want to bring this one in also, we have decided to accept your offer of \$100 cash, and will appreciate your check for that amount at once."

On March 10th plaintiff sent defendant check for \$100, and in his letter stated that he was buying R. J., 710, with the understanding "that it is like the cut sent me and in good condition." On March 12th the defendant wrote the following letter to the plaintiff:

"We are in receipt of yours of the 10th inst., inclosing check for \$100.00, in payment of the R. J., 710 funeral car, which we have stored at Fayetteville, Tenn. We note your shipping instructions to forward to the Hall Furniture Co., at Leaksville, N. C., via the cheapest route. Before ordering this car shipped to you, however, we would want it thoroughly understood that we do not guarantee conditions of any secondhand vehicles. As stated in our last letter, we have not seen the vehicle ourselves, but our representative who did see it and made the

transaction, advises us that, in his opinion, he considered it worth every dollar which we are asking you for it. A car that has been out some years evidently does show wear and tear, and if there should be any doubt in your mind as to the value of it, it would pay you to go to Fayetteville, Tenn., to look at this car, in order that there may be no misunderstanding with us regarding its condition. What may be considered by us as being good condition may not agree with your ideas of good condition, as there is a great deal of room for difference of opinion as to the value of secondhand hearses. We wrote you yesterday that we were informed by our customer that this hearse had a brake on it and steel tires, and we understand that it will be shipped to the buyer with lamps, curtains, pole and everything ready for use. If you, therefore, decide to take it with the distinct understanding that it cannot be returned to us if not satisfactory and that it is not guaranteed by us as to condition, we will instruct our customer to forward it over the cheapest route, sending bill of lading with freight rate inserted for same to us which we will, in return, forward to you, together with receipted bill for the amount. It is not our intention to deceive any purchaser of goods from us and therefore, think it best to write you of the actual conditions so that if you desire to look into it personally you could do so before making shipment of the vehicle to you. We will hold your check until we hear from you as to your decision in the matter."

The plaintiff offered evidence tending to prove that the hearse was of no value and worthless, that there were no wheels on the hearse, and that those sent with it were not of sufficient strength to hold it up because some of the spokes were out and a part of the felloes loose, and that the top was weatherworn and rotten so you could tear it off with the hand, and a part of the woodwork was decayed and in bad shape. The defendant offered no evidence as to condition of the hearse. His honor charged the jury among other things, as follows:

"The warranty upon which the plaintiff would be entitled to recover, if any, would be inherent to—or as we say in law, implied by law in the transaction, the implied warranty of identity—that it was the same thing contracted for, and that it was fit for the purpose for which it was intended; not that it was good quality, or first quality, or second quality, but that it was the thing contracted for, a hearse, and that it was fit for use for the purpose for which it was intended. So that, upon this issue, after considering all the evidence, if you find from this evidence and by its greater weight that the hearse received by the plaintiff was not the one that was ordered, or that the car received was worthless and unfit for the purpose for which it was purchased, incapable of being used as a hearse, if you find these to be the facts by the greater weight of the evidence, it will be your duty to answer this issue, '\$100.' But if you find that this car was the one that the plaintiff ordered, and that the condition was not such as stipulated by the plaintiff in his original letter or the cut, yet if it was fit for use for the purpose intended—that is, fit for use as a hearse—if you find these to be the facts, it will be your duty to answer this issue 'Nothing.' The burden is upon the plaintiff to satisfy you that this was not the same car that was ordered specifically, and that when received it was in a worthless condition. If you find from this evidence that it was not the same car, but a different car, or that it was worthless and unfit for the purpose for which it was purchased and incapable of being used as such, you will answer the issue, '\$100.'"

—and the defendant excepted. There was also a motion for judgment of nonsuit, which was denied, and the defendant excepted. There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Brooks, Sapp & Williams, of Greensboro, for appellant. P. W. Gildewell, of Reidsville, and Manning & Kitchin, of Raleigh, for appellee.

ALLEN, J. It was decided in *Ashford v. Shrader*, 167 N. C. 48, 83 S. E. 29, that although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use. This decision, and others of like import in our reports (*Medicine Co. v. Davenport*, 163 N. C. 297, 79 S. E. 602; *Tomlinson v. Morgan*, 166 N. C. 557, 82 S. E. 953; *Grocery Co. v. Vernoy*, 167 N. C. 427, 83 S. E. 567) rest upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as "the purchaser cannot be supposed to buy goods to lay them on a dunghill," as expressed by Lord Ellenborough in *Gardner v. Gray*, 4 Campbell, 143, it will not be assumed that the seller desires to obtain money for a worthless article. His honor applied this rule in his charge to the jury, and the defendant, while admitting its correctness in proper cases, insists that it has no application here because the defendant wrote the plaintiff on March 12th, before the contract was closed, that it would not guarantee the condition of the hearse.

The meaning of the word "condition" is not clear, but it is certain that the defendant was not providing against the sale of a worthless article, because in the same letter he assigns as his reason for not guaranteeing condition the great room for difference of opinion as to the value of secondhand hearses, and in the next paragraph says "It understands the hearse will be shipped to the buyer with lamps, curtains, pole and *everything ready for use*," and again, that its representative, who had seen the hearse, advised that it was worth every dollar the defendant was asking for it. Crediting the defendant with the honesty of purpose declared in the statement in the letter that "It is not our intention to deceive any purchaser of goods from us," the defendant thought it was selling, and intended to sell, a thing of value, ready for use, and worth \$100, but was not willing to guarantee the condition or quality, as there was so much difference of opinion as to the value of secondhand hearses. As thus understood, the refusal to guarantee condition means only a refusal to warrant as to quality, and although the law writes this into every contract for the sale of personal property, that in the ab-

sence of express agreement there shall be no warranty as to quality, it holds the seller to the duty of furnishing an article merchantable or salable, or that can be used. If so, why should the obligation of the seller be less because he writes in the contract what the law would place there? In other words, if the law writes into a contract of sale that there is no warranty as to the quality of the goods sold, and still holds the seller to the duty of furnishing an article that is merchantable or salable, or one that can be used, why does not the same duty rest upon the seller when he, instead of the law, writes into the contract that he will not warrant the quality. It may be said that this gives no effect to the language used, and strikes down one of the terms of the contract, and this would be true out for the correspondence proceeding the letter of March 12th. It appears, however, that the plaintiff wrote the defendant on February 27th that it was "in the market for a good secondhand funeral car," and that the defendant replied on March 1st: "We are glad to hear from your favor of the 27th inst., that you are in the market for a good light weight, secondhand, black funeral car. Accordingly we inclose herewith the following design"—and effect may be given to the refusal to guarantee by relieving the defendant from the possibility of liability upon an express warranty as to quality.

We are therefore of opinion that the charge of his honor is supported by reason and authority.

There are several exceptions in the record, but all of them relied on by the defendant are dependent upon the question considered and decided.

There was also evidence upon the part of the plaintiff that the hearse was heavy weight, when he had contracted for one of light weight, and that while the description in the design called for steel tires, those on the hearse sent were tires made for rubber, on which there was no rubber.

No error.

(169 N. C. 35)

CROWELL v. MARYLAND MOTOR CAR INS. CO. (No. 444.)

(Supreme Court of North Carolina. April 28, 1915.)

1. INSURANCE §146—CONSTRUCTION OF CONTRACT—APPLICATION OF GENERAL RULES.

An insurance policy should be interpreted by the rules which are applicable to other written contracts to ascertain and give effect to the intention of the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. §146.]

2. INSURANCE §146—CONSTRUCTION OF CONTRACT—LIBERAL CONSTRUCTION.

An insurance policy should be so construed as to effectuate the purpose of indemnification against loss, rather than to defeat it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. §146.]

3. INSURANCE §146—CONSTRUCTION OF CONTRACT—LANGUAGE OF POLICY.

An insurance policy should be fairly and reasonably construed, unless it is so clear and unambiguous as not to require a construction, when its words are taken in their plain and ordinary sense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. §146.]

4. INSURANCE §138—FORFEITURE—REGULATIONS AS TO USE OF PROPERTY.

An insurance company may insert in its policy reasonable conditions as to the use of the property insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246-249; Dec. Dig. §138.]

5. INSURANCE §325—FORFEITURE—FORBIDDEN USE OF PROPERTY.

A clause in a policy of insurance on a motor car, providing that the car should not be "rented or used for passenger service of any kind for hire," does not authorize a forfeiture, where the car was used by the owner's chauffeur without his knowledge upon a single occasion to carry persons for hire; the car being destroyed while in the exclusive possession of the owner and after the forbidden use had ceased.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 750; Dec. Dig. §325.]

6. INSURANCE §325—CONSTRUCTION OF CONTRACT—FORBIDDEN USE OF PROPERTY.

A clause in a policy of insurance of a motor car, providing that the car should not be "rented or used for passenger service of any kind for hire," implies more than a single act of renting or using, and refers to the business of carrying passengers for hire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 750; Dec. Dig. §325.]

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by W. J. Crowell against the Maryland Motor Car Insurance Company. From a judgment for plaintiff, defendant appeals. No error.

The defendant insured the plaintiff's motor car and accessories for \$1,000, under a policy which, by its eighth clause, provided as follows:

"The motor car hereby insured will not be rented or used for passenger service of any kind for hire, except by special consent of this company indorsed hereon in writing."

The tenth and eleventh clauses declare that the policy shall be void if there be false representation or concealment in certain particulars set forth, or any fraud or false swearing about any matter relating to the insurance, and shall also be void if the interest of assured in the car be other than the sole and unconditional ownership, or if it be or become incumbered by a chattel mortgage, or if there is any change in the owner's interest or title, other than that caused by his death, whether by legal process or judgment or by his voluntary act, or otherwise.

The nineteenth clause provides that:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the loss or damage."

In November, 1913, plaintiff was the owner or proprietor of a garage in the city of Charlotte, N. C., and sometimes hired automobiles, and held a license for the purpose. He also kept the car in question in the garage for his own use, and not for renting or to be used in passenger service of any kind for hire, though it had been used just once, before it was burned, to take a man to the railroad station. The car was taken from the garage by Ben Stitt, one of plaintiff's employes, and he carried a party of bird hunters in it to Lincoln county on Thanksgiving day, 1913. It was punctured several times on the return, and finally left at a place on the Dowd road, six miles from Charlotte, and Ben Stitt telephoned to another garage for another car to take the party of men to the city. The car came, and the men were carried to the city, and Stitt paid the money he had received from them for this service. The defendant offered in evidence the proof of loss signed by plaintiff, in which he stated that the car had been used for his private purposes, "and some for hire." The court charged the jury that if they found that the car was used only twice, in carrying a man to the station at a former time, and on the occasion when it was burned to carry the hunters to Lincoln county, under the circumstances as testified by the plaintiff, and only twice during a period of a year and a half, it would not be such a renting or using of the car "for passenger service for hire" as is forbidden by section 8 of the policy, and they would answer the issue in respect thereto, "No;" but if, on the contrary, they found it was kept for hire and used for hire, for passenger service, they would answer the issue, "Yes," as that was a violation of section 8 of the policy of insurance. The jury returned a verdict for the plaintiff; and, from the judgment thereon, the defendant appealed.

Cameron Morrison and J. H. McLain, both of Charlotte, for appellant. Thad A. Adams and Cansler & Cansler, all of Charlotte, for appellee.

WALKER, J. (after stating the facts as above). We find no material error in the trial of this case, and have concluded, after patient consideration of the facts, that substantial justice has been done, and in accordance with well-settled principles of the law.

[1] A policy of insurance, it may be said generally, should be interpreted by the rules which are applicable to other written contracts, for the purpose of ascertaining and giving effect to the real intention of the parties. We have said that it should be construed strictly against the insurer and favorably to the insured, when there is doubt or ambiguity in its terms, as it is supposed to be prepared by the former.

[2, 3] But however this may be, the object

of the contract being to afford an indemnity against loss, it should be so considered as to effectuate this purpose, rather than in a way which will defeat it. It should have, from every point of view, a fair and reasonable construction, unless it be so clearly and unambiguously expressed as not to require construction, when its words will be taken in the plain and ordinary sense. *Bray v. Insurance Co.*, 139 N. C. 390, 51 S. E. 922; *Railroad Co. v. Casualty Co.*, 145 N. C. 116, 58 S. E. 906; 19 Cyc. 655; *W. F. Ins. Co. v. Simons*, 96 Pa. 520; *Rogers v. Aetna Ins. Co.*, 95 Fed. 103, 35 C. C. A. 396; *Insurance Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; *F. C. Insurance Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; *S. F. & M. Insurance Co. v. Wade*, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870; *Vance on Insurance*, p. 429.

[4, 5] The clause in this policy, upon the alleged violation of which the defendant relies to defeat a recovery, provides that the motor car thereby insured "will not be rented or used for passenger service of any kind for hire, except by special consent of the company indorsed on the policy." It is apparent, we think, that the parties, by this clause, contemplated, not a single act of renting or using the car for hire, a mere casual or isolated instance, and that, too, without the knowledge or consent of the owner, but something of a more permanent nature. 19 Cyc. 736. This car was not "rented" in the sense of that word as employed in the policy, but it was used by the plaintiff's servant to carry the hunters to the country, but this can hardly be considered as being engaged in the "passenger service."

In *Mears v. Humboldt Ins. Co.*, 92 Pa. 15, 37 Am. Rep. 647, it was said:

"We are not disposed to give the word 'use' in this policy the narrow construction claimed for it. It must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. Nearly every policy of insurance issued at the present time contains this condition, or a similar one. What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency."

The case of *S. F. & M. Ins. Co. v. Wade*, supra, furnishes another illustration of this rule. This machine was not kept for the purpose of being rented or used in the passenger service. It was the merest accident that it was used on this occasion; "the other car which had been used for hire not being in the garage that morning." This is what the witness Ben Stitt said about it; and besides, when the car was burned, the journey had been completed and all the parties had returned to the city by another car the night before the burning, which was one of those unaccountable accidents, not attributable to any use of the car for carrying the parties to their hunting ground, so far as appears. The hire had been given up, and the owner

had resumed the possession of his private car, and placed it in the care of his servant to be brought back to the garage. We do not see, from the language of the policy, how such a case could have been intended by the parties as a ground of forfeiture. There was no increase of the risk, which would be incurred by its ordinary and perfectly legitimate use as a private automobile; it being all the time in the possession of the plaintiff's chauffeur, and, at the time of the fire, in his exclusive possession and control. It seems to us that it would be too narrow and rigid a construction of the clause, if we should hold that this single act of the chauffeur falls within its prohibition, and consequently involves a forfeiture of the insurance. The carrying of the man, some time before, to the station, was, if forbidden, too remote from the time when the car was burned, and is covered by the principle announced in *Cottingham v. Insurance Co.*, 84 S. E. 274, decided at this term.

At the time the car was burned, the alleged forbidden use of it had entirely ceased, and its owner, without whose knowledge or consent it was taken out of the garage, had resumed possession and control of it, the tire had been repaired, and he was then engaged in returning it to the garage. The increase of risk by the wrongful use, if there was such, had entirely ceased and determined. It would seem, therefore, that, upon this undisputed state of facts, the case is brought fairly within the influence of the principle of *Cottingham's Case*. Insurance companies have the right to insert in their policies reasonable conditions as to the use of the insured property, and the courts will not, by subtle and ingenious argument, construe away the provisions for their security or deprive them of their full benefit, as safeguards against fraud or negligence, or other unlawful act, nor, on the other hand, will they construe the policy so strictly in favor of the insurer as to make them more than they were designed to be—a protection against such hazards, and consequently a precarious indemnity to the insured. *Gardner v. Insurance Co.*, 163 N. C. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714. They are entitled, both insurer and insured, to a fair, just, and common-sense interpretation of the policy, so that the one may be restrained from doing things calculated unnecessarily to increase the risk, and which are forbidden by the policy, and the other may be held to the full obligation assumed by the contract to furnish a certain and reliable indemnity against loss; the parties being reciprocally held to the same measure of duty and fidelity in respect to the obligations imposed by the insurance contract.

[6] The eighth clause is somewhat obscurely worded, and we must give it that construction which favors the plaintiff, as it in-

volves a question of forfeiture. The words "passenger service," when considered in connection with the preceding words "rented" or "used," imply more than a single act of renting or using, and refer to the business of carrying passengers for hire. It is susceptible of this meaning which, under the familiar rule applicable to such cases where the language is not clear and definite, we are authorized to give them.

Being of the opinion that the case is not covered by the eighth clause of the policy, it is not necessary to discuss the other questions argued before us.

No error.

(169 N. C. 24)

McCASKILL et al. v. PEGRAM FARM & LUMBER CO. (No. 405.)

(Supreme Court of North Carolina. April 28, 1915.)

ADVERSE POSSESSION ⇐115 — EVIDENCE — QUESTION FOR JURY.

Evidence examined and held to require the submission to the jury of the issue whether plaintiff, in an action to recover land, had held it by adverse possession for 21 years under color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. ⇐115.]

Appeal from Superior Court, Richmond County; Lane, Judge.

Action by J. M. McCaskill and others against the Pegram Farm & Lumber Company. From a judgment of nonsuit for defendant, plaintiffs appeal. Reversed.

This is an action to recover land. The plaintiffs alleged that they were the owners of the land in controversy, and this was denied by the defendant.

John P. Cameron, of Rockingham, and M. W. Nash, of Hamlet, for appellants. Adams, Armfield & Adams and Stack & Parker, all of Monroe, and Lowdermilk & Dockery, of Rockingham, for appellee.

ALLEN, J. The plaintiffs have failed to show a connected chain of title to the land in controversy, as they did not locate the grant introduced in evidence, and they must rely on an adverse possession for 21 years under color to take the title out of the state and vest it in themselves. *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142. They introduced in evidence a deed to their father, who is dead, dated February 14, 1880, and registered December 12, 1885, which is color of title, and offered evidence that this deed covered the land in dispute.

The question, therefore, presented by the appeal is whether any evidence of adverse possession was introduced which ought to have been submitted to the jury; and, in passing upon this question, we have no right to determine the weight or sufficiency of the

evidence, but simply to determine whether there was any evidence of the fact, giving to it the construction most favorable to the plaintiffs.

The authorities on what is necessary to constitute an adverse possession are fully reviewed in *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347, and it is there said:

"It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. *Loftin v. Cobb*, 46 N. C. 406 [62 Am. Dec. 173]; *Montgomery v. Wynns*, 20 N. C. 667; *Williams v. Buchanan*, 23 N. C. 535 [35 Am. Dec. 760]; *Burton v. Carruth*, 18 N. C. 2; *Gilchrist v. McLaughlin*, 29 N. C. 310; *Bynum v. Carter*, 26 N. C. 310; *Simpson v. Blount*, 14 N. C. 34; *Tredwell v. Reddick*, 23 N. C. 58."

Applying this rule, we are of opinion there was evidence of an adverse possession which ought to have been submitted to the jury.

The evidence of the plaintiffs tended to prove that the land in controversy is woodland; that there is no house on it; that up to the time of the entry of the defendants, about 1910, none of it had been cleared, and that it could not be cultivated profitably; that the father of the plaintiffs, and, after his death, their mother, lived on another tract of land about a mile distant; that there was very little wood on the land on which they lived; that their father was a school-teacher and used a great deal of wood; and that the land was bought for wood.

J. M. McCaskill testified that his father died in 1888, leaving two children, who are the plaintiffs; that he stayed at home with his father and mother from the time the land was bought until the fall of 1887; that after he left home in 1887 he returned five or six times each year; that the land in controversy was bought for the purpose of getting wood and lightwood from it; that up to the time he left home he hauled wood and lightwood from the land; that he cut black-jack on the land and burned it for ashes; that he hauled wood and lightwood from the land every winter and all during the winter; that this was done every year while he was at home; that, after his father died, his mother took charge of the land, and that she used it as it was used when he was at home; that his mother married a Mr. Hart about 1898, and that it was used by them as it had been before; that it had been used every year since it was bought; that Mr. Hart had black-jack out on the land, and they had to get wood and lightwood from it all the time; that no one ever disputed their title to the land up to the time of the entry by the de-

fendant; and that the land was worked by different persons for them.

C. W. McCaskill, another plaintiff, testified that he was seven years old when his father died, and that he did not leave home until about 1900; that he used the land for lightwood, with his father's permission; that the land was used each year for getting wood and lightwood; that his mother used it for turpentine; that from 1900 to 1910 his step-father was using the land for the purpose of getting wood and lightwood; that after he left home he returned each year and saw how the land was used; that they got their winter's wood from the land each year as long as he stayed at home, and also their wood for the summer from the land.

Daniel McQueen, a witness for the plaintiffs, testified that he was more than 60 years old; that he worked on the land for Mr. McCaskill, father of the plaintiffs, while he was living; that he worked for him every year; that he got wood and lightwood for him until he died; that he worked on the land after he died; that he hauled wood and lightwood and cut black-jack and cut down trees; that he got wood and lightwood off the land more or less every year that Mr. Hart was living; that he commenced working on the land for Mr. McCaskill, and then worked on it for Mr. Hart, and that he thinks he worked on it as long as 21 years or more.

There was other evidence introduced in behalf of the plaintiffs tending to corroborate the evidence of these witnesses.

Reversed.

(129 N. C. 21)

COLONIAL TRUST CO. et al. v. STERCHIE BROS. et al. (No. 446.)

(Supreme Court of North Carolina. April 28, 1915.)

1. JUDGMENT ⇐780—LIEN—PAROL TRUST.

A contemporaneous parol trust in favor of grantor, in an absolute deed passing title on its face, gives grantor no right to claim the land conveyed as against the lien of a judgment creditor of grantee, which attached to the land when the deed was recorded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343-1349; Dec. Dig. ⇐780.]

2. JUDGMENT ⇐780—LIEN—PRIORITY.

The lien of a judgment attaches when the land is conveyed to the judgment debtor, and is superior to any equity which his grantor could retain by a parol agreement or subsequent recorded conveyance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343-1349; Dec. Dig. ⇐780.]

3. JUDGMENT ⇐780—LIEN—PRIORITY.

The amount of consideration recited in a deed made without consideration is immaterial as affecting the priority of the lien of a prior docketed judgment against grantee attaching to the land conveyed as against the claim of grantor under a parol trust.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343-1349; Dec. Dig. ⇐780.]

4. MORTGAGES — 173—LIEN—PRIORITY — EFFECT OF RECORDING ACT.

In view of the Connor Act (Revisal 1905, § 980), requiring registration of a conveyance of land to be good against creditors and purchasers for value, a trust or mortgage to secure purchase money, even if executed in writings simultaneously with a conveyance, would not avail against the lien of a judgment against grantee, docketed prior to registration of the trust deed or mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 412, 419-424; Dec. Dig. ¶ 173.]

5. MORTGAGES — 174—PRIORITY — EFFECT OF REGISTRATION ACT.

Neither would it avail against a subsequent conveyance by the grantee registered prior to the registration of the trust deed or mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 413-416; Dec. Dig. ¶ 174.]

Appeal from Superior Court, Mecklenburg County.

Action by the Colonial Trust Company and others against Sterchie Bros., and others. The court refused to continue a restraining order to the hearing, and plaintiffs appeal. Affirmed, and action dismissed.

This is an appeal from a refusal to continue a restraining order to the hearing. The plaintiffs allege in their complaint that on May 1, 1913, the Colonial Trust Company conveyed to the defendant W. V. Hall, by deed in fee simple, with warranty, and reciting "\$100 and other valuable considerations," certain lots in Charlotte, which deed was duly recorded in the office of the register of deeds of Mecklenburg on that date. A few days later (May 3d) Hall conveyed the property by deed of trust to J. W. Barry, trustee, to secure a loan of \$900, which was also duly recorded. In December, 1913, at the request of the Colonial Trust Company, Hall, by deed duly recorded, conveyed said lots in fee simple, with the usual covenants of warranty to plaintiffs Garriss and wife.

In May, 1909, the defendants Sterchie Bros. obtained judgment against W. V. Hall, which was duly docketed June 3, 1909, in Mecklenburg county. On November 14, 1914, the defendants Sterchie Bros. caused an execution to be issued on aforesaid judgment against W. V. Hall, and the aforesaid lots were advertised for sale thereunder. The plaintiffs obtained a restraining order against the sale of said lands, returnable before Harding, Judge, at the courthouse in Charlotte, December 28, 1914, alleging that, when the property was conveyed by the Colonial Trust Company to the said W. V. Hall, he paid nothing therefor, and that there was a contemporaneous agreement that he should hold only the naked legal title and was to execute a declaration of trust, and that therefore Hall had no interest which could be sold under the execution. The defendants demurred upon the ground that no cause of action was stated. His honor, being of that opinion, dissolved the restraining order.

J. W. Barry, of Charlotte, for appellants.
Robert S. Hutchison, of Charlotte, for appellees.

CLARK, C. J. [1] In *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028, it was held that:

"Where there is a deed, conveying the absolute title to land, giving clear indication on the face of the instrument that such title was intended to pass, a contemporaneous parol trust cannot be set up or ingrafted in favor of the grantor. The vendor cannot in such case, by a contemporaneous parol agreement, contradict his written conveyance. A trust in favor of the grantor to secure the purchase money, or for other purposes, must be in writing."

Gaylord v. Gaylord has been cited with approval in *Newkirk v. Stevens*, 152 N. C. 502, 67 S. E. 1013; *Dunlap v. Willett*, 153 N. C. 321, 69 S. E. 222; by Brown, J., in *Ricks v. Wilson*, 154 N. C. 286, 70 S. E. 476; *Weaver v. Weaver*, 159 N. C. 21, 74 S. E. 610; *Jones v. Jones*, 164 N. C. 322, 80 S. E. 430; and *Cavenaugh v. Jarman*, 64 N. C. 875, 79 S. E. 673.

The plaintiffs, therefore, cannot claim under the alleged contemporaneous parol trust as against the lien of the docketed judgment in favor of Sterchie Bros., which attached upon the registration of the deed to Hall. Nor can they claim under the subsequently executed deeds made by Hall. The condition of the plaintiffs cannot be stronger than that of a vendor who has taken a mortgage, or a deed of trust, or who has received a written declaration of trust from the vendee to secure the purchase money, but has failed to place the same on record.

[2] When the deed to Hall was recorded, the lien of the defendants' judgment at once attached to the land and was superior to any equity which the trust company either retained or attempted to retain by the alleged parol agreement, or by any subsequently recorded conveyance.

[3] The amount of consideration recited in the deed to Hall is immaterial. If it amounted to notice, under our registration laws it could not avail against the lien of prior registered conveyances or docketed judgments.

[4, 5] Rev. § 980, commonly known as the "Connor Act," provides:

"No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth."

Even if there had been a trust or mortgage executed in writing simultaneously with the conveyance to Hall, it would not avail against the lien of a docketed judgment, or a conveyance by Hall registered prior to the registration of the trust deed, or mortgage to secure the purchase money. In *Bunting v. Jones*, 78 N. C. 242, it was held that, where the vendor's deed and the mortgage by the vendee to secure the purchase money

were made simultaneously and recorded together, then the lien of a judgment did not take priority over the mortgage to secure the purchase money. This case has been cited with approval (see Annotated Edition) in many cases down to *Hinton v. Hicks*, 156 N. C. 24, 71 S. E. 1086, in all of which the conveyance and the mortgage back were "filed for registration at the same moment." In such case the title does not vest in the vendee for a single moment, but as Judge Reade said in *Bunting v. Jones*, supra, it is "like the Borealis race that flits ere you can point their place." In the present case the conveyances in pursuance of the alleged trust were not executed, much less registered, till afterwards.

In *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99, it was held that a mortgage for the purchase money of land is not entitled to priority over a second mortgage, which is filed first, even though the second mortgagee may have actual notice of the unregistered prior mortgage, and that this was so prior to the passage of the Connor Act, which merely extended the principle to deeds and judgment liens. That case has been cited in many cases quoted in the Annotated Edition, and since then it has been further cited and approved, together with other cases of like tenor in *Piano Co. v. Spruill*, 150 N. C. 169, 63 S. E. 723, *Moore v. Quickle*, 159 N. C. 130, 74 S. E. 927, *Moore v. Johnson*, 162 N. C. 272, 78 S. E. 158, and there are many other cases affirming the same doctrine which do not cite *Quinnerly v. Quinnerly* by name.

Under the provisions of the Connor Act, the holder of a subsequently registered conveyance takes subject to the lien of a judgment creditor of the grantor, where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered till the payment of the purchase money. *Tarboro v. Micks*, 118 N. C. 163, 24 S. E. 729; *Bostic v. Young*, 116 N. C. 766, 21 S. E. 552; *Francis v. Herren*, 101 N. C. 497, 8 S. E. 353.

In *Quinnerly v. Quinnerly*, supra, it was said:

"It is altogether too late to contend that the vendor of real estate, who has conveyed it by deed, has a lien upon the land for the purchase money; nor can the vendor reserve a lien, unless he take his security in writing and have it registered. All secret trusts, latent liens, and hidden incumbrances are and were intended to be cut up by the roots, by force of our registration laws. And since the decision of this court in *Womble v. Battle*, 38 N. C. 182, the law as here announced has been considered as well settled in North Carolina."

Decisions to the contrary can be found in Tennessee and other states which retain the doctrine of "vendor's lien for purchase money," which was repudiated by us in *Womble v. Battle*, supra.

It seems that the object of the Colonial Trust Company in the conveyance to Hall was to procure money through a mortgage put on the property by him, and thus avoid injury to its credit by executing a mortgage itself. It might have taken a mortgage back and have had the same recorded simultaneously with its deed. Not having done so, the lien of the judgment against Hall takes priority, and the court properly held that the complaint did not state a cause of action. Action dismissed.

WALKER, J., concurs in result.

(169 N. C. 326)

STATE v. KENNEDY. (No. 393.)

(Supreme Court of North Carolina. April 28, 1915.)

1. HOMICIDE — 112 — SELF-DEFENSE — IN GENERAL — "QUITTING THE COMBAT."

Defendant, who, while armed with a deadly weapon, wrongfully began a difficulty by assaulting deceased, and who, after a counter assault, several times told deceased and others to get off of him or he would shoot them off, could not set up self-defense, since one who provokes a difficulty and kills the other party is at least guilty of manslaughter, unless before the necessity of killing arises he in good faith abandons the difficulty; the term "quitting the combat" not always necessarily requiring a physical withdrawal, but, if he cannot withdraw in safety, an abandonment of the difficulty signified to his adversary.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. ¶ 112.]

2. HOMICIDE — 221 — INSTRUCTIONS — DYING DECLARATIONS.

In a prosecution for murder, an instruction that the admission of dying declarations was an exception to the general rule of evidence requiring that the witness be sworn and subject to cross-examination, and that for that reason such declarations should be received with caution, and that the jury might give it such weight as they would have given if it had been made under the sanction of an oath, was proper; the language in which the caution should be expressed being left largely to the discretion of the trial judge.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 463, 464; Dec. Dig. ¶ 221.]

Appeal from Superior Court, Stanly County; Lane, Judge.

Walter J. Kennedy was convicted of manslaughter, and he appeals. Affirmed.

It was proved that on March 7, 1914, about 5 p. m., at Oakboro in said county, Johnnie Morton was shot and mortally wounded by Walter Kennedy and died of the wound about four days thereafter.

There was evidence on the part of the state tending to show:

That Kennedy and one Pointer, a lightning rod agent, were driving by the store of deceased where the latter and Wm. Osborné and several others then were, and received the impression that some one in the store cursed Pointer, referring to him as a "damned old lightning rod agent." That the buggy was stopped and Pointer, going in the store, inquired who cursed him,

repeating the charge. Some one said, "No such talk was in here;" and Kennedy replied, "You can't bluff me; some of you said it;" and the two walked out, Kennedy going into a barber shop near by. That, shortly thereafter, Columbus Morton, who had been in the barber shop, went into his brother's store and told him he could go and be shaved, as the brother could mind the store for him, and Johnnie walked into the barber shop, and, as he was about to take his seat in one of the chairs, Johnnie said, "Kennedy, there was a mistake about that cursing;" and Osborne said, "Yes, Walter, there was a misunderstanding;" when Kennedy said, "You can't scare me," or "bluff me," and slapped Morton in the face, and Morton put his hand on Kennedy's shoulder and said, "Why, Walter, what do you mean?" and Kennedy shot him in the body under the arm, inflicting the wound of which he died.

Connor Smith and Finley Hinson, eyewitnesses of all or a part of the occurrence, and the dying declaration of the deceased were in substantial accord as to this version, and the account received confirmation from the declaration of Kennedy, telling how the bullet entered and ranged. The course of the ball also was in support of the position of the state that the pistol was fired and the wound inflicted while the parties were in an upright position.

One of the state's witnesses testified that Kennedy had his pistol out when he first slapped the deceased in the face, and it was argued by the state that the bruises found on the knees of Kennedy, after the killing, were caused in the struggle which occurred when the father and brother of the defendant took the weapon away from him.

The evidence of the defendant tended to show:

That, after the talk at the store, defendant went into the barber shop to get a shave, and, while he waited for the water to heat, Osborne came in and said, "Kennedy, I don't like to be accused of a thing I'm clear of;" and Walter said, "Mr. Osborne, I haven't accused you of anything you didn't do," etc.; and he said, "You accused me of cursing Pointer, and I didn't do it;" and Walter said, "I don't say you are the man," etc. Osborne replied, "I'm not the man; I never fought any, but I'm not like the man who can't." Then Johnnie came in and said, "Walter Kennedy, you are trying to run my business;" and I replied, "I am not, and I don't want to run any such business as you run, and you can't run mine." And when I said that he struck me, right up here on the head (witness indicates on head). I kinder dodged down, and he knocked me back against the partition right at the back of the stove. That partition is between where we were and the little back room, and there are some curtains hung up there. He knocked me against that partition, and then his brother, Lum Morton, come in. He is the one that was on the stand here yesterday. And Lum Morton said: 'Damn him, let me get hold of him, and I'll fix him;' and he caught me in the collar and jerked me to my knees; both of them beating me in the back of the head and shoulders, he striking my right shoulder. And I said, 'Boys, get off of me,' three or four times, and I said, 'If you don't, I'll shoot you off,' and they wouldn't do it, so I drew my gun and fired. They bruised my shoulder and back of my neck; my head was sore, and my knees were scarred up and skinned. I hurt my knees on the floor. I would rear up and try to get up with them, and they

would press me back to the floor, and that is how my knees got bruised. My clothes were cut, on the left side. I asked them three or four times to get off. Lum Morton caught hold of me in the collar. It tore my collar loose in the hole. My clothes are there in that suit case. Both of my coats were cut. My coat and overcoat, too. My collar was torn, and my coat and overcoat were cut. It cut through the overcoat. I did not see the knife. I felt it when he cut my coat. I felt my coat pulling from me, and kinder zip zip; sorter that way. (Collar, cravat and overcoat were exhibited in court, and witness showed the torn and cut places on same.) I shot John Morton to save my own life. I thought they were going to kill me. They would not get off of me. When the gun fired they left me. They run out when the pistol fired, and my brother was the first man that came to me, and he said, 'Don't shoot any more.' His name is Vander. He took my gun, and said, 'Don't shoot any more;' and I said, 'Here, take my gun, and keep them off of me.' I told him that, and handed him my gun, and I walked out of the door. John Morton run out. I never did see him, but where they say he fell a good many were rushing up around there."

The testimony of the father and brother of the defendant was in substantial support of defendant's account. Cuts on his coat and bruises on his knees were proved to have been shown not long after the occurrence; certainly that same night or early next morning.

His honor charged the jury, fully reciting the positions of the parties and much of the evidence.

There was verdict of guilty of manslaughter. Judgment on the verdict and defendant excepted and appealed, assigning for the error a portion of his honor's charge, as follows:

"Now, the law is that if a person by his own conduct, either by word or acts calculated and intended to provoke a difficulty, induces or provokes another to assault him, and a combat ensues, and the person who provokes another to assault him fights willingly and wrongfully, he is at least guilty of manslaughter, unless, before delivering the fatal blow or act, he has in good faith abandoned the difficulty, and retreated as far as he can with safety, and then only can he be heard to plead self-defense, if he has been at fault in bringing on the difficulty."

And the refusal to give the following prayer in reference to the dying declarations of the deceased:

"The admission of dying declarations is the exception to the general rule of evidence, which requires that the witness should be sworn and subjected to a cross-examination. The solemnity of the occasion may reasonably be held to supply the place of an oath, but nothing can fully supply the absence of a cross-examination. Such declarations should be received with much caution on account of the absence of such cross-examination, and the jury in this case, in passing upon the credibility of the alleged dying declaration in this case, should take into consideration that the deceased was not subjected to a cross-examination."

J. O. Brooks, of Marshville, F. I. Osborne, of Charlotte, R. L. Smith, R. E. Austin, G. D. B. Reynolds, and A. C. Huneycutt, all of Albemarle, and J. J. Parker, of Monroe, for appellant. The Attorney General and T. H. Calvert, Asst. Atty. Gen., for the State.

HOKE, J. In *State v. Brittain*, 89 N. C. 481, and in reference to defendant's first exception, this court held:

"Where a prisoner makes an assault upon A, and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A, held, that the killing cannot be justified upon the ground of self-defense. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law."

And, in support of the position, Ashe, Judge, delivering the opinion, quotes from Lord Hale, as follows:

"If A assaults B first, and upon that assault B reassaults A, and that so fiercely that A cannot retreat to the wall or other non ultra, without danger of his life, and then kills B, this shall not be interpreted to be *se defendendo*, but to be murder or simple homicide, according to the circumstances of the case; for otherwise we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*. The party assaulted indeed shall, by the favorable interpretation of the law, have the advantage of this necessity to be interpreted as a flight, to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by the way of interpretation, be accounted a flight to save himself from the guilt of murder or manslaughter."

The same position is stated by the court in *Garland's Case*, 138 N. C. 675, 50 S. E. 853, as follows:

"It is the law of this state that where a man provokes a fight by unlawfully assaulting another and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life. This is ordinarily true where a man unlawfully and willingly enters into a mutual combat with another and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he 'quitted the combat' before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life." *Foster's Crown Law*, p. 276.

The same author says, on page 277:

"He, therefore, who, in case of a mutual conflict, would excuse himself on the plea of self-defense, must show that before the mortal stroke was given he had declined any further combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalty of manslaughter"—citing also the above passage from Lord Hale and *Brittain's Case*, supra, in support and illustration of the principle.

It may be well to note that the term "quitting the combat," within the meaning of these decisions, does not always and necessarily require that a defendant should physically withdraw therefrom. If the counter attack is of such a character that he cannot do this consistently with safety of life or

limb, such a course is not required, but, before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary. The principle here and the basic reason for it is very well stated in case of *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470:

"There is every reason for saying that the conduct of the accused, relied upon to sustain such a defense, must have been so marked in the matter of time, place and circumstance as not only to clearly evince the withdrawal of the accused, in good faith, from the combat, but also * * * as fairly to advise his adversary that his danger had passed and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault."

And when, as heretofore shown, the counter assault is so fierce that the original assailant cannot comply with this requirement, then, in the language of Lord Hale:

"He that first assaulted hath done the first wrong and brought upon himself this necessity and shall not have the advantage of his own wrong to gain the favorable interpretation of the law that that necessity which he brought on himself should, by way of interpretation, be accounted a flight to save himself from murder or manslaughter."

The doctrine as stated has been applied or recognized as sound in principle in well-considered cases here and elsewhere, and is given also in text-books of approved excellence. *State v. Pollard*, 168 N. C. 116, 83 S. E. 167; *State v. Dove*, 156 N. C. 653, 72 S. E. 792; *State v. Kennedy*, 91 N. C. 572; *Parker v. State*, 88 Ala. 4, 7 South. 98; *State v. Slias Darling*, 202 Mo. 150, 100 S. W. 631; *State v. Smith*, 37 Mo. App. 137; *State v. Hawkins*, 18 Or. 476, 23 Pac. 475; *Kinney v. People*, 108 Ill. 519; *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 416; 1 McLean Crim. L. § 309; *Clark's Crim. L.* p. 183; 25 A. & E. pp. 270-271. In 1 *Hawkins*, Pl. Or. p. 87, the learned author expresses the position in even stronger terms, as follows:

Chapter 11, § 7: "According to some good opinions, even he who gives another the first blow, in a sudden quarrel, if he afterwards do what he can to avoid killing him, is not guilty of felony. Yet such a person seems to be too much favored by this opinion, inasmuch as the necessity to which he is at last reduced was at first so much owing to his own fault."

The charge of his honor then was in strict accord with the doctrine as it obtains in this jurisdiction and, this being true, we may not approve the argument urged upon us by the learned counsel that a man who wrongfully brings on a fight may maintain the position of perfect self-defense because, at the precise time of the homicide, he was "sorely pressed" and could not abandon the combat with any proper regard for his safety, citing *Ingold's Case*, 49 N. C. 217, 67 Am. Dec. 283. According to the testimony, as it has been evidently accepted by the jury, his client, "armed with a deadly weap-

on, wrongfully began the difficulty by slapping the deceased in the face, and he never, at any time after that, ceased the combat or gave any sign of doing so." The statement in his own testimony that he said, "Get off me, boys," two or three times, and then, "Get off me or I'll shoot you off," presents him in no such attitude as the law requires to restore his right of perfect self-defense, and, while, according to his own account, he was being "sorely pressed" at the precise time of the killing, it was a necessity brought about by his own wrong and, in our opinion, under the law and the testimony, he has been properly convicted.

True, there are numbers of decisions on this subject, and by courts of high repute, that the requirement that one in the wrong at the beginning shall cease the combat in good faith and signify this to his adversary before the right of self-defense is restored to him should only apply when the original assault was felonious or at least of a character importing menace of death or great bodily harm, but, in many of these, the person indicted had been convicted of the offense of murder, and the courts were dealing chiefly with the right to a new trial of that supreme issue and may not have been specially attentive to the right of self-defense. This was, perhaps, true in *Ingold's Case*, cited by counsel, but, to the extent that *Ingold's Case* gives countenance to the principle that one who has wrongfully commenced a fight may maintain the position of perfect self-defense, because, at the time, he is "sorely pressed" and without having given any intimation of his purpose to abandon the combat; the same is not in accord with our later decisions and may be considered as disapproved.

The cases of *Fouth v. State*, 95 Tenn. 711, 34 S. W. 423, reported in 45 L. R. A. 687, and *State v. Gordon*, 191 Mo. 114, 89 S. W. 1025, reported in 109 Am. St. Rep. 790, are to the effect that mere opprobrious or insulting language, though resulting in a difficulty, should not, of themselves, be held to deprive a man of the right of self-defense; decisions that are not apposite to the facts presented in this record, and which may not, in all cases and necessarily, antagonize the principles we approve in the disposition made of the present appeal.

[2] On the second exception the prayer of defendant in reference to the dying declarations is taken, in exact terms, from the opinion in *State v. Williams*, 67 N. C. 13, 14. An examination of the case, however, will disclose, as suggested in the argument of the state's counsel, that the learned judge, in excluding certain declarations, was stating in general terms the reasons for receiving such declarations in evidence and as a caution to courts in reference to their admissibility, and was not intending to lay down any special formula in which the caution should be expressed in a charge to the jury.

In the present case, the judge did caution the jury, reminding them that the declarations were not made under oath nor at a time when deceased could have been subjected to cross-examination and instructed the jury that—

"having been made in the fear of impending death and after hope of life was gone, the law says they may be given such weight, if the jury sees fit to do so, as they would have given if they had been made under sanction of an oath. The law says that no superstitious effect is to be given a statement because it is a dying declaration."

While these declarations are to be weighed with caution, and the judge should so tell the jury, the way in which the caution should be expressed is, to a great extent and very properly, left to the discretion of the trial judge and, in this instance, the charge of his honor is not dissimilar to the form approved in *State v. Whitson*, 111 N. C. 695, 16 S. E. 332.

There has been no reversible error made to appear, and the judgment of the court is affirmed.

No error.

(189 N. C. 27)

ROBERTS et al. v. BOWEN MFG. CO.

Appeal of BIGGS.

(No. 296.)

(Supreme Court of North Carolina. April 28, 1915.)

1. INSOLVENCY — 110 — PREFERENCES — MORTGAGES.

The receiver of an insolvent corporation contracted with an individual for him to manufacture into lumber certain timber sold to him, but title to which was retained as security. This contract he assigned to another corporation, which subsequently became insolvent and unable to pay its laborers for work done under the contract. Revisal 1906, § 1131, provides that mortgages of a corporation upon its property shall not exempt it from executions for labor performed. *Held*, that this statute did not give the laborers a preference over the receiver of the first corporation, since it applies only to mortgages made by the corporation whose laborers are unpaid.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. §§ 181-185, 188; Dec. Dig. ¶ 119.]

2. INSOLVENCY — 110 — PREFERENCES — LIENS.

Where a contract between a receiver and an individual to manufacture into lumber certain timber sold by the receiver, but to which he retained the title as security, was assigned by the individual to a corporation which subsequently became insolvent, Revisal 1906, § 1208, making the claims of employees of an insolvent corporation a first lien upon its assets, did not create a preference as against the receiver who made the contract; his interest in the lumber held as security not being an asset of the corporation to which the contract was assigned.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. §§ 181-185, 188; Dec. Dig. ¶ 119.]

3. INSOLVENCY — 118 — PREFERENCES — PRIOR LIENS.

A court of equity administering the assets of an insolvent corporation will not give a preference to labor claims, as against a prior

lien under a contract existing when the receiver was appointed.

[Ed. Note.—For other cases, see *Insolvency*, Cent. Dig. §§ 180, 186, 187, 190-192; Dec. Dig. ¶118.]

4. RECEIVERS ¶70—TITLE—PRIOR LIENS.

The title of a receiver relates only to the time of his appointment, and any liens existing at that time are not divested thereby.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 126; Dec. Dig. ¶70.]

5. STATUTES ¶174, 175—CONSTRUCTION—AMBIGUITY.

A statute ambiguously worded will not be construed so as to work injustice, if another meaning can reasonably be given to it.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 254, 266; Dec. Dig. ¶174, 175.]

6. STATUTES ¶205—CONSTRUCTION—INTENT.

In construing a statute, it should be considered in its entirety with reference to the whole system of which it is a part, and with a view to the general legislative intent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. ¶205.]

Appeal from Superior Court, Bladen County; Allen, Judge.

Action by J. C. Roberts and others against the Bowen Manufacturing Company. From a judgment for plaintiffs, defendants the Newton-McArthur Lumber Company and J. C. Biggs, its receiver, appeal. Reversed.

On December 29, 1913, the Newton-McArthur Lumber Company, a corporation, failed in business, was declared insolvent by the court, and J. C. Biggs appointed receiver of its assets in a proceeding under the statute. Through the receiver, the said company entered into a contract with W. T. Bowen, by which it agreed to sell to him and he agreed to buy, cut, and manufacture, upon the terms and conditions therein specified, all the pine and other merchantable timber owned by it, under contracts, deeds, and leases in Bladen county. The timber was to be paid for at prices and at dates named in the contract, which was duly registered in said county in January, 1914. W. T. Bowen assigned his interest in the said contract to the Bowen Manufacturing Company, another corporation, on March 2, 1914. It was also agreed in the Newton-McArthur Company contract with W. T. Bowen that the former should furnish to the latter, for the manufacture of said timber, its entire plant at or near Elizabethtown, including sawmill, planing mill, and logging equipment, with all live stock and all buildings and real estate owned by it, excepting certain land, and all of its furniture and fixtures in the commissary and office, except the adding machine. This was done, and the property so furnished was delivered by W. T. Bowen to the Bowen Manufacturing Company when he sold his interest in the contract to the latter company. The Bowen Company, up to August 15, 1914, had cut timber and manufactured the same into lumber; there being at that time on its yards 492,491 feet of lumber. On Sep-

tember 2, 1914, the Bowen Company was declared insolvent, and J. A. Lyon appointed receiver of its assets. It then owed its employes and laborers, for work and labor, the sum of \$3,400. These claims had been reduced to judgments, executions issued thereon, and levies made upon its property and effects in August, 1914, before the receiver was appointed. The proceeding (Harnett Lumber Co. et al. v. Newton-McArthur Lumber Co.) in which J. C. Biggs had been appointed receiver was transferred from Bladen to Cumberland county, and an order entered therein at September term, 1914, restoring to him all the property left, which was covered by his contract with W. T. Bowen, with this exception:

"It is further ordered and decreed that the lumber on hand at the plant of the Newton-McArthur Lumber Company, which was manufactured by the Bowen Manufacturing Company, and which has heretofore been delivered to J. Alden Lyon, receiver of the Bowen Manufacturing Company, is excepted from the operation of this order, and the rights of J. Crawford Biggs, receiver of the Newton-McArthur Lumber Company, to said lumber or the proceeds arising therefrom, is reserved for the further determination of the court."

The lumber on the yards at Elizabethtown was sold by J. A. Lyon, receiver, and he has in hand \$4,200, and \$700 owing to him for lumber sold, which is about all of the assets of the Bowen Company left, which will be insufficient to pay the claims of the employes and laborers and the claim of J. C. Biggs, receiver, under the contract with Bowen, which amounts of \$2,188.85; it being due for lumber. The claims of the employes and laborers of the Bowen Company, amounting to \$3,400, were for work and labor performed within 60 days prior to the appointment of J. A. Lyon, as receiver of the Bowen Company, and within four weeks prior to the closing down of the plant by the Bowen Company in August, 1914. Three-fourths in value of the lumber on hand at the plant, and which was sold by J. A. Lyon, receiver, was manufactured prior to the time when said work was done and labor performed by the said claimants. It is stated in the case:

"That J. C. Biggs, receiver of the Newton-McArthur Lumber Company, knew that W. T. Bowen had organized a corporation known as the Bowen Manufacturing Company, and that this corporation was operating the plant and cutting the timber covered by contract (Exhibit A), but he did not know of the arrangement or contract which W. T. Bowen had made with the Bowen Manufacturing Company for the operation of the plant."

It was provided in the contract between the Newton-McArthur Company, by J. C. Biggs, receiver, and W. T. Bowen, that the former should have a lien on "all lumber on hand," and "all supplies, goods, and merchandise transferred by the contract" for the full performance of the same, and that it should stand as security therefor and specially "for the payment of any amount due or to become due under the terms of the con-

tract." As additional security, the title to all of the timber covered by the contract was retained by the Newton-McArthur Company until its stipulations were all fully performed, and it was further agreed that "the vendee, W. T. Bowen, should have no right to sell said standing timber, but only to cut and manufacture the same at the company's plant," except the oak and gum logs. W. T. Bowen gave a bond to the Newton-McArthur Company in the penalty of \$10,000, conditioned for the payment of all sums due for timber cut by him and for the faithful performance of his contract with said company. There are other provisions in the contract, not necessary to be set out.

The court held and adjudged that the claims of the employes and laborers of the Bowen Manufacturing Company should be paid first, after the costs and expenses of the receivership of J. A. Lyon, and that the balance, if any, should be paid to J. C. Biggs, receiver of the Newton-McArthur Company, and from this judgment J. C. Biggs, receiver, and the Newton-McArthur Company appealed.

Sinclair, Dye & Ray, of Fayetteville, and R. W. Winston, of Raleigh, for appellants. Robinson & Lyon, of Fayetteville, for appellees.

WALKER, J. (after stating the facts as above). [1] The appellees, who are the claimants of the amounts due them from the Bowen Manufacturing Company for work and labor performed in cutting and manufacturing the timber into lumber, base their right to a preference in payment out of the funds over the Newton-McArthur Lumber Company and J. C. Biggs, its receiver, upon Revisal, §§ 1131, 1206. The first of these sections provides as follows:

"Mortgages of corporations upon their property or earnings, whether in bonds or otherwise, shall not have power to exempt the property or earnings of such corporation from execution for the satisfaction of any judgment obtained in courts of the state against such corporations for labor performed, nor torts committed by such corporation whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

It will be seen, at a glance, that this section refers to mortgages made by the corporation for which the labor was performed, and it says this in so many words. The substance of it, when properly analyzed, is that mortgages of corporations upon their property, etc., shall not exempt the property and earnings "of such corporations" from execution upon a judgment based upon labor performed for or torts committed by "such corporations." It is too plain to require argument of the question that it refers only to mortgages made by the very corporations, whose laborers have not been paid. That is not our case. It may be remarked here that every case in which the section has been successfully invoked to pro-

tect the claims of laborers from prior mortgages, has been of that kind.

[2] In reply to the contention of appellees that section 1206 applies, the appellants say: This section does not apply in this case in that the purpose of that section is to give the claims of employes of an insolvent corporation a first lien upon the assets of such corporations; and appellant insists that his interest in the lumber on hand is not an asset of the Bowen Manufacturing Company; that his interest therein is protected by his contract with Bowen, and that the manufactured lumber cannot be treated as an asset of the Bowen Manufacturing Company until the stumpage of appellant is deducted therefrom. The appellees' claims are against the Bowen Manufacturing Company, and appellant's rights arise by virtue of his contract with Bowen, and whatever rights the Bowen Manufacturing Company acquired from Bowen are subordinate to the rights of the appellant under his contract with Bowen, and it would seem to follow logically that the rights of employes of the Bowen Manufacturing Company are subordinate to appellant's rights. It is clear that the employes of Bowen could not have priority under Revisal, § 1206, to the rights of appellant, as that statute is limited to employes of insolvent corporations; and where appellant, as receiver of the court, executes a contract with an individual, it cannot be that, because the latter sees fit to organize a corporation to perform his contract with an officer of the court, the employes of the corporation, which takes the assignment of the contract, can come in ahead of the rights of the receiver, who likewise represents creditors, especially where the contract is duly recorded. We think that this position is sound. Section 1206, so far as it has any bearing upon this case, is not substantially different from section 1131, as a proper consideration of its terms will show, except that it is not confined to prior mortgages and is different in respect to the time for which the "first and prior lien upon its assets" of its laborers is given retroactive operation. It provides for a lien, in favor of laborers and other employes, upon the assets of an insolvent corporation for wages due for work, labor performed, and services rendered, within two months next preceding the date on which the proceedings to declare the corporation insolvent are commenced, "which lien shall be prior to all other liens that can or may be acquired upon or against such assets." It evidently has no application to a case of this kind, as there was no privity between the appellants and the Bowen Manufacturing Company, and they claim under a separate and independent lien, created some time prior to the formation of the Bowen Manufacturing Company, for which the appellees performed the work and labor, and by a contract, not between that company and ap-

pellees, but between the latter and W. T. Bowen, an individual. The lien covered by section 1206 is one which exists strictly against the assets of the insolvent corporation, and is preferred only to one acquired upon those assets by some one else, and not one acquired before the corporation was chartered and organized, and which arose out of dealings between entire strangers. As between lienors, in respect to the assets of the insolvent corporation, and whose liens rest specifically upon them as assets of the corporation, the laborer has the preference. We need not decide to what length this lien of the laborer may be extended, and what particular liens will be subordinated to it. It is sufficient to say, in this case, that it does not overreach the appellant's lien. While the case may not be directly in point, there is some analogy afforded by the reasoning in *McAdams v. Trust Co.*, 167 N. C. 494, 83 S. E. 623. We there said:

"The work and labor was performed and the materials furnished by the plaintiff with full knowledge, in law at least, and also in fact, of the prior mortgage. He must be presumed to have been able to take care of his own interests and to have contracted for a lien with reference merely to the equity of redemption and in subordination to the older incumbrance, of which he had full notice, and his case must now be judged by these considerations. The mortgagor could not give him a better right or title than he himself possessed at the time. As the work was commenced after the defendant's mortgage was registered, the lien of the plaintiff is subject to the prior lien of the mortgagee, and the court should have so declared."

[3] Nor do we think the fact that the assets of the insolvent corporation are being administered by a court of equity can make any difference. The doctrine of *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, seems to be restricted to railroads and similar or quasi corporations. The weight of authority is that the rule applicable to railroad cases in regard to the displacement of the lien of a mortgage does not extend to private corporations. A full discussion, with citation of the authorities, will be found in *First National Bank v. Cook*, 2 L. R. A. (N. S.) 1012, and especially in an elaborate note at page 1057.

"Where the parties are all before the court, and do not object, and where it is necessary to put the property in a marketable shape, it seems that the court may authorize the payment of claims in preference to mortgage liens. But the weight of authority holds that it is not the province of a court of equity to undertake the management of a private business, and to create liens thereon, without the consent of the mortgagee, and that it cannot displace the lien of the mortgage where the mortgagee asserts an independent title under his instrument of mortgage giving him the right of possession." *Bank v. Cook*, supra.

The court said, regarding this question, in *Kneeland v. Am. L. & T. Co.*, 136 U. S. 97, 10 Sup. Ct. 953, 34 L. Ed. 379:

"Upon these facts, we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. * * * We emphasize this fact of the

sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

"Where property comes into the hands of a receiver subject to pre-existing liens, it is as much his duty to preserve and protect such liens in favor of the holders thereof as it is to make a just distribution of the assets among the unsecured creditors." *High on Receivers*, § 138; *American T. & S. Bank v. McGettigan*, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345.

[4] The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested thereby. *Bank v. Bank*, 127 N. C. 433, 37 S. E. 461; *Pelletier v. Lumber Co.*, 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837; *Fisher v. Bank*, 132 N. C. 776, 44 S. E. 601; *Kneeland v. Loan & Trust Co.*, supra. In *Int. Trust Co. v. Decker*, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152, the court, quoting from *Trust Co. v. United Coal Co.*, 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59, said:

"We are of opinion that, in administering the affairs of an ordinary insolvent private business corporation for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lienholders, without their consent." *Union Trust Co. v. S. S. & L. Co.*, 166 Fed. 193, 92 C. C. A. 101.

[5] In construing a statute, where there is ambiguity in its words, we have the right to consider the unjust, and certainly the disastrous, consequences, of a given meaning, and we will not so consider it as to impliedly impute to the Legislature any intention to do what is manifestly unjust, or to embarrass and hamper the public in its business dealings, unless such a construction is unavoidable by reason of the plainness of the language and the clearness of the meaning; that body being the only one to declare the public policy of the state, whether it be right or wrong, according to the view of the moralist. In doubtful cases, we decide in favor of right and justice; but, if the intent is plainly expressed, it is to be followed without further inquiry. *Lewis' Sutherland on Stat. Constr.* vol. 2, § 367 (238) pp. 702, 703. The courts have united in saying that, if a construction of the statute in question must lead to absurd and mischievous consequences, it is inadmissible, if the statute is susceptible of another meaning by which such consequences can be avoided. This is not only a canon of construction adopted by the courts and text-writers, but it is as well the rule of common sense. But, in applying this rule, we must not forget or overlook the restriction of it within its proper limits, which has also been sanctioned, and a careful observance of which has been enjoined by the courts. This restriction is applicable to other canons of interpretation, and may be thus stated, following the lead of one of our highest courts: The spirit of the

instrument, especially of the Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other, and would be inconsistent unless the natural and common import of the words be varied, construction becomes necessary; and to depart from the obvious meaning of the words is justifiable. Yet in no case should the plain meaning of a provision, not contradicted or qualified by any other provision in the same instrument, be disregarded, because we believe the framers of that instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application. *Sturges v. Crowninshield*, 4 Wheat. 202, 4 L. Ed. 529. It has been said that, to authorize a departure from the literal construction, one of two things must be shown: Either that there is some other part of the statute which cuts down or expands its meaning, or else that the provision itself is repugnant to the general purview. *Douglass v. Freeholders*, 38 N. J. Law, 214; *Hyatt v. Taylor*, 42 N. Y. 262; *Gwynne v. Burwell*, 6 Bing. (N. C.) 559; *Sutherland*, p. 705, and note 45.

[8] We should also construe the entire statute, and keep in mind constantly that the general legislative intent is a key to its meaning, and a statute should be considered also as an entirety with reference to the whole system of which it is a part. *Sutherland*, §§ 348, 368, 369. If we apply these rules, it is not hard to determine that the Legislature did not intend to destroy vested rights of which the claimants had due and timely notice by registration of the contract, or to give a lien, when it would arbitrarily deprive another of his contractual rights, already fixed, as between him and another, who is not the corporation upon whose assets the lien can only rest. It would render uncertain the security of mortgagees and lienholders, if we should uphold the asserted right of lien, and would consequently hamper and handicap investment of money in legitimate enterprises, which would entail more real loss to the laborer or lienor, than of benefit he would derive from the other construction. If a lender of money, who takes a mortgage on land, will lose his lien if the mortgagee should sell the timber to a corporation, so that the latter can incur obligations to his employes and laborers, which must be paid before the mortgage debt, investors of money would become chary and would speedily withdraw from the market.

This would entail serious consequences, and do more harm than good in our business affairs. The laborer is worthy of his hire, and should be paid, and preferred in payment, because of his dependence upon his daily wage, but we should be careful to see that, by mere construction of the statute, we do him no harm in the effort, inspired by our sense of right, to do him full justice.

The distribution, as ordered by the court, should have been reversed. The claim of J. C. Biggs, receiver, of the Newton-McArthur Company, will be paid first, and then the costs and expenses of this proceeding, and the claims of the appellees in the order named.

Reversed.

HOPE, J., concurs in result.

(100 S. C. 477)

MARION COUNTY LUMBER CO. v.
HODGES. (No. 9076.)

(Supreme Court of South Carolina. April 21, 1913.)

1. APPEAL AND ERROR ¶959 — REVIEW — ABUSE OF DISCRETION.

Leave to amend an answer being within the discretion of the trial court, an order denying leave will not be reviewed in the absence of manifest error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3825-3831; Dec. Dig. ¶959.]

2. APPEAL AND ERROR ¶635—DISMISSAL — RECORD.

Where defendant only argued on appeal the denial of leave to amend his answer, his appeal must be dismissed where the incompleteness of the record rendered it impossible for the appellate court to determine whether the trial judge abused his discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. ¶635.]

Appeal from Common Pleas Circuit Court, of Dillon County; R. W. Memminger, Judge.

Action by the Marion County Lumber Company against C. P. Hodges. From an order refusing defendant leave to amend his answer, he appeals. Appeal dismissed.

D. D. McColl, of Bennettsville, for appellant. A. F. Woods and M. C. Woods, both of Marion, for respondent.

FRASER, J. This is an appeal from an order of Judge Memminger refusing to allow the defendant to amend his answer.

[1, 2] It is admitted that the motion to amend is an appeal to the discretion of his honor. In order for this court to sustain this appeal, it must appear that there is manifest error in refusing the amendment. The complaint is not incorporated in the "case," and when the original answer denies certain allegations of the complaint by number, this court has no means of knowing what the issues are.

The only question argued by the appellant

is his right to amend, and, since he has not shown the right to amend, the appeal is dismissed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(100 S. C. 478)

THOMAS v. SPARTANBURG RY., GAS & ELECTRIC CO. et al. (No. 9068.)

(Supreme Court of South Carolina. April 16, 1915.)

1. CONSTITUTIONAL LAW ¶70—ENCROACHMENT ON LEGISLATURE—JUDICIAL AUTHORITY.

While it is primarily for the Legislature to decide whether a general law can be made applicable, it is ultimately a judicial question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. ¶70.]

2. CONSTITUTIONAL LAW ¶48—STATUTES—PRESUMPTIONS.

In determining whether a general law can be made applicable, the court will indulge every reasonable presumption and solve every reasonable doubt in favor of its validity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶48.]

3. STATUTES ¶76—SPECIAL LAWS—CLASSIFICATION.

Civ. Code 1912, § 3950, requiring cars operating north of a line ten miles north of and parallel to the thirty-first meridian to be equipped with fenders, is not based upon arbitrary classification within Const. art. 3, § 34, subd. 9, forbidding the enactment of special laws where general laws are applicable, when construed with reference to climatic conditions and the nature of the country.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. ¶76.]

4. CONSTITUTIONAL LAW ¶241—RAILROADS ¶229—EQUAL PROTECTION OF LAWS—REGULATION OF RAILROADS.

Civ. Code 1912, § 3950, requiring cars operating north of a line ten miles north of and parallel to the thirty-first meridian to be equipped with fenders, is not unconstitutional as denying the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701; Dec. Dig. ¶241; Railroads, Cent. Dig. § 743; Dec. Dig. ¶229.]

5. CONSTITUTIONAL LAW ¶211—EQUAL PROTECTION—CLASSIFICATION.

The classification made by a statute need not be one of mathematical precision, nor need it result in perfect equality; it being sufficient if it is reasonable in its main features.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ¶211.]

Appeal from Common Pleas Circuit Court of Spartanburg County; S. W. G. Shipp, Judge.

Action by A. J. Thomas against the Spartanburg Railway, Gas & Electric Company and South Carolina Light, Power & Railways Company. From a judgment for defendants, plaintiff appeals. Reversed.

Gwynn & Hannon, of Spartanburg, for appellant. Sanders & De Pass, of Spartanburg, for respondents.

HYDRICK, J. This action was brought to recover the penalties provided in section 3949 of the Civil Code for the failure of defendant to provide its cars with fenders, as required by section 3950.

By demurrer to the complaint, defendant attacked the constitutionality of the statute on two grounds: (1) That it denies to it the equal protection of the laws; and (2) that it contravenes subdivision 9 of section 34 of article 3 of the Constitution, which provides that, "where a general law can be made applicable, no special law shall be enacted." The first ground was overruled, but the court held the statute void on the second ground, saying:

"There is no good reason why the Legislature should require fenders to be placed upon cars operated north of a line ten miles north of and parallel to the thirty-fourth meridian."

[1] After some diversity of opinion, it has been definitely settled that, while it is primarily for the Legislature to decide whether a general law can be made applicable, just as it decides its constitutional power to enact all statutes, it is, nevertheless, ultimately a judicial question. *Barfield v. Mercantile Co.*, 85 S. C. 186, 67 S. E. 158; *Tisdale v. Scarborough*, 99 S. C. 366, 83 S. E. 594.

[2] But, in solving the question, the court will indulge every reasonable presumption and solve every reasonable doubt in favor of the statute. *State v. Hammond*, 66 S. C. 225, 44 S. E. 797; *Commissioners v. Buckley*, 82 S. C. 357, 64 S. E. 163. This is a well-settled and universally recognized rule upon which courts proceed in testing the constitutionality of a statute. In *Hammond's Case* Mr. Justice Jones said:

"In determining whether a general law can be made applicable, the judiciary should indulge every presumption in favor of the legislative act, and so it should be presumed that the Legislature by the special or local enactment thereby declared its view that the general law could not be made applicable. This conclusion, however, being to some extent at least a question of law, would no more bind the judicial department in enforcing a constitutional limitation than the legislative determination that a statute is constitutional, which is presumptively involved in the passage of every statute. * * * But the applicability of a general law is not simply a question of fact; it involves matter of law; and it is not intended by this court now to assert that, when the Legislature has said that a general law cannot be made applicable, such conclusion may be controverted by any evidence outside of what appears upon the face of the statute, and upon such matters as to which a court must take judicial cognizance. Courts will take judicial notice of the division of the state into counties, their names, their locations with respect to each other, their population as shown by the United States census, the prominent geographical features of the county, the principal water courses and their nature and location, matters of common knowledge and experience in respect to science and the ordinary operation of the forces of nature. It should be further stated that the court should not declare a statute unconstitutional unless the invalidity is manifest beyond a reasonable doubt."

In *State v. Burns*, 73 S. C. 197, 52 S. E. 960, the same learned justice, speaking for the court, said with regard to special provisions in general laws (which are permitted by the proviso to subdivision 10 of the same section in reference to subjects not among those as to which special or local laws are expressly prohibited in the preceding subdivisions) that, as to these, there must necessarily be a wider range for legislative discretion. For the same reason the legislative judgment in determining whether a general law can be made applicable must be given due consideration; and a proper respect for a co-ordinate branch of the government requires that, when the Legislature has, by the enactment of a special law, in effect, declared that a general law cannot be made applicable, its decision should not be overruled by the courts, if there is any reasonable hypothesis upon which that decision can be predicated. In other words, if circumstances and conditions may exist under which the matter becomes one about which reasonable minds may differ, the court will not undertake to "run a race of opinions upon points of right, reason, and expediency with the lawmaking power." *Cooley, Const. Lim.* 236. The same principle is applied in determining the validity of classifications made by the Legislature in the exercise of the police power. Examination of the decisions of this court in which statutes have been held to violate this inhibition of the Constitution will show that they are based upon the ground that there was no reason at all why a general law could not have been made applicable, or because they were special notwithstanding there was already upon the statute books a general law applicable to the subject, which, of course, was in effect a declaration by the Legislature that a general law could be made applicable.

[3-5] Applying these principles to the case in hand, it cannot be said that the classification made by the statute is wholly unfounded in reason. No doubt, at some places on and near the meridian by which the state is divided the conditions and circumstances existing north and south of it are precisely the same. But every classification is almost necessarily arbitrary in some of its features. It is not necessary to the validity of a classification that it should be made with mathematical precision, or that, in operation and effect, it should result in perfect equality. It does not offend, if, in its main features, it is reasonable. We know that climatic conditions in the Piedmont section of the state are very different from those which prevail in the lower part, and that the difference becomes more accentuated as we get further from the dividing line made by the statute. This difference in climate may require that cars operated in that part of the state should be provided with vestibules for the protection of the motormen, while these would be un-

necessary in the milder climate of places south of that line. Where vestibules are necessary, there is good reason for requiring the use of fenders, because the glass in the vestibules, especially when clouded by moisture congealed on it, and the framework which supports it, obstruct to some extent the view of the motormen, and increase the danger of collisions, and the fenders lessen the danger of injury in case of collisions.

Another reason why the Legislature may have thought it wise to require cars operated in the upper part of the state to be provided with fenders is that, the ground being more hilly, there are more steep grades and sharp curves in the railroad of that section than in those of the level low country. Other considerations may suggest themselves, but these are enough to show that the classification is not wholly arbitrary.

What has already been said applies with equal force to the first ground of demurrer. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; *Barrett v. Indiana*, 229 U. S. 26, 33 Sup. Ct. 692, 57 L. Ed. 1052; *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. —.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 8)

RITTER v. ATLANTIC COAST LINE R. CO.
et al. (No. 9078.)

(Supreme Court of South Carolina. April 21, 1915.)

1. TRIAL \Leftrightarrow 142—ACTIONS—JURY QUESTION.

Where more than one reasonable inference can be drawn from the evidence, it should go to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. \Leftrightarrow 142.]

2. RAILROADS \Leftrightarrow 339—CROSSING ACCIDENTS—DEFENSES.

Contributory negligence of one killed at a railroad crossing is no defense, where the railroad company was guilty of willfulness and wantonness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1085, 1100, 1101; Dec. Dig. \Leftrightarrow 339.]

3. RAILROADS \Leftrightarrow 350—CROSSING ACCIDENTS—WILLFULNESS AND WANTONNESS.

Whether failure to give the statutory signals and keep the required lookout for travelers on a railroad crossing was willful and wanton negligence is a question for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. \Leftrightarrow 350.]

Appeal from Common Pleas Circuit Court of Barnwell County; T. S. Sease, Judge.

Action by Isham F. Ritter, administrator of the estate of Tillman Ritter, deceased, against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Moss & Lide, of Orangeburg, Harley & Best, of Barnwell, and L. W. McLemore, of Sumter, for appellants. R. C. Holman, of Barnwell, W. H. Townsend, of Columbia, L. K. Sturkie and Raysor & Summers, all of Orangeburg, and E. J. Best, of Columbia, for respondent.

WATTS, J. This was an action for actual and punitive damages brought by the plaintiff against the defendant for the alleged wrongful, wanton, reckless, and negligent killing of the plaintiff's intestate, Tillman Ritter, by the defendant while attempting to cross Atlantic Coast Line Railroad on the public road near the city of Orangeburg on March 15, 1910. The defendants' answer denied the material allegations of the complaint and set up as an affirmative defense contributory negligence and gross contributory negligence and willfulness under the statute. The cause was tried before Judge Sease and a jury, and resulted in a verdict in favor of the plaintiff for \$1,000 actual, and \$2,000 punitive, damages. After entry of judgment defendants appealed before case was submitted to the jury, the defendants moved the court for a direction of verdict in favor of defendants, which was refused, and after verdict was rendered defendants moved to set aside the verdict of \$2,000 for punitive damages, as there was no evidence to sustain this finding, which motion was refused.

[1] The defendants' exceptions raise the question that the uncontradicted evidence shows as a matter of law that the plaintiff's intestate's death was due to his own contributory negligence, and that there was no evidence tending to show wantonness, or willfulness on the part of defendants' agents or servants as the proximate cause of plaintiff's intestate's death. The evidence of plaintiff's witnesses, Williamson and Kemmerlin, afforded some evidence to carry the case to the jury, and while there was testimony to contradict or explain from other witnesses in the case introduced by the defendants, there was more than one reasonable inference that could be drawn from it, and that was enough to submit it to the jury for their determination. *Lawson v. Railway Co.*, 91 S. C. 218, 74 S. E. 473.

[2] In addition to this the jury found by their verdict there was willfulness and wantonness on the part of railroad company, and contributory negligence is no defense to willfulness and wantonness.

[3] As to question of wantonness and willfulness and the verdict for punitive damages, was there any evidence to support jury's finding on this branch of the case? The evidence of the engineer in charge of defendant's train and Johnson, the fireman on the engine at that time, shows that the fireman did not keep a lookout on the side he was on, as it was his duty to do, and the deceased

came from the side on which it was the fireman's duty to keep a lookout, but that the fireman was shoveling coal for about 900 yards before they reached and as they approached the crossing and kept no lookout. Whether the bell was rung or whistle sounded as law requires at a public crossing was in dispute as is usual in such cases as this and was for the jury to determine. There was ample evidence in the case for the jury to determine whether there was a failure on the part of defendants to keep a lookout for travelers at the public crossing and give the statutory signals by ringing bell or sounding whistle as the train approached the crossing, as required by the statute, and if there was a failure to do so, then it was left to the jury to determine whether this was willful and wanton. His honor committed no error of law as complained of, and ruling is sustained by *Woodward v. Railway Co.*, 90 S. C. 266, 73 S. E. 79; *Sanders v. C. & W. C. Ry. Co.*, 93 S. C. 551, 77 S. E. 289; *Kirkland v. Ry. & Elec. Corporation*, 97 S. C. 72, 81 S. E. 306; *Folk v. Railway*, 99 S. C. 277, 83 S. E. 452.

The exceptions are overruled. Judgment affirmed.

GARY, C. J., and FRASER, HYDRICK, and GAGE, JJ., concur.

(100 S. C. 499)

MOORE et al. v. MARION COTTON OIL CO. (No. 9077.)

(Supreme Court of South Carolina. April 21, 1915.)

1. APPEAL AND ERROR \Leftrightarrow 1050 — HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for services under a contract to buy cotton seed oil at instructed prices, error, if any, in admitting testimony as to market price, was immaterial, where there was no contention that the price offered was up to the market price.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1063, 1069, 4153-4157, 4166; Dec. Dig. \Leftrightarrow 1050.]

2. MASTER AND SERVANT \Leftrightarrow 80 — RESCISSION OF CONTRACT—QUESTION FOR JURY.

In such action, evidence held to make the rescission of the contract a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 107-127; Dec. Dig. \Leftrightarrow 80.]

3. MASTER AND SERVANT \Leftrightarrow 80 — SERVICES—NONPERFORMANCE OF CONTRACT—EVIDENCE.

In such action, evidence held to make the sufficiency of plaintiff's pleaded excuse for non-performance a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 107-127; Dec. Dig. \Leftrightarrow 80.]

4. TRIAL \Leftrightarrow 159 — MOTION FOR NONSUIT—EVIDENCE—STATUTE.

Under the express provision of Code Civ. Proc. 1912, § 220 et seq., a party moving for a nonsuit on the ground of variance between allegations of the complaint and the proof must show that he has been misled.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 359-367; Dec. Dig. \Leftrightarrow 159.]

5. APPEAL AND ERROR ¶1004—HARMLESS ERROR—INSTRUCTIONS.

In an action for services under a contract to buy cotton seed oil at instructed prices, error, if any, in an instruction that if plaintiff was ready to perform, and went ahead and did his best to buy cotton seed oil, defendant was liable, whether he bought any or not, was harmless, where there was no showing that conditions for the services had arisen.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ¶1004.]

6. MASTER AND SERVANT ¶80—ACTION FOR SERVICES—BURDEN OF PROOF—RESCISSION.

In such action, where the plaintiff alleged a contract for services, and the defendant alleged a rescission, the burden was upon the defendant to show rescission, and if he failed, the verdict should be for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ¶80.]

7. MASTER AND SERVANT ¶80—ACTION FOR SERVICES—SUBSTANTIAL PERFORMANCE.

In such action, it was only necessary, to enable plaintiff to recover, for him to show a substantial performance of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ¶80.]

8. TRIAL ¶260—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

Requested instructions covered by the general charge were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ¶260.]

9. TRIAL ¶235—INSTRUCTION—WEIGHT OF EVIDENCE.

In an action for services under a contract to buy cotton seed oil at instructed prices, the court, in charging that the plaintiff was bound to prove his case by the preponderance of the evidence, was not bound to use the figure of balances.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 530-541, 543-548, 551; Dec. Dig. ¶235.]

10. CONTRACTS ¶274—RESCISSION.

Where two parties make the contract and rescind it and make a new contract, the party who would avail himself of any benefit therefrom must rely on the new contract; but if, after rescission, the parties agree to work under the original contract, then that contract is the only contract and the only basis of suit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1202-1206; Dec. Dig. ¶274.]

Appeal from Common Pleas Circuit Court of Marion County; C. J. Ramage, Special Judge.

Action by J. W. Moore and R. S. Moore, partners under the firm name and style of J. W. & R. S. Moore, against the Marion Cotton Oil Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

The contract, evidence, and the instruction on readiness to perform were as follows:

Contract (Exhibit A).

This agreement made and executed, in duplicate, this 10th day of August, 1910, by and between Marion Cotton Oil Company, Marion, S. C., party of the first part, and J. W. & R. S. Moore, of Fork, S. C., party of the second part. Witness:

First. That party of the second part is to

buy seed for the account of the party of the first part at Fork and Squire's Siding, and for no one else, during the season of 1910-11, or for a period of six months; that is, from September 1st, 1910, to March 1st, 1911, and is to pay such a price for them as he is instructed by party of the first part.

Second. That party of the second part is to use his time and influence towards promoting the interest of the party of the first part, both in the purchase of seed and the sale of products for their account, and in every other way possible.

Third. That any and all money advanced party of the second part by party of the first part is to be considered as trust money, to be used only in the purchase of seed, and is to remain the property of the party of the first part until so used.

Fourth. That party of the second part is to keep a correct record of all money paid for seed and is to make a daily report, showing seed bought and amount paid for them, also a report of receipts from products sold.

Fifth. That it is further agreed that party of the second part is to ship to party of the first part such of his own seed as he may sell at the market price.

For and in consideration of above services, the Marion Cotton Oil Company, party of the first part, agrees to pay J. W. & R. S. Moore, of Fork, S. C., party of the second part, a salary of \$100.00 per month, same to be paid at the last of each month.

Party of the first part also agrees to bear all expenses of draying and hauling seed from the place of party of the second part to cars in which they are loaded. They also agree to bear any other expenses incident to the business.

In witness whereof, the said parties above named have duly signed and sealed these presents, in duplicate, on the day and year first above written.

Marion Cotton Oil Company,
By Eugene C. Culvern, Mgr.
J. W. & R. S. Moore,
Per R. S. Moore.

Witness: L. H. Little.

R. S. Moore testified:

Direct examination, by Mr. M. C. Woods:

Q. Mr. Moore, are you one of the plaintiffs in this case? A. Yes, sir. Q. On or about the 10th of August, 1910, did your firm enter into a contract with Marion Cotton Oil Company? A. Yes, sir. Q. Is this the contract (showing paper to witness)? A. Yes, sir.

Plaintiff introduced the following contract (appended hereto as Exhibit A):

Q. Mr. Moore, in pursuance of this contract, did you buy seed for Marion Cotton Oil Company at Fork and Squire's Siding during the season of 1910 and 1911? A. Yes, sir. Q. At such prices as you were given? A. Yes, sir. Q. Did you use your time and influence in promoting the interest of the oil mill to as great an extent as you could? A. Yes, sir. Q. Did you account for all money that you received for the purchase of seed? A. I didn't call for any money until I had made a shipment. I furnished my own money to buy the seed, and, when I would have two or three or four hundred dollars in them, I would write them to send me a check, and they sent me a check. Q. You would apply it on the seed? A. Yes, sir. Q. Did you keep records of your purchases and make reports to them regularly? A. Yes. Q. Did you ship to the Marion Cotton Oil Company your own seed? A. No, sir. Q. Why not? A. Because they wouldn't pay me the market price.

Defendant's counsel objects to the witness stating that the oil mill did not pay the market price. The market price is one of the elements that is to be proved, and the jury is to decide what was the market price.

The Court: I think he can state that they wouldn't pay him the market price.

Mr. A. F. Woods: That is one of the elements that is to be proved; that is one of the points in contest, as to what was the market price. He can state what prices he was paying and what prices other people were paying, but the inference to be drawn as to what was the market price is an inference to be drawn by the jury and not the witness.

The Court: I think the question is competent. (Exception noted by defendant.)

Q. Did you have many seed? A. Yes; I had a good many seed. Q. When did you get ready to sell your seed? A. Some time in the latter part of January. Q. When you got ready to sell them, what did you do? A. I tried at different places to see what I could get for them, and when I got the best prices I could get, then I called up the Marion Oil Mill and asked them (interrupted)—Q. Where all did you inquire as to the market price? A. I tried Lumberton, Maxton, Dillon, Dunbar, Mullins, and Marion. Q. Did you ascertain what seed were bringing at that time? A. Yes. Q. What was the result of your inquiry as to what they were bringing at that time? A. Anywhere from 50 to 53 cents.

Mr. A. F. Woods: Does your honor understand that I object to that testimony on the ground that it is purely hearsay?

The Court: You can test him on cross-examination. You object to all this testimony?

Mr. A. F. Woods: Yes, sir.

The Court: In my judgment it is competent. (Objection overruled; exception noted.)

Q. Mr. Moore, when you ascertained the price seed was bringing, what did you do, if anything? A. I offered them to the Marion Cotton Oil Mill at the best price I was offered for them, both over the phone and by letter. Q. With whom did you have this conversation over phone? A. Mr. Culvern. Q. What position did Mr. Culvern hold; what connection did he have with Marion Cotton Oil Company? A. He was manager. Q. State what occurred in that conversation between you and Mr. Culvern? A. He stated that he was loaded on cotton seed—on high-priced cotton seed, I believe he put it—and he didn't want any more at those prices, and, if I could get that price for them, to go ahead and sell; that it would be perfectly all right with him. Q. Did he offer you any price for your seed? A. Yes; he offered me 45 cents. Q. What did you tell him in reference to that? A. I told him what seed was bringing at other places and what I thought I could get for them. Q. He said he didn't want them at that price? A. He said he didn't want them at that price; that he had a lot of high-priced seed, heating up on him, and he didn't want any more right then. Q. Did you express a willingness to sell to him at the market price? A. Yes; he said he didn't want them; he had plenty of them, more than he could attend to at that time, and, if I could get that price for them, to go ahead and sell them; that it was all right with him. Q. How much salary were they to pay you for the season of 1910-11? A. \$600. Q. How much did they pay you? A. \$200. Q. How much balance do they owe you? A. \$400. Q. Have you or not demanded that balance? A. Yes, sir. Q. Did they pay you, or did they refuse to pay you? A. They refused to pay me.

Cross-examination:

Q. Mr. Moore, Mr. Culvern said he was loaded up with seed and didn't want any more seed because they were heating on him? A. Yes, sir. Q. Have you ever heard of seed heating the latter part of January? A. Yes, sir. Q. Where did you ever hear that; what mill? A. I have heard of it in several mills. I have heard them say so. I was not in the mill business, but I have had some of my own seed to heat about that time. Q. Don't you know the seed will heat in the fall months, but never heat

as late as January 1st? A. No, sir; I don't know it. Q. The kind of seed you raise will heat right on up to the 1st of February? A. Yes; they will heat if you put too many together, and if you gin a pile of cotton for somebody that is damp and the seed is damp. Q. The seed you plant will heat up to the 1st of February? A. They will if you get them wet or put wet seed in with dry seed. Q. Was not the whole trouble between you and the oil mill that they wouldn't sell you meal? A. No, sir. Q. You didn't try to buy meal from them and they told you they couldn't supply you? A. No, sir. I tried to buy meal from them, but they didn't tell me they couldn't supply me. They simply asked me a dollar a ton more for it than I could buy it elsewhere. Q. Wasn't this whole difficulty because you wanted to sell your seed to somebody else to get your meal? A. No, sir. Q. That was not so? A. No, sir. Q. Did you or not tell Mr. D. E. Godbold at your store in Fork, during the month of November, about the middle of November, 1910, that unless the Marion Cotton Oil Mill would pay you more for your seed than anybody else that they were not going to get them because you had to use your seed to get meal with? A. No, sir; and Mr. Godbold can't tell me that I did. Q. You didn't say that? A. No, sir; and he knows I didn't. Q. Any time during that fall? A. No, sir; no time. Q. You didn't tell him that at any time? A. No, sir. Q. The trouble between you and the oil mill was not simply this: That you had neglected to provide for your meal and you wanted to sell your seed to some other mill to obtain meal? A. No, sir. Q. Wasn't that the trouble? A. No, sir; because you could swap seed for meal anywhere. Q. Some other mill offered you meal at a dollar a ton cheaper if you would let them have your seed? A. You could buy it almost anywhere for a dollar less than they offered it to me. Q. That was the reason they offered you the meal for a dollar a ton less? A. No, sir; it was not. Q. To get your seed? A. No, sir. Q. You didn't tell them that? A. No, sir. Q. You didn't tell Mr. Culvern that? A. No, sir. Q. You didn't tell Mr. Godbold that? A. No, sir. Q. Did you and Mr. Culvern have a conversation over the phone about canceling this contract some time in November? A. No, sir. I can tell you what our conversation was: I called him up from Dillon to know what I could buy some meal for from him. He was at his house sick, and he priced me the meal at a dollar a ton higher than anybody I had prices from. Q. Was he under any contract to sell you meal? A. No, sir. I waited until I came home to my office at Fork, and I called him up again and asked him about the meal, how about some meal and the price of it, and if he couldn't sell it to me for less than he had priced it to me. He said, "No," that was the best price he could make on it; that he could sell all the meal he had at that price. Q. Was that all the conversation you had? A. No, sir. Q. Go on and tell the rest. A. He told me that he couldn't sell me the meal for any less. I told him I could buy the meal for less. He said, "You oughtn't to expect me to sell it to you as cheap as the other mills, as we are paying you such a big salary." I said, "If that be the case, then it would pay me better"—we had been figuring on the cotton seed—I told him it would pay me better to quit representing the mill than to come and pay more for meal and take less for seed. He said, "That will suit me." He said, "That is what I want you to do." He said, "Come down and let's straighten up." I told him when I decided to do that I would come down, and I didn't come. Q. Didn't you all cancel the contract and you agreed to come down later and settle the balance between you? A. No, sir. That ended the conversation right there. It is very reasonable that it would pay me to cancel the contract if I had to pay more for meal

and take less for seed. Q. When did you say you offered him your own seed? A. Some time in the last of January. Q. Did you tell Mr. Culvern who offered you more than he offered you? A. I don't remember whether I told him or not. Q. Did you or not? A. I don't remember whether I told him who offered it or not; just so I was offered that. Q. Were you not employed to represent their interest? A. That was for my own seed. Q. But you say other people were paying more for seed than they were; wasn't it your duty to let them know who it was? A. All the mills were paying more for it. Q. Didn't he ask you who was doing it and you wouldn't tell him? A. They wanted me to submit in writing who it was offered me the price for my seed, and I wouldn't do it. That was my individual seed. If it had been an outside person I would have done it. Q. You stated that you used all your time to help their business, you did what you could to promote their interests; now, wasn't it your duty, if you were working for them and taking their money, if their price was not up to the market, was it not your duty to let them know who was paying more? A. I had done that often, and it didn't amount to nothing. They wouldn't give me any better limits to buy seed. Q. Did you write them that letter (showing letter to witness)? A. Yes, sir. I didn't write it, but I dictated it. Q. You did refuse to let them know? A. Well, I say I did refuse to let them know who made me the price on my own individual seed.

Defendant introduces letter from J. W. & R. S. Moore to Marion Cotton Oil Company, dated January 28, 1911.

Q. You wouldn't show them, then? A. No, sir; not my own individual seed. Q. What did you mean by "the proper time?" A. When we got together, if it was before that, if they came up and paid me my money, I would show them then. Q. Wasn't it a fact that you had an offer from your brother and you were trying to prize them up? A. No, sir; I had no offer from him whatever. Q. Why wouldn't you tell them who offered you that and give them a chance to meet it? A. Because I didn't think it was my business to tell them who. It was my individual seed. If it had been somebody else's seed I would have told them. It was to my interest to get all out of my seed I could. Q. Did you know there was such a clause as this in this contract, that you should use your time and influence towards promoting the interest of the party of the first part, both in the purchase of seed and the sale of produce of every kind and in every other way? A. Yes, sir. Q. Didn't good faith require you to tell who was paying more for seed than they were, when you were taking their money for doing that; didn't good faith and the promotion of their business require you to give them the name of the person paying more for seed than they were? A. Every mill I called up were paying more for seed than they offered me for my seed. This was my seed, and I didn't think it was necessary to tell them. Q. You refused to tell them a single person that was paying more? A. Yes; I told him there were lots of people that were paying it, and he knows it. Q. You said you would tell him at the proper time? A. He asked me over the phone. Q. Did you tell him? A. No, sir. Q. You told him you would tell him at the proper time? A. I never did tell him who made me that offer on my individual seed. If it had been an outsider I was buying the seed from, I would certainly have told him. Q. What business were you engaged in beside buying cotton seed? A. Merchandising, farming, and in the brick business. Q. Did you send the Oil Mill Company this statement (showing paper to witness)? A. Yes; my bookkeeper did. Q. Does that statement correctly set forth the transactions according to your books? A. I

think so, as well as I remember now. Q. That is the one you sent them? A. Yes, sir; that is one of them. Q. It shows the credits and debits? A. Yes; that shows the money they paid me and the amount of seed I bought for them.

Defendant offers to introduce statement. (Objected to by plaintiff on the ground of irrelevancy. Objection overruled. Exception noted.) Defendant introduced statement.

Q. Did you send them reports of seed purchased for the defendant? A. Every day I bought any seed. Q. At the last trial didn't you say you did not? Didn't you tell me you didn't send reports every day? A. No, sir; I don't think I did. I know I didn't. I couldn't admit I sent them every day, because I didn't buy seed every day during the year. Q. I am talking about the days you bought seed, when this case was tried before, didn't you admit you didn't send them every day? A. I sent a report regularly along as I bought seed. I've got a copy of the reports right over there.

Redirect examination:

Q. Did you say cotton seed would heat any time they would get wet? A. If you wet the seed that came out of one bale and put them in a pile of 10,000 bushels, it would heat the whole pile, if you let them stay there long enough. I have tried it.

Q. Do you know whether the seed of the Marion Cotton Oil Company were heating or not? A. I only know what Mr. Culvern said about high-priced seed and they were heating on him. Q. And gave that as a reason he didn't want your seed? A. Yes, sir. Q. As a matter of fact, did you buy your meal and sell your seed to the same person? A. No, sir. Q. You sold your seed to one person and bought your meal from another? A. Yes, sir. Q. How did the price of that meal compare with the price Mr. Culvern gave you? A. I got it at a dollar a ton less. Q. As I understand you, you sold your seed to one person and bought your meal from another person for a dollar a ton less than you could have bought it from Mr. Culvern? A. Yes, sir.

Recross-examination:

Q. To whom did you sell your seed? A. I sold them to the Dunbar Mercantile Company. Q. What did you get for them? A. Fifty-three cents. Q. Whom did you buy your meal from? A. I bought my meal from the Dillon Oil Mill. Q. Who was the Dunbar Mercantile Company buying seed for? A. I suppose they were buying for the Southern Oil Company. They had them shipped there. Q. Was not the Dillon Mill one of the Southern Cotton Oil Company Mills? A. Yes; but I sold the seed to the Dunbar Mercantile Company. I didn't know who they were going to ship them to. Q. The Dunbar Mercantile Company was buying for the Southern Cotton Oil Company? A. Yes, sir. Q. The Dillon Mill is a member of the Southern Cotton Oil Company? A. Yes, sir.

Redirect examination:

Q. When did you buy your meal? A. In the last part of February or middle. Q. Had you already sold your seed? A. Yes, sir. Q. In the sale of those seed, was there any condition that you buy your meal there? A. No, sir. Q. Did it have any relation to that? A. Not a bit in the world.

W. E. Caldwell testified:

Direct examination.

Q. Mr. Caldwell, what is your business? A. I am with the Southern Cotton Oil Company at Dillon. Q. How long have you been in the cotton oil mill business? A. Nineteen years. Q. In the season of 1910 and 1911, were you familiar with the market price that the mills were paying for seed? A. I was in the state of North Carolina, where I was located at that time. Q. What point in the state of North Carolina? A. In Gibson, just on the state line. Q. What was the market price for seed during

the months of January and February, 1911? What was the range of prices?

Defendant's counsel objects, on the ground that the witness had disqualified himself to answer the question as he has stated that he was familiar with the prices in North Carolina.

Q. Were you familiar with the prices in South Carolina? A. Being on the line, I was. Q. Familiar with them in both states? A. Yes, sir. We have a mill in Bennettsville, just ten miles from where I was. Q. Did you have any connection with the mill at Bennettsville? A. No, sir; but I paid the same for seed. Q. What was the range of prices for seed during the months of January and February, 1911?

Defendant objects to witness testifying as to February.

Q. In the month of January, what was the price? A. My recollection is in the early part of January we paid 50 cents for seed at Gibson and also at Bennettsville, and some time during the month of January we paid as high as 54 cents for seed in car load lots. Q. What is the nearest oil mill to Fork and to Squire's Siding? A. I don't know the distance to Marion. I think Marion is the nearest. Q. How far is it from Dillon? A. It is 11 miles from Smithboro to Dillon. I don't know the distance from Smithboro to Fork and Squire's Siding. I think Marion is the nearest mill. Q. Do you know what the Dillon Mill was paying in January and February, 1911? A. Only by the record. Q. Have you the original records of the Dillon Mill at that time? A. Yes, sir. Q. (By Mr. A. F. Woods.) Did you keep those books? A. No, sir.

Defendant's counsel objects to introduction of books.

Eugene P. Culvern testified:

Direct Examination.

Q. Mr. Culvern, during 1910 and 1911, did you occupy any position with the Marion Cotton Oil Company? A. Yes, sir; I was the manager for the company. Q. Are you now employed by the Marion Cotton Oil Company? A. I am employed by the same people who own this mill, but I am not working for the Marion Cotton Oil Company now. Q. You are the party who made this contract with Mr. Moore? A. Yes, sir. Q. Mr. Culvern, did you have any conversation with Mr. Moore over the phone about the 10th of November, 1910? If so, state what it was. A. Yes; I remember Mr. Moore called me up and wanted to buy some meal, asked me my price on the meal, and I named him the price. He said that was too high, that he could buy it cheaper, but, in order to buy his meal cheaper, he would have to give the other people the refusal of his seed. I stated to Mr. Moore that we didn't care where he bought his meal, we could sell all our meal, but he was under contract to ship us his seed, and we paid him a salary for it and expected to buy his seed at the market price. He said he didn't see why we should ask him so much more for meal than anybody else and held him down that way. He said if he had to be held down that way he would prefer to cancel the contract. I told him that would be all right with me; that we would consider it canceled; that that was what I wanted him to do. Mr. Moore said, "All right." I said, "When are you coming down and have a settlement?" He said, "On Friday." This was on Thursday, and he said he would come down on Friday and have a settlement. He didn't come, and the following week I called him up and asked him why he didn't come. He said he had reconsidered; that he had a man helping him and had gone to some expense and he preferred to go ahead and buy seed and renew the contract. I told him if he would get busy and buy us some seed and ship us his own seed we would give him the market price and we would let the contract go on. Q. When was it that he offered you his own seed? A. It was in the latter part of December, is my recollection. Q. When did he offer them to you again,

if at all? A. I don't remember his offering them to me any more. Q. The only time you remember his offering them to you is the latter part of December? A. Yes, sir. Q. You didn't keep the books? A. No, sir. Q. Do you know what you were paying for seed along about the last of January, in car load lots? A. In car load lots we were paying about 50 to 52 or 53 cents, in that neighborhood. Q. You would have paid it to Mr. Moore if he had offered you the seed? A. Yes; at that time. Q. When was that? A. In January. Q. Did he offer them to you at that time he said he sold them? A. No, sir. Q. Is there anything else you care to say about it? A. Only this: In the oil mill business the market fluctuates very often, and if Mr. Moore had offered me his seed at the time he sold, or was ready to sell, I might have been willing to take them at the price he offered them to me at before that, but the trouble was he didn't offer them to me at that time. I very often refuse seed one day, and the very next day I would have been glad to buy them at the same price I turned them down at. Q. He didn't offer you his seed when he said he sold them? A. No, sir. Q. You would have been willing to pay that price if he had? A. We were paying it. Q. Was your mill paying the market price in this territory? A. There is no question of it. We were buying seed all around home and all over the country and couldn't have got them otherwise. Q. You were paying the full market price for this territory? A. Yes, sir. Q. Is it or not a fact that, owing to local conditions, each section has a price of its own? A. Yes, sir. Q. Sometimes you are paying more than another section and sometimes less? A. Yes, sir. Q. The market price is a question of local conditions? A. Yes, sir. Q. Your mill was paying the full market price in the section of Marion, Fork, and Squire's Siding at that time? A. Yes, sir.

Cross-Examination:

Q. What was that market price? A. We were paying in the latter part of January, at the time he said he sold his seed, from 50 to 53 cents a bushel. Q. What commission were you allowing on car load lots? A. To our regular buyers, we were allowing about \$1.25 a ton. Q. How much would that be a bushel? A. A little over a cent and a half a bushel. Q. So, if you were paying from 50 to 53 cents, did that include the cent and a half a bushel? A. That included the commission that was on car load lots of seed as we would have bought Mr. Moore's. Q. Are you positive the market price the latter part of January was 50 to 53 cents? A. Yes; I think so. Q. Is that your signature (showing letter to witness)? A. Yes, sir. Q. Did you write that letter? A. Yes; I wrote it.

Plaintiff introduces letter from Eugene C. Culvern to Messrs. J. W. & R. S. Moore, dated January 21, 1911.

Q. In view of your statement that you were paying from 50 to 53 cents for seed, suppose you read the letter. A. I see what the letter is. The market might have changed in two or three days. Q. Mr. Culvern, you say in this letter: "As our phone conversation yesterday afternoon, beg to advise that we could not use your seed at 53 cents per bushel. They are not nearly worth this much, and we are well posted as to the price which is now ruling. We are perfectly sure that no oil mill would care for seed at anything like this price. We are paying at present in Marion 45 cents per bushel and commission in car loads. The market price for seed is the prices which the mills are paying for them, and not a price which might be made by some speculator. I asked you, the last time you were in our office, to let us see the offer which you had for your seed in writing, signed up by the manager or representative of the mill making the offer, so that I could show same to the president of our mill, if necessary, and am sorry that you refused to comply with this request."

A. As I said, the market might have changed in two or three days. Q. Mr. Culvern, you testified, when Mr. Woods examined you, that that conversation was in December. You were wrong about that. It was in January, wasn't it? A. We had several conversations. Q. You testified that this offer of seed was in December? A. I said that was my recollection of it. Q. Did you use the word "recollection"? A. Yes; I did. Q. It was a month later, wasn't it? A. That one was. Q. There must have been some talk between you and Mr. Moore about 53 cents? A. There might have been. Q. Now, Mr. Culvern, you say that you and Mr. Moore canceled this contract about November 10th? A. About November 10th is about the time we had the conversation in which we agreed to cancel it, and he said he would come down and settle our account. Q. Can you swear from your recollection, or are you positive that you agreed to cancel at that time? A. It was a phone conversation. It was certainly a clear understanding on my part that Mr. Moore agreed to come down on the following Friday and cancel the contract. Q. Did you cancel the contract? A. I supposed that was the cancellation of it at that time. Q. Didn't you continue to act on this contract? A. You remember I told you we had another conversation the next week, in which he said he wanted to let the contract stand. Q. You continued to treat him as your agent? A. Yes; after the second conversation. Q. You say this conversation was about November 5th? A. Yes, sir; near about that time. Q. Did you write that letter on November 10th? A. Yes. Q. On November 25th you were still sending them money to purchase seed for your account? A. Yes, sir. Q. Treating them as your agent? A. Yes, sir. Q. Doing the same thing on November 10th, weren't you, treating them as your agent? A. Yes, sir. Q. Still doing it in December? A. Yes; right on through the season. Q. Didn't they put up a seedhouse for you in December? A. I believe they did. Q. Now, as I understand it, you swore in your examination in chief that they only offered you these seeds one time, and if he had offered them to you another time you might have taken them? A. We might have taken them one day at a price we would not have cared to buy them at the day before. The market changes. Q. Didn't you testify in your examination in chief that Moore had only offered these seeds to you one time, but if he had offered them to you again you might have taken it? A. Yes; might have done so. Q. You are mistaken about that? A. I was a little mistaken in the date of the conversation. Q. You had a talk in December? A. I think so. Q. You certainly had it in January? A. Yes. Q. What were you paying for seed on the day you had a conversation with him in January? A. Our books show we were paying in car loads an average of about 50 cents a bushel. Q. But you wrote him 45 cents? A. At different times. Q. Forty-five cents plus commissions of a cent and a half would be 46½ cents. You were paying 50 cents, but you wrote Moore 45? A. Prices changed several times during the month.

Redirect examination:

Q. The prices you were paying on one day is no indication what the prices would be the week later? A. No, sir; not a bit. Q. You were detailing your conversation just from your recollection? A. Yes, sir; phone conversation. Q. Something that happened nearly four years ago? A. Yes, sir. Q. You were just stating the best of your recollection? A. Yes, sir.

Recross-examination:

Q. Would the price range eight cents a bushel in a short time? A. It might do it. Q. Did it at that time? A. I don't remember.

Mr. M. C. Woods (addressing the court): May it please your honor, I wish it to appear in the record that Mr. Culvern came to my office about these differences between the oil mill and

the Moores, and we reached a full and complete settlement of the same, and agreed at that time that it was a full and complete settlement, and Mr. Culvern and I agreed that the salary question was left open. Mr. Culvern will bear me out in that.

Excerpts from Court's Instructions.

The Court: I am construing this contract as I see it. Of course, it is understood that the plaintiff in his complaint claims that he is entitled to the entire amount, and the defendant claims they are not entitled to pay them anything. That is the contention of the parties; but I am construing this contract. A man would not have to work the entire six months in order to get pay for a part, because you are all common-sense men, and anybody can see from this contract it means what it says. It is to be paid monthly, so many dollars a month, and payable at the end of each month. You will observe, gentlemen, that this is simply a contract of employment. The parties of the second part do not guarantee that they will buy any seed at all, but they are put there to buy seed; that is their business; and under this contract, if they go ahead and do their best to buy seed, whether they buy any or not, the party of the first part would be liable. * * * If a man hires the foreman to sell goods and pays him a fixed salary of \$100 or \$200 a month, he would be liable whether you sold a dollar's worth of goods or not, if you sold the best you could. You cannot make people buy.

A. F. Woods, of Marion, for appellant. M. C. Woods, of Marion, for respondents.

FRASER, J. The appellant thus stated his case:

"This is an action by J. W. Moore and R. S. Moore, partners trading as J. W. & R. S. Moore, against the defendant Marion Cotton Oil Company, for \$400 for services alleged to have been rendered by plaintiffs to defendant under a written contract, which is set out in full in the case. The case first came on for trial at the fall, 1913, term of the court of Marion county before Judge H. F. Rice and a jury. One of the terms of the contract is that plaintiffs should ship their own individual cotton seed to defendant at the market price. It developed, in the course of the testimony of the plaintiffs, that this term of the contract had not been complied with, and the plaintiffs then sought to show an excuse for nonperformance, to which testimony defendant objected on the ground that the complaint had alleged a full performance of the contract, and that no excuse for nonperformance could be proved without an allegation to that effect in the complaint. Judge Rice sustained this objection, whereupon, on motion of plaintiffs, he withdrew the case from the jury and made an order permitting plaintiffs to serve an amended complaint setting up their alleged excuse for noncompliance with this term of the contract. Thereafter plaintiffs served an amended complaint, alleging full performance of the contract mentioned in the complaint, except that term of the contract relating to the shipment of their individual seed, and as to that they alleged that they undertook to perform it, but were prevented by defendant's refusal to pay them the market price. At the spring, 1914, term of court for Marion county the case again, on the amended pleadings, came on for trial before Special Judge C. J. Ramage and a jury. This trial resulted in a verdict for the plaintiffs for \$400, the full amount sought, and this appeal is from the judgment entered on that verdict."

The case contains the following statement:

"Mr. M. C. Woods, Plaintiffs' Attorney (addressing the Court): May it please your honor,

I wish it to appear in the record that Mr. Culvern came to my office about these differences between the oil mill and the Moores, and we reached a full and complete settlement of the same and agreed at that time that it was a full and complete settlement, and Mr. Culvern agreed that the salary question was left open. Mr. Culvern will bear me out in that."

"Mr. A. F. Woods (Defendant's Attorney): We agree that that statement is correct."

Mr. Culvern was the manager of the defendant. After that settlement, the plaintiffs served their complaint, alleging a breach of the contract on the part of the defendant on the one question left open, to wit, the salary, and alleged that they (the plaintiffs) had performed the contract on their part. Under the direction of the court, the plaintiff alleged the nonperformance of another provision of the contract and his excuse for nonperformance.

The defendant, by its answer, denied the contract set up in the complaint and the allegations as to the excuse for nonperformance, and set up that the contract had been rescinded. Near the end of the trial the plaintiffs and the defendant agreed to submit the question to the jury as an entire contract, and on that issue the jury found for the plaintiff the entire amount claimed.

There were four questions in issue: (1) Did the defendant make the contract of service? (2) Did the plaintiffs perform their part of the contract? (3) Was the contract rescinded? (4) Was there sufficient excuse for nonperformance of the fifth clause?

There are seventeen exceptions. One was abandoned. The exceptions were consolidated in the argument and will be consolidated here.

[1] I. The first and second exceptions complain of error in the admission of testimony as to the "market price." If there was error, it was wholly immaterial, because there was no contention in the evidence that the price offered was up to the market price. The exact market price was not in issue.

[2, 3] II. Appellant considers 3, 4, 5, and 6 together and says exceptions 4 and 6 raise the question on the motion for a nonsuit that performance of some of the services, as to which no waiver had been alleged, had not been proved, and exceptions 3 and 5 present the contention that there was a failure to prove the waiver alleged, as well as a failure to prove other terms of the contract, as to which no waiver had been alleged. These exceptions cannot be sustained. There were but four questions. The contract was in evidence. There was evidence (it may be conflicting) that plaintiffs had performed. The question as to rescission and the sufficiency of the excuse for nonperformance, on the nonperformance pleaded, were questions for the jury.

[4] III. The seventh exception complains of error in refusing the nonsuit on the ground of a variance between the allegations of the complaint and the proof. There has been no

attempt to show that the defendant has been misled, and this is necessary, under the express terms of the Code. See Code of Civil Procedure, § 220, and cases there cited.

[5] IV. The eighth and fourteenth exceptions complain that his honor confused performance with readiness to perform. If it was error, it was not prejudicial, because the contract provided that the plaintiffs agreed to purchase cotton seed with money furnished by the defendant (which plaintiffs agree to hold in trust) and to purchase at the prices named by the defendant. Plaintiffs were to buy seed with defendant's money and at defendant's prices. There is no showing that the conditions for service had arisen. Under the contract, plaintiffs agreed to buy seed for defendant and for no one else. Plaintiff said he had done more than he agreed to do by buying seed with his own money. If that was not true, defendant ought to have shown it. That is not confession and avoidance. The charge as to readiness to perform was harmless. These exceptions cannot be sustained.

V. The ninth exception complains of a charge on the facts. This exception cannot be sustained. The statement of facts was made by plaintiff's attorney and the record fails to show that his honor adopted that part that stated the facts.

[6] VI. The tenth exception complains of error in the charge that where the plaintiff alleges a contract, and the defendant alleges a rescission, the burden is upon the defendant to show rescission, and, if he fails, the verdict must be for the plaintiff. On that issue the statement is correct. His honor had already charged that the plaintiff must prove his contract, by the preponderance of the evidence. This exception is overruled.

[7] VII. The appellant groups the eleventh, twelfth, and thirteenth exceptions and states the question as follows: The basis of these exceptions is that the judge charged the jury that it would only be necessary, in order for the plaintiff to recover, for them to show a substantial performance of their contract. This charge was correct, under *McMillan v. Insurance Co.*, 78 S. C. 433, 58 S. E. 1020, 1135.

[8] VIII. The sixth and seventh requests were covered by the general charge.

[9] IX. The judge is not bound to use the figure of balances, and, when he charges that the plaintiff is bound to prove his case by the preponderance of the evidence, he has declared the law. The fifteenth exception cannot be sustained.

[10] X. The sixteenth exception cannot be sustained. The appellant contends that when two parties make a contract and rescind it, and make a new contract, then the party who would avail himself of any benefit from the contract must rely on the new contract. That is true, provided there is a new contract. If, however, after a rescission, the parties agree to continue operations

under the original contract, then the original contract is the only contract and is the only basis of the suit.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(100 S. C. 490)

BAIRD v. WEATHERFORD et al.
(No. 9074.)

(Supreme Court of South Carolina. April 20, 1915.)

1. JUDGMENT \Leftrightarrow 725—CONCLUSIVENESS—AGRICULTURAL LIENS—WAIVER.

A judgment on verdict for a lessor for half of a crop for a lien for rent, in a suit involving the issue whether the lessor had waived a part of his lien, is conclusive on the parties and shows a waiver of a part of the lien.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255-1257; Dec. Dig. \Leftrightarrow 725.]

2. AGRICULTURE \Leftrightarrow 15—LIENS—FORECLOSURE—EXPENSES.

Under Civ. Code 1902, §§ 3062-3064, providing for foreclosure of agricultural liens and requiring the clerk to issue his warrant and the sheriff to seize the crop and sell it for cash and pay over the net proceeds in extinguishment of amount due, the officers should be paid for their services out of the proceeds and the balance applied to the debt due.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 42-49; Dec. Dig. \Leftrightarrow 15.]

3. COSTS \Leftrightarrow 32—PARTIES LIABLE—STATUTORY PROVISIONS.

In equity and under Code Civ. Proc. 1902, § 326, a defendant, in a proceeding to foreclose an agricultural lien, who claims one-half of the crops free from the lien and makes out his case and shows that he was without fault in bringing about the litigation, was entitled to his costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. \Leftrightarrow 32.]

Appeal from Common Pleas Circuit Court of Darlington County; Frank B. Gary, Judge.

"To be officially reported."

Proceedings on a warrant under agricultural lien by A. T. Baird, trustee, lessor, against R. L. Weatherford and C. K. Dudley, lessees, and C. K. Dudley individually, in which Charley Dudley gave notice that the amount claimed by the lessor for rent was not justly due him, and in which the Edwards Company filed an affidavit claiming to be assignees of a rent lien. From a judgment, the lessor appeals. Affirmed.

The following is the opinion of the presiding judge:

The case first above mentioned was referred to me by his honor, Judge R. C. Watts, by order, December 15, 1910, to determine what portion of the funds in the hands of the sheriff arising from sale of crops seized and sold in the case first above stated shall be paid out to each of said parties, and the second case was referred to me by his honor, Judge Aldrich, July 15, 1911, and by consent the two cases were to be heard together; but, as the issues in the two cases are entirely distinct, the case first above mentioned only was heard at this time.

I beg leave to report that I have taken the testimony herewith filed and find:

That these two causes arose under proceeding instituted by A. T. Baird, trustee, against R. L. Weatherford and Charley Dudley, to seize crop under lien, a warrant therein being issued October 12, 1909. The affidavit upon which said warrant was issued, made by Dr. Baird, claimed 15 bales of lint cotton, weighing 500 pounds each. There were three separate lease and lien papers for 5 bales of cotton, each embraced in the 15 bales claimed by Baird, trustee. After seizure of cotton and cotton seed by the sheriff under the warrant referred to, Charley Dudley gave notice to the sheriff that the amount claimed by Baird, trustee, for rent, was not justly due to him, and requiring proceeds of sale of such crops to be held as provided in section 3062, volume 1, of the Code. The Edwards Company filed with the sheriff an affidavit claiming to be assignees of one of said rent liens and as owners thereunder of 5 bales of cotton seized by the sheriff under proceedings first named. Upon the issue made by the affidavit under which warrant to seize crop was issued, and the notice and affidavit of Charles Dudley, a trial was had before Judge De Vore and a jury.

[1] There was but one question really submitted to the jury upon the hearing of that issue, and that was whether or not Baird, trustee, waived his lien for rent from the share of the crop that would go to Charles Dudley. This was of necessity the only issue before the court, for no one up to that time or since has denied Baird's right as between himself and Weatherford to recover Weatherford's interest in the crop. The jury was clearly instructed by the judge at the last that their verdict should be, in either event, whether Dudley's half of the crop was covered by the lien or not, in favor of the plaintiff, but whether or not Baird had waived his lien would determine amount of the verdict. In the event that it had not been waived, then the jury should find a verdict for 15 bales of cotton for the plaintiff; but, if they found that the lien on Dudley's share had been waived, their verdict should be for the plaintiff for one-half of 26 bales of cotton, which was the total crop raised by Dudley and Weatherford on these lands on shares. The verdict of the jury was, "We find for the plaintiff one-half of twenty-six bales of cotton or the value in money." On this verdict Baird, trustee, on November 23, 1910, entered up judgment thereon. From this judgment and verdict there is no appeal.

This verdict and judgment is final as between all parties involved, binding upon me, and is conclusive that Baird, trustee, waived his lien as against Dudley's share of the crop, and that the verdict, while following the form given to the jury by his honor, was in fact and effect a verdict in favor of the defendant Dudley for one-half of the crops raised on the lands of the plaintiff and himself and Weatherford. I find that the 22 bales of cotton seized and sold by the sheriff brought \$1,444.41 (or \$64.65 per bale), and that the cotton seed brought \$79.69. Dudley had, before the seizure by the sheriff, received 4 bales of cotton on account of his share. I therefore conclude and find that Dudley should receive the proceeds of 9 bales of the cotton (\$590.85), and one-half of proceeds of cotton seed (\$39.84), or \$630.69.

Question is made as to the costs. As to the costs in the reference to me I think there can be no question, but whether costs can be taxed for proceedings in the trial of the issue made before the jury seems to be the question.

[2] There is no general provision of law whereby in special proceedings costs can be taxed as in actions. But in the statutes (1 Code, §§ 3062-3064) providing method, etc., of

foreclosing agricultural liens, it is provided that the clerk of court shall issue his warrant, require an undertaking or bond, and the sheriff shall seize the crop, sell it for cash, "and pay over the net proceeds thereof, etc., in extinguishment of the amount then due." It cannot be held that these officers should not be paid what the fee bill gives them for their services, while the fact that the statute requires the paying over only of the net proceeds intends that in this instance the fees for officers shall be paid from such proceeds first and the balance applied to the debt due.

[3] The defendant Dudley, having to the satisfaction of the jury established his right to one-half of the crops as evidenced by the verdict above referred to, without any diminution of his claim shows that he was without fault in bringing about the litigation which has taken place on account thereof, and in equity as well as in law I think him entitled to his costs, and I find that he is entitled thereto. Code, 1902, vol. 2, § 326.

The issues raised by case of Kirven v. Register, Sheriff, et al., stated above, are passed upon in another report. It was admitted in open court that J. P. Kirven, plaintiff in case second above stated, has no interest whatsoever in the share of Dudley referred to above.

Geo. W. Brown, of Darlington, for appellant. W. F. Dargan, J. R. Coggeshall, E. O. Woods, and Geo. E. Dargan, all of Darlington, for respondents.

GARY, C. J. For the reasons stated in the report of the probate judge, which was confirmed in all respects by his honor the circuit judge, the judgment of the circuit court is affirmed.

HYDRICK, WATTS, and GAGE, JJ., concur. FRASER, J., disqualified.

(101 S. C. 1)

MAULDIN et al. v. MAULDIN et al.
(No. 9066.)

(Supreme Court of South Carolina. April 15, 1915.)

1. TRUSTS ⇐189—SALE OF PROPERTY—POWER OF COURT.

The power to sell trust property must be exercised with the utmost caution, and it is not enough that the beneficiaries are willing to sell, but the necessity for or advantage of a sale must appear.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 240, 241, 244; Dec. Dig. ⇐189.]

2. TRUSTS ⇐191—TESTAMENTARY TRUSTS—SALE OF TRUST PROPERTY.

Where testator provided for a postponement of a sale of trust property for 20 years, but allowed a discretion as to sale after the death of his wife, a family settlement, to avoid litigation, advancing the time of sale, will not be enforced, especially where an anticipation of time of sale was not for the wife's benefit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. ⇐191.]

3. TRUSTS ⇐282—TESTAMENTARY TRUSTS—SALE OF TRUST PROPERTY.

The court may not anticipate the time of distribution of a testamentary trust estate, and thereby destroy trusts and defeat the rights of contingent remaindermen.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 402; Dec. Dig. ⇐282.]

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

Action by John McH. Mauldin and others, as executors of William L. Mauldin, deceased, against Oscar K. Mauldin and others. From a judgment for defendants, plaintiffs appeal. Reversed.

The following is the proposed settlement referred to in the opinion:

Greenville, S. C., February 16, 1914.

To the Executors of the Estate of W. L. Mauldin, Deceased:

We, the undersigned, do hereby purpose the following settlement regarding the estate of W. L. Mauldin, to wit:

1. That the special limitation upon our interests shall be waived so that our interests shall be on the same footing as the interests of the other children, and that the executors shall at once advance the period for distribution so that the rights of all the children in the proceeds of the sale of the real estate shall become vested at once.

2. That the Main street property shall be sold as soon as the sum of two hundred and fifty thousand (\$250,000) dollars can be obtained; provided, however, that if this sum cannot be obtained the executors may sell for a less sum. The other real estate shall be sold in parcels from time to time as sales therefor can be obtained. The executors are to charge no commissions on the sale or division of the proceeds of sale of the Main street property.

3. One-third of the proceeds of the real estate, after deducting expenses of sale, including commissions of executors, where allowable, shall be set aside for the benefit of Mrs. Eliza K. Mauldin to be held by herself and the other executors, with the right to make such investment thereof as they may determine upon, with the full right on her part to use all interests and profits arising therefrom; and on her death what remains to be divided in the manner indicated in the fourth paragraph hereof.

4. The balance of the proceeds arising from the sale of the real estate shall be equally divided among the five children, share and share alike.

5. All personal property shall belong to Mrs. Eliza K. Mauldin, and all past transactions regarding the estate shall be confirmed. The retained income on the interest of W. L. Mauldin to be paid over to him forthwith.

This proposition is to be accepted or rejected by 12 m. February 19, 1914. If accepted, we will expect you to take such proceedings in court as may be necessary to carry out this family arrangement.

Haynsworth & Haynsworth, of Greenville, for appellants. B. A. Morgan, of Greenville, for respondents.

FRASER, J. Mr. W. L. Mauldin died leaving of force his last will and testament. This will gave much dissatisfaction to some of his children. A lawsuit was threatened. To avoid a family unpleasantness, an agreement was made, and this action was brought to carry out the terms of this engagement. Inasmuch as the family settlement cannot be confirmed, it is well to say as little about the will as practicable, in order that this court may not seem to decide any question the parties may desire to litigate in future. It is conceded that the agreement proposes a sale and distribution of the funds in an-

ticipation of the time fixed by the will. It is also conceded that there are two minors who may have an interest as contingent remaindermen, and who are made parties to represent themselves and any other contingent remainderman, yet unborn, who may become entitled to an interest in the property.

There are only two questions involved: (1) Shall the time of sale be anticipated? (2) Shall the time of distribution be anticipated?

[1] 1. The right to sell trust property is clear. That the power shall exist is sometimes desirable, sometimes necessary. This power should be exercised with the utmost caution at all times. It is not enough that the beneficiaries of the trust are willing for a sale, or even that they are anxious for it. If the law contemplated that the cestui que trust shall control the property, then the trustee is a useless incumbrance. The necessity for, or advantage of, the sale must appear. The testator owned the property and, in theory of law, at least, was allowed, by the law, to dispose of it as he pleased, unless restrained by some positive prohibition.

[2] The owner and holder of \$300,000 worth of real estate is a man whose judgment as to its continued management is entitled to be respected, and not to be disregarded, unless there is cogent reason for it. The reason must appear. The record shows no reason why Mr. Mauldin's judgment should be disregarded, not even the insufficient, but frequently assigned reason, "A good price has been offered." Even if it be unnecessary to show a reason, so far as the adults are concerned, there are minors who are parties to this proceeding. Surely a due regard to their rights requires the disclosure of some reason for the change in order that the chancellor may have a basis for the exercise of his discretion. It is said that the time of sale is deferred until after the death of the widow for her benefit, and she has the right to waive it. From a reading of the whole will it may appear that the condition is made for her protection, and a protection from herself against the demands of her children. The simple question is, Should a court sanction a settlement, demanded as the price of family peace, in which a mother is required to surrender her protection and get nothing in return? Let "the proposed settlement" be reported. It provides for a present advantage for all the adults except for mother. The contingent interests of the minors are destroyed. It must be distinctly understood it is not the mother's fault, and she has done her best to pay the "price of peace."

In *Farr v. Gilreath*, 23 S. C. 515, 516 (cited by respondents), the sole object is a postponement of the sale was to benefit the life tenant, and the sale appeared to be for her advantage. In this case Mr. Mauldin desired a postponement for 20 years, but allowed a discretion after the death of the wife. Here the postponement was not solely for the bene-

fit of the wife and it does not appear that an anticipation of the time of sale is for her benefit.

Family peace is much to be desired, but if family settlements are to be sustained for no other reason than family peace, then a premium is put on family discord. The exceptions that raise this question are sustained for the want of a better showing.

[3] 2. Can the time of distribution be anticipated? It would not be proper for the court at this time to give an authoritative construction to the will of Mr. Mauldin. It is sufficient to state that the complaint alleges that the minors are made parties to represent the contingent remaindermen. The judgment appealed from provides, not only for a sale of the property, but that the trustees shall pay out the fund now and surrender their trust in anticipation of the time provided for in the will. Until the time designated in the will shall come, no one can tell who will be entitled to the fund. The adults may consent for themselves; the minors cannot; no one can consent for them. If good title cannot be secured without a surrender of their contingent interests, then their contingent interests are valuable, and this court is bound to protect them. The power of the court to anticipate the time of sale is clear, but the power of the court to destroy the rights of contingent remaindermen is a different question. *Bofl v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627, is cited as authority. *Bofl v. Fisher* holds that land may be sold, but that the interests of the parties, vested and contingent, are transferred to the fund. In this case the proposition is to sell the property and pay out the proceeds of sale. The result is to destroy the rights of contingent remaindermen and destroy the trust. The power to destroy trusts and deliberately defeat the rights of contingent remaindermen, is not a power the courts will or ought to exercise, even if it exists in any court.

The judgment appealed from is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(100 S. C. 495)

KIRVEN v. REGISTER, Sheriff, et al.
(Supreme Court of South Carolina. April 20, 1915.)

Appeal from Common Pleas Circuit Court of Darlington County; Frank B. Gary, Judge.

"To be officially reported."

Action by J. P. Kirven against E. W. Register, sheriff, and another. From a judgment for plaintiff, defendant A. T. Baird appeals. Affirmed.

The following is the report of the probate judge: This action was brought by Kirven to recover from Register, sheriff, proceeds of eight bales of cotton which had been seized and sold by J. C. Blackwell, his predecessor in office, for \$555.12. By petition, A. T. Baird, trustee, was made party defendant. Register, sheriff, answered, stating why he had not paid over funds in his hands, that he held same as sheriff and

would pay them as the court would direct. Baird, trustee, answered, denying that Kirven had any interest in the cotton seized, or in the proceeds thereof, and claiming that he as trustee was the owner of the cotton. The testimony taken is herewith reported.

I find, as matter of fact, that: Baird, as trustee, leased certain lands to R. L. Weatherford for 1909 for 15 bales of cotton, evidenced by three liens of 5 bales each; that Weatherford with consent of Baird contracted with Charley Dudley to have Dudley make the crops on shares, one half to Weatherford and one to Dudley. The half that Dudley was to get was in the proceeding under foreclosure of lien held by the court, and therefore by me, to belong to Dudley. The half that Weatherford was to get was to go to Baird, trustee, to extent of 15 bales, subject only to such agreements or waivers in regard thereto as Baird, trustee, might have made. From this preponderance of the evidence I find that Baird waived so much of his lien for rent as was necessary to pay for the fertilizers advanced by Kirven. That the amount of fertilizers advanced by Kirven pursuant to agreement with Baird, trustee, was \$490. That the eight bales of cotton (or proceeds thereof) involved herein were from the half that Weatherford was to get.

I therefore find that Kirven should be paid from the funds in the sheriff's hands the sum of \$490, and the balance after payment of the costs of the proceedings herein should be paid to A. T. Baird, as trustee.

Geo. W. Brown, of Darlington, for appellant. W. F. Dargan, J. R. Coggeshall, E. O. Woods, and Geo. E. Dargan, all of Darlington, for respondent.

GARY, C. J. For the reasons stated in the report of the probate judge, which was confirmed in all respects by his honor the circuit judge, the judgment of the circuit court is affirmed.

HYDRICK, WATTS, and GAGE, JJ., concur. FRASER, J., disqualified.

(76 W. Va. 115)

MARTIN et al. v. CLARK et al.

(Supreme Court of Appeals of West Virginia.
April 6, 1915.)

(Syllabus by the Court.)

1. PARTITION \S 5 — PAROL PARTITION — VALIDITY — JOINT TENANTS.

A parol partition of land between joint tenants, however clearly the terms thereof may be established, is not valid and binding, unless completely executed by the taking of possession, in severalty, of the different parcels.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 13-17; Dec. Dig. \S 5.]

2. PARTITION \S 9 — PAROL PARTITION — PERFECTING BY POSSESSION — SUFFICIENCY OF EVIDENCE.

A case in which it is held the facts proven are not sufficient to establish possession in severalty.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 26-32; Dec. Dig. \S 9.]

Appeal from Circuit Court, Raleigh County.

Suit by J. W. Martin and others against L. H. Clark and others. From a decree for defendants, plaintiffs appeal. Reversed and remanded.

J. E. Summerfield and Painter & Shrewsbury, all of Beckley, and Brown, Jackson & Knight, of Charleston for appellants. McCreery & Patterson of Beckley, for appellees.

WILLIAMS, J. Eva M. Tolley and her sister, Virginia B. Tolley, were joint tenants of the surface of two tracts of land devised to them by their parents, C. E. Tolley and Paulina Tolley, who had also been joint tenants. C. E. Tolley devised the whole of the two tracts to his wife for life, with remainder to his two daughters aforesaid, as if he were the sole owner, and died in 1896. His wife later made a will, acquiescing in the will of her husband, and devised the land to the two daughters in fee, and died in 1907. One tract is denominated in the record the "Home Place," and the other the "Jeff Trump Tract." Virginia B. Tolley married L. H. Clark, and Eva M. Tolley, some years later, married J. W. Martin. We will hereafter refer to them as Mrs. Clark and Mrs. Martin. Mrs. Martin and her husband brought this suit against Mrs. Clark and her husband for partition of the two tracts of land. The defense to the bill, as to the Home Place, is that the two sisters had made parol partition of it. The court held that partition to be binding, and decreed that each party execute a deed to the other, in conjunction with her husband, releasing and conveying her interest to the other, according to the dividing line they had made. This gave to Mrs. Clark lot No. 1, containing 36.85 acres, and to Mrs. Martin lot No. 2, containing 53.25 acres; and Mrs. Martin appealed.

[1] The courts of the various states are not in harmony on this question; but, whatever may be the rule in other jurisdictions, the right of joint tenants to make a valid parol partition is now too well established, in this state, by the decisions of this court, to admit of question. *Frederick v. Frederick*, 31 W. Va. 566, 8 S. E. 295; *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. 817; and *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102. The Virginia courts were also inclined to this rule, at least in relation to coparceners, until the Legislature of that state enacted a statute requiring partition to be by deed. *Coles v. Wooding* (Va.) 2 Pat. & H. 189; *Boiling v. Teel et al.*, 76 Va. 487; and Code of Virginia (1904) § 2413. But, in order that a parol partition shall be binding, the agreement must not only be clearly and distinctly proven, but it must also have been completely executed by a taking of possession of the respective parcels, in severalty. However, possession for a time, sufficiently long to bar an action, is not required.

[2] Upon a careful review of the evidence in this case, we are clearly of opinion that an oral agreement to make partition, the location of the dividing line, and the parcel

each party was to get, are all sufficiently established. But we are equally clear that no possession in severalty has been proven. At the time of the alleged partition, to wit, April, 1908, Mrs. Clark was married, and living in the only dwelling house on the Home Place. Mrs. Martin was then single and lived with her, as one of the family, and assisted in the work about the house and garden, apparently without compensation other than her board. She married in September, 1912, and thereafter both families continued to occupy the house, each having separate apartments, and they were thus living when this suit was brought. The house is on lot No. 1, which, the answer avers, fell to Mrs. Clark after Mrs. Martin had been given her choice and had selected lot No. 2.

Both parties appear to have been anxious to divide the land. W. P. Tolley, a brother, testified that Mrs. Martin requested him to get a surveyor and have him divide the land; that he did get George F. Wilson, the county surveyor, and had him run a line dividing the land into two parcels; that his two sisters were present when it was run; and that Eva M. (now Mrs. Martin) was given her choice and took the lower end of the farm, or lot No. 2. Mrs. Martin does not deny the facts testified to by her brother, but says she simply remarked that she would take the lower end of the farm, to see if they would do her justice in making the division. It also appears that each party paid half the expenses of the surveying. Counsel insist that Mrs. Martin was perfectly contented with the division until after she married, and that her husband thereafter caused her to become dissatisfied, by inducing her to believe Mrs. Clark had gotten the more valuable portion of the land. But whether she was at first satisfied or not is not material, if possession, in severalty, of the respective parcels, was not substituted for the previous joint possession of the whole. Nothing short of that would defeat her right to partition in equity. No fence was ever built on the division line, and very little improvement has since been made on lot No. 1, and none on lot No. 2, except the rebuilding of an outside line fence between it and Ash Mankins, for which Mrs. Martin paid one-half the cost of so much as extended along lot No. 2, and Mrs. Clark one-half of so much as bounded on lot No. 1. Both owned cattle individually, and continued to permit them to graze over the pasture lands, on both sides of the line, as they had done before; no attempt being made to confine them on either parcel of land. Mr. Clark raised two crops of corn on parts of lot No. 2, free of rent. No separate accounts appear to have been kept between the parties, respecting the proceeds derived from the land. Mrs. Martin had the hay cut from lot No. 2, in 1912 and 1913, for the reason, as she

says, she was entitled to some of the crops from the farm, and had not been getting any. Mr. Richard Snuffer testified that he cut the grass those years on lot No. 2, at Mrs. Martin's request; that for the year 1912 he received a part of the crop, and for the year 1913 Mr. Martin paid him the money; and that, in 1913, he cut the grass on both sides of the line, which, he says, was shown him by Mr. Clark as the division line, and that he did it at the request of Mr. Martin. Mr. Clark testified that he cut the grass on lot No. 2, for every year after the line was run, until 1912, except one, when the meadow overflowed. It does not appear that he did so pursuant to any agreement with his sister-in-law. Presumably he cut it and the cattle consumed it, just as the custom of the parties was, before the attempted partition. He also admitted that he pastured his cattle on the meadows, in the fall, after the grass was cut.

So far as the record disclosed, there was little change, if any, in the character of the possession after the running of the line. The parties appear to have continued to use the whole of the land in common, and actually occupied the same dwelling house, without either paying rent to the other. These facts are certainly not sufficient to prove possession in severalty.

Mr. Clark testified that, after the division line was run, he built fences on lot No. 1, shedded the barn on three sides, planted an orchard, and put palings around the garden, the value of which improvements he estimates at \$500. But he admits that part of the lumber used in making them came from other lands, jointly owned by the two sisters. The evidence is conflicting as to the relative value of the two parcels. W. P. Tolley thinks they are about equal in value. But plaintiff and her nephew, Luther Cole, both think lot No. 1 is worth \$2,000 more than lot No. 2. Richard Snuffer values lot No. 1 \$1,000 more than lot No. 2; and J. E. Callaway, who lives near the land and has known it for 32 years, says it was worth \$500 more, in 1908, when the line was run. But the comparative value of the two parcels is not material to a determination of whether a parol partition was actually completed or not, and we simply refer to this evidence, as tending to show plaintiff's good faith in refusing to abide by the parol agreement.

Lot No. 1 also appears to lie between lot No. 2 and the public road, making an easement over lot No. 1 necessary to the enjoyment of lot No. 2. No provision is shown to have been made, either by the parties themselves in their oral agreement, or by the court's decree appealed from, for such right of way. It would seem to be indispensable.

Further complaint is made of the decree, because it failed to make partition of the Trump Tract. No objection was raised by

the answer to a partition of that tract. The decree only dealt with the Home Place, and disposed of the issues raised by the answer. It did not dismiss plaintiff's bill, and hence the suit is still pending for a partition of the Trump Tract. The failure to make partition of it is not error, for which the decree should be reversed. It is a matter yet to be acted on by the lower court.

For the reasons herein stated, the decree is reversed, and the cause remanded.

(76 W. Va. 144)

CLARK v. LEE. (No. 2302.)

(Supreme Court of Appeals of West Virginia.
April 6, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §113 — DECISIONS REVIEWABLE — ORDER SETTING ASIDE DEFAULT.

An order setting aside a judgment by default, entered upon an inquiry of damages, is a subject of review by writ of error, under clause 9, § 1, c. 135, Code, serial sec. 4981.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758-785; Dec. Dig. § 113.]

2. APPEAL AND ERROR §346—TIME FOR APPEAL—CROSS-ASSIGNMENT OF ERROR.

After the expiration of the period of limitation of appeals, such order cannot be reviewed, and a cross-assignment of error therein made in a brief filed on a writ of error to a later judgment in the case, obtained after the expiration of the limitation of the right of appeal from such order, is unavailing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1891, 1894; Dec. Dig. § 346.]

3. DAMAGES §228 — EXCESSIVE VERDICT — RIGHT TO CORRECT.

Under no circumstances can the trial court reduce the amount of a general verdict. If it is excessive, and the amount of the excess is ascertainable from data appearing in the evidence, an opportunity should be allowed the party having the verdict to remit such excess, and, on his declination to do so, the verdict should be set aside.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579; Dec. Dig. § 228.]

Error to Circuit Court, Fayette County.

Action by J. R. Clark against E. B. Lee. Judgment for plaintiff, and defendant brings error. Reversed, verdict restored, and remanded.

C. R. Summersfield, of Fayetteville, for plaintiff in error. Osenton & Horan, of Fayetteville, for defendant in error.

POFFENBARGER, J. Claiming a balance of \$440.09 due him for work and labor, and \$50 for money expended by him in and about the defense of a prosecution in a federal court, Clark brought his action in assumpsit against the defendant, Lee, in August, 1908, making the summons returnable to September rules. With his declaration he filed the statutory affidavit. A default judgment was rendered in his favor on the 12th day of February, 1909. On the 2d day of March,

1909, within the same term, Lee appeared and moved the court to set aside the judgment on the ground of surprise, and his motion was sustained. The plaintiff excepted to this action of the court, but did not obtain a writ of error. On the issues raised by the defendant's pleas of nonassumpsit and payment, subsequently filed, a trial was had on May 29, 1909, and resulted in a verdict of \$446.64 for the plaintiff. A motion to set aside this verdict was overruled, but the court reduced it to the sum of \$239.75, and rendered judgment for that amount. A writ of error to this judgment was obtained, and the plaintiff, in his brief filed in this court, cross-assigns error in the action of the court in setting aside the default judgment.

[1, 2] A period of more than three years intervened between the date of the jury trial and that of the rendition of the last judgment. It is important to inquire, therefore, whether the lapse of time has barred the right of the plaintiff to complain of the abrogation of his default judgment, which occurred more than three years before the allowance of the writ of error; the limitation on the writ of error being then two years. If the order setting it aside was an appealable one, and plaintiff's failure to appeal from it within the period of limitation bars right of complaint against it, the cross-assignment of error has come too late, and avails nothing; for the right of cross-assignment given by our rule No. 10 is necessarily limited to matters brought into this court, or within the power of the complainant to bring them in. The rule cannot enlarge the statute of limitations. Courts can neither enlarge their jurisdiction nor take away the rights of litigants by any rules they may adopt.

Without inquiry as to the jurisdiction, we entertained a writ of error to an order setting aside a default judgment, in *Citizens' Trust & Guarantee Co. v. Young*, 83 S. E. 1007. Strictly construed, clause 9 of section 1, c. 135, Code, serial sec. 4981, authorizing the allowance of a writ of error or appeal in any civil case where there is an order granting a new trial or rehearing, might not give a right of review in such a case as this. In the usual sense of the term, there has been no trial. The defendant did not appear, there was no issue, and the proceeding was rather ex parte in character. But the court passed upon the plaintiff's evidence and rendered a judgment, wherefore, in the limited and restricted sense of the term, there was a trial. At any rate, there was judicial action resulting in a judgment, and the motion to set it aside was at least an application to have the case reheard. The order complained of destroyed a judgment duly and formally entered up. Being remedial, the statute is to be liberally, not strictly, construed, and the case is within its spirit, if not within its letter.

Determination of the susceptibility of the order to review by the appellate court applies the statute of limitation, unless reviewable orders in law actions are in some way distinguishable from appealable decrees in chancery causes. No ground upon which such a distinction can be made is perceived. In both cases the statute gives the right of review, and then limits the time within which it may be had. An appealable decree, though interlocutory, cannot be reviewed after expiration of the period of limitation. *Morrison v. Leach*, 84 S. E. 177; *Barbour, Stedman & Herod v. Tompkins*, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. (N. S.) 715; *Shumate's Ex'rs v. Crockett*, 43 W. Va. 491, 27 S. E. 240; *Core v. Strickler*, 24 W. Va. 689; *Buster v. Holland*, 27 W. Va. 510.

[3] Reduction of the verdict by the court and rendition of judgment on it as reduced were not in accordance with the rule. Under no circumstances has the court any power to alter the verdict. If it is not sustained by the evidence, or is plainly and clearly excessive, it should be set aside in the former case, and in the latter also, unless the amount of the excess is fairly and reasonably ascertainable from data and the party having the verdict enters a remittitur of the excess. If the excess is not accurately ascertainable, on account of the state of the evidence, or the nature of the case in issue, no part of the erroneous verdict can be saved by a remittitur, and it must be set aside. *Hall v. Philadelphia Co.*, 81 S. E. 727; *Unfreid v. Railroad Co.*, 34 W. Va. 280, 12 S. E. 512; *Vinal v. Core*, 18 W. Va. 1. When, however, there is data in the evidence from which the court can safely determine the amount of the excess, it should give an opportunity to remit such amount, and, if the remittitur is not entered, then set aside the verdict. In no case can the court reduce the verdict and render judgment for what remains after elimination of the excess. *Rodgers v. Bailey*, 68 W. Va. 186, 69 S. E. 698; *Gibson v. Governor*, 11 Leigh (Va.) 600; *Buena Vista v. McCandlish*, 92 Va. 297, 23 S. E. 781; *Fry v. Stowers*, 98 Va. 417, 36 S. E. 482.

The bill of particulars charges 22 months of work at \$45 per month, and admits payments, without itemization thereof, amounting to \$545.91. The defendant's specifications of payment are 55 in number, ranging from \$1 to \$227.30. Some of these are admitted, and others are not. Those admitted amount to about \$450. As to many others, the plaintiff disclaims knowledge, and says he does not think he received them. Lee says his own statement rendered at the termination of the service, and showing a considerable balance due from him, was erroneous. He claims credits alleged to have been found just before the trial. As his testimony is founded largely upon book entries and memoranda made during the course of employ-

ment, it has some support in corroborative facts and circumstances, and seems to be entitled to prevail over that of the plaintiff, in those instances in which he does not deny having received sums of money charged to him, and only says he does not know, or does not remember, whether he did or not. But, if so, a question we do not decide, these items can be more readily and safely ascertained in the court below, with the assistance of counsel, than here.

The judgment will be reversed, the verdict restored, and the case remanded for action on the verdict in conformity with the principles herein stated.

LYNCH, J., absent.

(76 W. Va. 120)

CENTRAL DISTRICT & PRINTING TELEGRAPH CO. v. PARKERSBURG & O. V. E. RY. CO. et al.

(Supreme Court of Appeals of West Virginia. April 6, 1915.)

(Syllabus by the Court.)

1. JUDGMENT ~~497~~—COLLATERAL ATTACK—MATTERS AFFECTING JURISDICTION — EXTRINSIC EVIDENCE.

Declarations by a domestic court of general jurisdiction respecting matters affecting its jurisdiction cannot be overthrown by extrinsic evidence, except for fraud or collusion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. ~~497~~.]

2. JUDGMENT ~~497~~—RECITALS — CONCLUSIVENESS.

In the absence from the record of anything contradictory thereto, the recitals in a decree that all the defendants had been duly served with process and had failed to appear is conclusive.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. ~~497~~.]

3. JUDGMENT ~~525~~—RECITALS IN DECREE—SERVICE OF PROCESS—CONTRADICTION.

A copy of the process found in the record, with no return thereon by the sheriff, but with a memorandum by the clerk stating that there is no return on said process, does not contradict the recitals in a decree as to service of process.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 568, 968, 982½; Dec. Dig. ~~525~~.]

4. JUDGMENT ~~525~~—RECITALS IN DECREE—CONCLUSIVENESS—SERVICE OF PROCESS.

Where a decree recites that the cause was heard upon the original and amended bills taken for confessed, after due service of process thereon on all the defendants, and the rule docket fails to show service of process upon some of them, the decree is a judicial ascertainment that all were served, and will be considered an informal correction of the rules.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 568, 968, 982½; Dec. Dig. ~~525~~.]

5. MORTGAGES ~~145~~ — DEED OF TRUST — CREATION OF LIEN—ISSUANCE OF BONDS.

Where the trustee in a deed of trust made by a railway company to secure a bond issue is made party defendant and served with process, it is not error for the commissioner to whom the cause has been referred to fail to

report such deed of trust as a lien, in the absence of proof showing issue and sale of bonds.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 290, 291; Dec. Dig. § 145.]

6. ACTION § 70 — ABANDONMENT — WHAT CONSTITUTES.

The pendency of a suit on the court's docket for three years without any order or proceeding taken during that time does not prove intention to abandon the suit.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 752-755; Dec. Dig. § 70.]

7. COURTS § 493 — JURISDICTION — STATE AND FEDERAL COURTS.

Where a state court has acquired jurisdiction of the parties by issuance and service of summons, in a suit brought to enforce liens against specific property within its jurisdiction, it cannot be ousted of its jurisdiction of the cause by the bringing of a subsequent suit in a federal court by the holder of bonds, secured by trust deed on the same property, for the purpose of enforcing the lien of such trust deed.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1346-1352; Dec. Dig. § 493.]

Appeal from Circuit Court, Tyler County.

Suit by the Central District & Printing Telegraph Company against the Parkersburg & Ohio Valley Electric Railway Company and others. From the decree, the defendant named appeals. Affirmed.

V. B. Archer, of Parkersburg, and McCoy & Swiger, of Sistersville, for appellant. S. Bruce Hall and M. H. Willis, both of New Martinsville, for appellee.

WILLIAMS, J. This suit was brought to enforce the lien of a judgment against the property of the Parkersburg & Ohio Valley Electric Railway Company. The original bill made the judgment debtor and Jack Hamilton parties defendant, and was filed at November rules, 1909. At January rules, 1910, plaintiff filed an amended bill bringing in two additional parties, to wit, the Union Trust & Deposit Company, a corporation, and John Schrader. The cause was later referred to a master commissioner, who made a report of the liens. There were no exceptions to the report, and on the 13th day of September, 1913, a decree was entered confirming it, fixing the priorities of the liens and decreeing a sale of the property which consisted of a line of electric railway and rights of way, about five miles in length in the county of Tyler, extending from Sistersville to the town of Friendly. There had been no appearance by any of the defendants. On the 15th day of November, 1913, the Parkersburg & Ohio Valley Electric Railway Company appeared before the judge of the circuit court of Tyler county in vacation, as it had a right to do under section 4, c. 134 (sec. 4978), of the Code, and moved the judge to set aside and annul the decree of sale and two other interlocutory decrees entered, respectively, on June 24, 1910, and June 27, 1913, on the ground, principally, that it had not been served with process either upon the

original or the amended bill, and for the additional reason that Henry M. Jackson, the purchaser of a large amount of mortgage bonds which said railway company had issued, had brought a suit against it and others, in May, 1911, in the United States District Court for the Northern District of West Virginia, which suit was pending at the time the decree appealed from was rendered. Plaintiff appeared and resisted the motion. Both parties filed affidavits upon the question of service of process. The judge continued the motion until the 22d of November, 1913, when he heard arguments of counsel upon it in vacation, and overruled it. The railway company excepted to his ruling.

[1, 2] The first order made in the cause, referring it to a commissioner, was made on the 24th of June, 1910, and contains this recital, viz.:

"This cause came on to be heard upon the bill of complaint and the amended and supplemental bill filed therein and exhibits filed therewith; upon the summons returned duly executed on all the defendants. The defendants failing to appear, demur, or plead, the bill is taken for confessed by all the defendants and submitted to the court."

Commissioner K. S. Boreman, to whom the case was referred, retired from office before making report, and, on the 27th of June, 1913, the court made another order referring it to O. C. Carter, another commissioner. That order recites that the cause was heard upon the bill and supplemental bill regularly matured at rules, and taken for confessed and set for hearing. The final decree likewise recites that the cause was heard upon the "original bill and amended bill filed in this cause, and process duly served thereon upon all of the defendants, except Jack Hamilton; upon bills regularly taken for confessed and cause set for hearing"; and upon the order of reference and commissioner's report. The foregoing recitals are the solemn declarations of a domestic court of general jurisdiction upon a matter pertaining to its jurisdiction, and constitute a part of the record which is generally accepted as a verity. Unless contradicted by some other portion of the record itself, the recitals are final and conclusive on the defendant. For reasons of public policy, the law will not permit the record to be overthrown by extrinsic evidence, except for fraud or collusion. 1 Black on Judgments, § 273; *White v. White*, 66 W. Va. 82, 66 S. E. 2, 24 L. R. A. (N. S.) 1279, 135 Am. St. Rep. 1013; *Jones v. Crim*, 66 W. Va. 301, 66 S. E. 367; and *Darnell v. Flynn*, 69 W. Va. 146, 71 S. E. 16.

"A recital in a decree that all the defendants had been duly summoned is conclusive on appeal in the absence from the record of anything to the contrary." *Moore v. Green*, 90 Va. 181, 17 S. E. 872; *Ferguson's Adm'r v. Teel et al.*, 82 Va. 690; and *Hill v. Woodward*, 78 Va. 765.

[3] But counsel for the railway company insist that the record does contain evidence

of the fact that process was not served upon it. We do not think so. There is no copy of summons in the record, either upon the original or the amended bill, with return thereon showing service upon the aforesaid railway company; and the only record evidence of service upon it is the recital of the fact in the decrees, and the rules taken by the clerk at the November and the December rules, 1909. The record shows the following memoranda made by the clerk, viz.:

"November rules, 1909. Summons returned executed as to Parkersburg & Ohio Valley Electric Railway Company, bill filed and decree nisi as to it."

And:

"December rules, 1909. Bill taken for confessed, and cause set for hearing as to Parkersburg & Ohio Valley Electric Railway Company."

These rules were evidently taken on the original bill, because the amended bill was not filed until January rules, 1910. Counsel for appellant insist, however, because a copy of the summons to answer the original bill appears in the record, and shows that it was issued on the 14th of September, 1909, returnable to October rules, and contains no return by the officer, showing whether it was or was not served, and because no order was made by the clerk at the October rules to which the summons was returnable, and because there is a note appended to the summons, not made by the clerk who issued it, but by his successor in office, who certified the record to this court, stating, "There is no return by the sheriff upon said summons," that therefore the record itself shows no process upon the original bill was served upon said railway company. But this is a non sequitur. Those facts do not necessarily contradict the court's declaration in its solemn decree that it was served and failed to appear. If they can be made to harmonize with the decree, on any rational and consistent theory, they certainly ought not to be taken as contradicting it. It was necessary, of course, for the summons to have been served before October rules, because it was returnable at that time. But the absence of any memorandum at October rules proves nothing, except the failure of plaintiff to file its bill then. Rules are designed to hasten the production of an issue between the parties, in the vacation of the court, by requiring the party in fault to declare, plead, rejoin, or answer, as the case may be. But no rule can be taken against a defendant until plaintiff has caused him to be served with process, and has filed his declaration or bill. 4 Min. Inst. 684, and *Waugh v. Carter*, 2 Munf. (16 Va.) 333. A rule could not have been taken before November rules, because the bill was not filed until then. Hence the absence of any rule upon the railway company at October rules is no evidence that it was not served before that time. The November rules do not show when it was served, and it

was not necessary for it to do so. The absence of a copy of summons, containing the officer's return, and the presence of one containing no return, do not disprove service, although the effect of a copy showing insufficient service might be otherwise. *Jones v. Crim*, 66 W. Va. 301, 66 S. E. 367. The copy of the summons, showing service, may have been lost out of the record. We simply suggest this as a rational and possible explanation of its absence from the record; for it cannot be presumed the court found falsely. The presence of a copy of summons with no return on it proves no more or less than if no copy appeared in the record at all. Indeed, we fail to see how an undorsed summons is properly a part of the record.

[4] Plaintiff filed its amended bill at January rules, 1910, for the purpose of making the Union Trust & Deposit Company, a corporation, and John Schrader, additional parties; and, while the rules taken thereon do not show service on any of the defendants, except John Schrader, still they are erroneous in this respect, as disclosed by other parts of the record. Process issued on the 8th of October, 1909, to answer the amended bill, one addressed to the sheriff of Wood county, and another to the sheriff of Hancock county. They both appear in the record, the former returned by the sheriff of Wood county, showing service upon the Union Trust & Deposit Company on October 13th, and the latter showing substituted service on John Schrader by the sheriff of Hancock county on the 20th of October. This return was defective, but was later amended, by permission of court. Notwithstanding service upon both these parties thus appears to have been made, the rules for January and February, 1910, mention service upon Schrader only. It does not appear by any other part of the record, except the decrees, whether process upon the amended bill was served upon the railway company or not. But the decrees are just as conclusive to show service upon it of process upon the amended bill as they are to show service of process upon it on the original bill. The final decree recites service was had, as to both the original and amended bills, upon all the defendants, except Jack Hamilton. This must be taken as supplying the omission and correcting the error in the rules. The court has such authority by virtue of statute (section 60, c. 125, [sec. 4814], Code 1913). *Riggs v. Lockwood*, 12 W. Va. 133; *Baylor v. B. & O. R. R. Co.*, 9 W. Va. 270; *Herring v. Bender*, 48 W. Va. 498, 37 S. E. 568; and *Sou. Express Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17. Defendant is not prejudiced because the correction was not expressly and formally made. The omission of the clerk to note on his rule docket service of process on the Union Trust & Deposit Company and Parkersburg & Ohio Valley Electric Railway Company does not contradict the court's decree finding that

they were served. Every reasonable presumption must be indulged in favor of the correctness of the decree. The copy of summons to answer the amended bill issued on the 30th of December, 1909, returnable to January rules, 1910, and addressed to the sheriff of Wood county, appearing in the record, without any return whatever upon it, proves nothing. The clerk's memorandum, stating there was no return on it, adds nothing to its value as contradicting the decree. There being no record evidence showing the court's decree to be erroneous as to service of process, we are compelled to hold it a verity, and unassailable by extraneous evidence, in the absence of any allegation that it was procured by collusion or fraud upon the court. It is therefore unnecessary to consider the affidavits taken in support of appellant's motion to set aside the final decree on the ground that it was not served with original process. The decree cannot be impeached by extraneous evidence, except for fraud or collusion, and that is not charged.

[5] It was not error to decree plaintiff's judgment to be the first lien upon the railway company's property. True, the trust deeds to secure bond issues were on record at the time plaintiff recovered its judgment, but the trust deeds were not alone sufficient to create liens. There had to be an issue and sale of bonds thereunder; and there was no evidence before the commissioner that any bonds had been issued. Moreover, the assignment, if it were error, would not prejudice appellant.

[6] The fact that the suit was pending from June, 1910, until June, 1913, without any order being made or proceeding taken in the cause, does not show abandonment. Abandonment depends upon intention; and failure to proceed in a pending cause for three years does not prove intention to abandon. *Garrett v. Oil Co.*, 66 W. Va. 587, 66 S. E. 741; *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005, 30 L. R. A. (N. S.) 176. Section 12, c. 114, serial section 4615, Code 1913, continues a cause that is upon the docket of the court without the entry of an order of continuance.

"A failure for 14 years to make any entry of a cause at all or to make any entry but a continuance is no discontinuance of the cause, if the court has made no order dismissing the cause for want of prosecution, as provided by section 8 of chapter 127 [sec. 4839] of the Code." *Buster v. Holland*, 27 W. Va. 510.

See, also, *Thomasson v. Simmons*, 57 W. Va. 578, 50 S. E. 740, and *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

[7] The suit brought by Henry M. Jackson against appellant and others in the United States District Court for the Northern District of West Virginia did not oust the state court of jurisdiction. The suit in the state court had been pending for nearly two years when that suit was brought; and the rule, in cases of concurrent jurisdiction between the

federal and state courts, is that the court first acquiring jurisdiction over the subject-matter of the suit and the parties by issuance and service of process is entitled to retain control of it until the end of litigation. Speaking on this subject, in *Covell v. Heyman*, 111 U. S. at page 182, 4 Sup. Ct. at page 358 (28 L. Ed. 390), Mr. Justice Matthews says:

"These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty."

"The rule is * * * well settled, * * * where two suits are pending between the same parties—the one in the state and the other in the federal court—the object of both suits being to secure the same relief, where the relief sought is the enforcement of a lien against specific property, to administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where in the progress of the litigation the court may be compelled to assume the possession and control of specific personal or real property, the court which first acquires jurisdiction by the issue and service of process must be allowed to proceed with the hearing of the case to final judgment or decree without interference on the part of the other court where in the suit is pending." *Hughes v. Green*, 84 Fed. at page 535, 28 C. C. A. at page 539.

"This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons." *Farmers' Loan, etc., Co. v. Lake Street Rd. Co.*, 177 U. S. at page 61, 20 Sup. Ct. at page 568 (44 L. Ed. 667).

The rule in cases like the present one is too well settled to admit of any doubt, and no further citation of authorities is necessary. Mr. Jackson brought his suit in the federal court, as a holder of mortgage bonds, to subject the railway company's property to the lien thereof. This suit had already been brought in the state court for the purpose of enforcing plaintiff's judgment lien against the same property in the hands of the same defendant; and the two suits were, therefore, for the same general purpose, that is, for the enforcement of liens. The Union Trust & Deposit Company, trustee in the two deeds of trust to secure the railway company's bonds, had been made a party to the suit in the state court, and it was its duty to protect the interest of the cestui que trust, who also had a right to come into the suit in the state court, if he so desired. He could not, by the bringing of an independent suit in the federal court for the enforcement of his lien, oust the state court of jurisdiction.

Finding no error, the decree will be affirmed.

LYNCH, J., absent.

(78 W. Va. 129)

WILLIAMS v. CARR et al. (No. 2758.)
(Supreme Court of Appeals of West Virginia.
April 6, 1915.)

(Syllabus by the Court.)

1. JUDGMENT \S 590—RES JUDICATA—PRIOR DECREE—SUBROGATION.

A pendente lite purchaser, who is also the purchaser of the same property at a judicial sale thereof subsequently decreed in the cause, is not concluded or estopped by a decree on his petition filed therein denying him credit on his notes given the special commissioner, for deferred payments of purchase money, for reasons alleged, from other relief against said notes based on matters subsequently occurring, and discharging his vendor from a large portion of the debt for which his land was decreed to be sold, and to whose rights petitioner is entitled to be subrogated, on the terms of his original purchase of the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1035, 1063, 1064, 1102-1106; Dec. Dig. \S 590.]

2. PRINCIPAL AND SURETY \S 167 — DISCHARGE OF SURETIES — EFFECT — LIABILITY OF SURETY NOT DISCHARGED—INJUNCTION.

Where two only of several sureties on a bond of indemnity appeal from a joint decree against all in favor of the obligee therein, and on grounds of defenses peculiar to them, and growing out of the conduct of the obligee towards the principal in the bond, such decree is reversed, and the bill dismissed as to those appealing, and whereby the surety not appealing is deprived of right of contribution from his co-sureties, equity at the suit of the surety remaining bound by the obligation and the decree thereon, or of his assignee, will enjoin the obligee from collecting from him a greater amount than his just and equitable proportion of the debt or obligation so decreed against him and his co-sureties.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. \S 167.]

Appeal from Circuit Court, Harrison County.

Suit by Mathias T. Williams against William H. Carr and others. From a decree for defendants, plaintiff appeals. Reversed and remanded.

Ernest D. Lewis, of Clarksburg, for appellant. A. Judson Findley and Smith & Jackson, all of Clarksburg, for appellees.

MILLER, J. Plaintiff and appellant, a pendente lite purchaser, and also a purchaser at the judicial sale of the same land subsequently decreed in the suit of Carr against Rezin C. Davis and others, seeks cancellation of his two notes of four hundred and fifty dollars each, executed to the special commissioner, and to have said notes surrendered, and the land conveyed to him discharged of all further claims thereon on account of the decree made in exoneration of Carr, surety on the bail bond of one Sutton, and to whom Sutton, as principal, with Davis and J. M. and H. G. Myers, as sureties, bound themselves by an indemnifying bond.

On Sutton's failure to appear his default was recorded, and the State, on September 12, 1907, had judgment against Carr on his

recognizance for twenty five hundred dollars, and execution awarded thereon. The bill alleges, as the fact is, that prior to said judgment and execution, but after Sutton's default, Carr, on January 19, 1907, claiming to be a creditor of Davis, by reason of said indemnity bond, instituted suit against him and his son Edward R. Davis, to set aside as voluntary and fraudulent, a certain deed alleged to have been made by father to son, but not recorded, and to require defendants, out of the property conveyed, to contribute the full share of Rezin C. Davis, in satisfaction of the penalty in said bail bond, in exoneration of said Carr, and that said deed be held void as to so much of said penalty, and for general relief.

The bill further alleges that pending this suit, and after his pendens recorded by Carr, plaintiff purchased the property from Davis, at the price of thirty five hundred dollars, paid and agreed to be paid as follows: to Rezin C. Davis, cash \$100.00; to Guy C. Davis, a vendor's lien on the property, \$1,326.00; to Strecker Brothers Co., \$1,000.00, secured by a deed of trust on the property; to F. M. Davisson, constable, \$300.00, the amount of a judgment and execution, constituting also a lien on the property, and for the balance executed to Rezin C. Davis his note due April 1, 1908, for \$756.60, subject to the following condition, namely, that if said property should become liable to the payment of said bond executed by said Rezin C. Davis and others to said Carr, or to the payment of any part thereof, that then he should apply the amount of said note, or so much thereof as should be necessary to pay off and liquidate such liability or claim, and all the costs and liabilities incurred by him in defending his title to said property.

The bill further alleges that in another suit brought by Carr against Davis and his son Charles H. Davis, to set aside, on the same ground, another deed from father to son, and resulting in a like decree and sale of the property conveyed, Carr had realized the sum of \$1,068.00, then remaining in the hands of the special commissioner, and that this sum together with the \$450.00 cash payment made by plaintiff to said special commissioner, making in all the sum of \$1,518.00, realized by Carr, was more than Davis' just proportion of the decree against the sureties in said indemnity bond; and that as the money realized from the sale of the property conveyed by Davis to his son Charles H., without consideration, was first liable, and plaintiff had already paid to said commissioner enough to make up Davis' pro rata share of said liability, and had paid incidental expenses in defending his title, beyond the amount of his note given Davis for balance of purchase money, he was entitled, under the terms of his contract, to the surrender of his two notes given said special commis-

sioner, and to a deed from him for the property; and for the further reason alleged and about to be stated, that Carr by his conduct had released J. M. and H. G. Myers, Davis' co-sureties, and had thereby also released him pro tanto from liability on said bond and the decrees thereon.

And as further evidencing the release of said Myerses the bill further alleges, that upon appeal by them from the final decree in another cause of Carr against Sutton, Davis, and them, of October 28, 1909, adjudging said Sutton and wife insolvent, and Davis and the said Myerses liable to pay the State the amount of the judgment aforesaid against Carr, in exoneration of said Carr, and decreeing also that they pay the same to the State for that purpose, this court, Carr v. Sutton, 70 W. Va. 417, 74 S. E. 239, reversed that decree, and because of Carr's neglect to perform the obligation of his own bond, as shown by the record, thereby adjudged that appellants were also entitled to be discharged from their bond, and further decreeing that the decree appealed from be reversed as to said appellants, and that as to them the bill be dismissed.

Wherefore, plaintiff further alleged, that notwithstanding said decree stood unreversed as to Davis, who did not join in said appeal, and who is now insolvent, and notwithstanding the two subsequent decrees against him in the other suits, Davis was thereby discharged pro rata from all liability to Carr on said indemnity bond, and the decrees thereon as aforesaid; and that as Davis' one third liability thereon had already been discharged by the sales and purchases of his land aforesaid, plaintiff was entitled to a decree surrendering his two notes and to a deed for the land from said special commissioner.

To this bill Carr pleaded former adjudications, binding appellant and Davis, namely, the decree aforesaid, reversed here upon the appeal of the Myerses, the decree in the suit of Carr against Davis, in which appellant purchased a part of the Davis property, and lastly, the decree upon the petition of appellant filed in said cause, pronounced before said decree of reversal, and dismissing the Myerses from the suit, denying appellant subrogation to the lien of Guy C. Davis paid by him as aforesaid, and as a credit on his said notes.

[1] In our opinion the decree on appellant's said petition, not appealed from, was not an adjudication on the merits of the bill now before us. That petition presented only the claim of appellant to be subrogated to the rights of Guy C. Davis, a very different question from the one presented by his present bill. The question now is whether the decree of this court reversing the decree below, and absolving the Myerses, Davis' co-sureties, pronounced subsequently to the several decrees pleaded and relied on, is conclusive of plaintiff's rights in the premises.

After a careful consideration of the facts, and the authorities on the subject, we have reached the conclusion, that Davis is not estopped by either or all of said former decrees. If Davis was not concluded thereby, appellant cannot be, for he stands in the former's shoes. The record shows that appellant paid full value for the property purchased from Davis, and if, as he alleges, and the fact may be, he has by his cash payment to the special commissioner, and costs and expenses incurred in defending his title, paid off his note given Davis for the balance of purchase money, any surplus arising from the sale by the special commissioner would be going to Davis, and as appellant would be entitled to that money, by right of subrogation, he would also be entitled to a surrender and cancellation of his notes, and to a deed from the special commissioner, as prayed for in his bill.

[2] But has Davis been discharged pro rata, or pro tanto, by the decree absolving the Myerses and dismissing them out of the suit? We are of opinion that he has been. While Davis was informed by the record of the defenses interposed by the Myerses in that cause, the decree below had denied them relief thereon, and appellant did not know, at the time of the decrees pleaded in estoppel, that Carr by his conduct, as decided in Carr v. Sutton, supra, had in fact and in law discharged the Myerses, and thereby deprived Davis of his right of contribution against them. In absolving the Myerses in the case just cited, we applied the general equity rules applicable as between creditor and sureties, depending on no statute, but prevailing at the common law. Many decisions, particularly the older decisions of the courts, seem to hold that any act of the creditor absolving one or more of several sureties operates a discharge of all, and our statute, chapter 101, Code 1913, enacted for the relief of sureties, and particularly section 2, serial section 4394, thereof, seems to go to that extent, at least in cases falling strictly within its provisions.

In the case at bar, however, we take cognizance of the fact that Davis did not appeal, and that at least two decrees stand against him in the several suits above referred to. In view of these facts appellant's counsel do not contend that Davis has been wholly absolved from liability to Carr, but pro tanto only and to the extent that he has been injured by the conduct of Carr in his right of contribution against his co-sureties absolving them.

That Davis has been absolved to the extent of two thirds of the decree against him and his co-sureties, we find well established by the following authorities cited and relied on by counsel, namely, Hewitt v. Adams (Va.) 1 Pat. & H. 34; Booth v. Kinsey, 8 Grat. (49 Va.) 560; Wright v. Stockton, 5 Leigh (32 Va.) 153; Brandt on Suretyship & Guaranty (3d Ed.) section 439; 1 Story Eq.

Jur. (13th Ed.) sections 325, 495 to 498a, inclusive; Waggener v. Dyer, 11 Leigh (38 Va.) 384-391; 27 Am. & Eng. Ency. Law, 527.

But it is strenuously insisted on behalf of Carr that because of the several decrees against Davis and his co-sureties he is concluded by those adjudications. But the law seems to be otherwise. Boughner v. Hall, 24 W. Va. 249, 250; Wayland v. Tucker, 4 Grat. (45 Va.) 267, 50 Am. Dec. 76.

And it has been held also by high authority that a surety against whom judgment has been taken will be discharged, at least pro tanto, by the successful appeal of his co-surety. Myers v. Farmer, 52 Iowa, 20, 2 N. W. 572; 27 Am. & Eng. Ency. Law, 527. And Boughner v. Hall, supra, holds, in effect, that equity will in cases like this interfere by injunction to stay the collection by the creditor from the surety of a greater amount than he is equitably bound for, upon the principles herein enunciated.

As appellant obtained good title to the property purchased by him from the defendant Davis, subject to the suit of Carr against him, and upon satisfying the balance justly due Carr from Davis he will be entitled under the decree of sale and purchase by him in said cause to the surrender of his notes given for the deferred payments of purchase money, and to a deed from the special commissioner for the property, we reverse the decree appealed from, and remand the cause for adjustment and settlement of the accounts between the parties in accordance herewith, and for further proceedings to be had herein in accordance herewith, and further according to rules and principles governing courts of equity.

LYNCH, J., absent.

(76 W. Va. 148)

DICKINSON, Sheriff, v. NEW RIVER & POCAHONTAS CONSOL. COAL CO.
(No. 2582.)

(Supreme Court of Appeals of West Virginia.
April 6, 1915.)

(Syllabus by the Court.)

1. RAILROADS ⚡369 — OPERATION—CHILDREN OF COAL MINE EMPLOYÉS—DUTY OF COMPANY.

Ordinarily a coal mining corporation is under no duty, in the handling of its coal cars and motors on its private railway between the mouth of the mine and its yards or tipple, to keep a lookout for children of employés on such track, even though they reside in the company's houses on its premises and near the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259-1262; Dec. Dig. ⚡369.]

2. RAILROADS ⚡355—OPERATION—CHILDREN OF COAL MINE EMPLOYÉS—USE OF TRACKS—LICENSEES.

If the use of such track is not expressly or impliedly made incidental to the use of the house or measurably appurtenant thereto, chil-

dren making use of the track, with knowledge of the company, are bare licensees.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227, 1235; Dec. Dig. ⚡335.]

Miller, J., dissenting.

Error to Circuit Court, Fayette County.

Action by R. H. Dickinson, sheriff, etc., against the New River & Pocahontas Consolidated Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Osenton & Horan, of Fayetteville, for plaintiff in error. Dillon & Nuckolls, of Fayetteville, for defendant in error.

POFFENBARGER, J. Regarding the demurrer to the declaration in this action as having been well taken, the court sustained it and entered a judgment of dismissal, to which the plaintiff obtained a writ of error.

Plaintiff's decedent, a child about 18 months old, was run over and killed on the defendant's railway track leading from the mouth of the mine to the coal yard, by a train of empty cars pushed by an electric motor. Many of the numerous employés of the company, foremen, mechanics, miners, motormen, brakemen, and other laborers resided in houses provided by the defendant on its property and situated near the mining railway track. In each of the four counts of the declaration these facts are set forth in connection with the following allegation:

"It then and there became and was necessary for such employés and their families to pass and repass over the property of the defendant and said railroad tracks in going from their homes to and from their work and to and from the offices and company store of defendant, and pass and repass over said property of defendant and said railroad tracks for other purposes in the performance of their duties as such employés."

The first count charges the defendant, through the action of the motorman in charge of its motor with four empty cars attached thereto, with having negligently and carelessly run over and killed the decedent; the second, negligence in the failure to maintain a lookout for persons rightfully on the track, including the decedent; the third, negligence in the failure to provide safe, sound, and suitable machinery and appliances for the operation of the railway; and the fourth, negligence in the failure to keep a proper lookout, in view of the open and unguarded condition of the track.

[1, 2] The order of dismissal does not disclose the ground of the court's action, but it is said, in argument, the principle declared in Martin v. Hughes Creek Coal Co., 70 W. Va. 711, 75 S. E. 50, 41 L. R. A. (N. S.) 264, Ann. Cas. 1914A, 668, was applied to the facts alleged and regarded as precluding recovery thereon. The facts susceptible of proper development in a trial under this declaration are very similar to those found in the Martin Case. The child for whose alleged wrongful death that action was instituted

was a member of a family living in a house about 150 feet distant from the track. The miners lived in houses located on both sides of the track, and their families visited across it. Here it is alleged the houses were located near the track, and that the employes and their families of necessity passed over it, going from their homes to their work and the offices and store of the company and returning, and for other purposes in the performance of their duties as employes and servants. But, as the 18 months old child, for whose death this action was brought, could not have been a servant or employe having occasion to go to and return from work, or any business at the company's store and offices, it was obviously not within the necessity predicated of employes and families, and the court properly tested the sufficiency of the declaration by the principle enunciated in the Martin Case. If the declaration had made the use of the track an incident to the occupancy and use of the house in which the family of the defendant resided, or the track measurably an appurtenance thereto, and so brought it, expressly or impliedly, within the contract between the father of the child and his employer, the case would have fallen within the principle applied in *Smith v. Sunday Creek Coal Co.*, 82 S. E. 608. But it does not do so. The necessity of use of the track is limited to persons going to and returning from work and business at the store and offices of the defendant. In the argument, the soundness of the conclusion announced in the Martin Case is therefore correctly treated and regarded as the sole question raised by the demurrer.

Out of the dominion and use of private property incident to the ownership thereof, limited only by the right of the property of others to freedom from injury by such use, springs the principle of immunity from liability for injuries to trespassers and bare licensees. Only upon the highest and most imperious considerations is this right of dominion and use limited. The value of property lies in its utility. But for its varied uses and adaptability it would be worthless. Freedom of use of property is property itself. It is an inherent element thereof. With great caution, therefore, courts and Legislatures impose restraints upon its use, and none are ever laid upon it without careful definition of their extent. *Powell v. Bentley & Gerwig*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; *Chambers v. Cramer*, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545; *McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936; *Wilson v. Phenix Powder Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890; *Pope v. Bridgewater Gas Co.*, 52 W. Va. 252, 43 S. E. 87; *Coal Co. v. Conley & Avis*, 67 W. Va. 129, 67 S. E. 613; *Griffin v. Coal Co.*, 59 W. Va. 490, 53 S. E. 24, 2 L. R. A. (N. S.) 1115; *Veith v. Hope Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410; *Walker v.*

Strosnider, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1; *Fellows v. Charleston*, 62 W. Va. 665, 59 S. E. 623, 13 L. R. A. (N. S.) 737, 125 Am. St. Rep. 990, 13 Ann. Cas. 1185; *Fruth v. Charleston*, 84 S. E. 105. Under the police power of the state, the Legislature may impose limited restraints upon the use of private property, in the form of regulations thereof, and may authorize municipal corporations to do so; but the Constitution itself withholds from the Legislature power to deprive the citizen of his property or its use, except for public purposes and on payment of compensation. The common law imposes an obligation upon the property owner to use it in such manner as not to injure that of another person; but this obligation is in favor of other property, not persons disassociated from the property. The stranger's right under this principle pertains to his property and the enjoyment and use thereof, not his person. *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935, 23 L. R. A. (N. S.) 691. This right of dominion and use, however, cannot be made a shield or cover for malicious acts on the part of the owner. *Townsend v. Wathem*, 9 East, 281; *Conrad v. Railway Co.*, 64 W. Va. 176, 61 S. E. 44, 16 L. R. A. (N. S.) 1129.

To strangers on their lands without right, owners owe no duty except abstention from intentional injury to them. Such persons are classified as trespassers and bare licensees. They cannot recover for injury by reason of excavations, defects in premises, contact with running machinery, or the like, for the proprietor owes them no active duty. So long as he does them no intentional injury, he is not liable for anything that may befall them. *Conrad v. Railroad Co.*, cited; *Smith v. Sunday Creek Co.*, cited; *Wilson v. Improvement Co.*, 69 W. Va. 778, 787, 73 S. E. 64, 45 L. R. A. (N. S.) 271, Ann. Cas. 1913B, 791. *Buswell*, Per. Inj. § 65; *Bigelow's Lead. Cas. on Torts*, p. 697; note *Kinkead on Torts*, § 318. In its strictness, the rule of liability to strangers coming upon the property of the owner accords with the general principles above adverted to. Ordinarily only those who come upon his premises on business, in some sense of the term, may hold him to the duty of care and caution, for their safety. There must be an invitation to come upon some matter or occasion of material interest or benefit to him. Those who come for mere gratification of their own curiosity, or other considerations exclusively personal to themselves, are not within the protection of the rule. *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Parker v. Publishing Co.*, 69 Me. 173; *Pomponio v. Railroad Co.*, 66 Conn. 528, 34 Atl. 491, 32 L. R. A. 530, 50 Am. St. Rep. 124. In the absence of maliciousness or intentional injury, our decisions recognize no distinction between acts of commission and omission on

the part of the owner, in cases of injuries to trespassers and licensees. *Conrad v. Railroad Co.*, cited; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884. In the former case, the injury was wrought by a turntable, when not running, nor in actual use by the railroad company. In the latter, it was inflicted by a machine in use and running at the time of the injury. Nor is the obligation varied by the character of the trespasser. Infants stand on the same footing as adults.

From the operation of this general rule, no class of property owners other than railroad companies has been excepted, and it was extremely difficult to find any principle upon which they could be taken out of it, to the extent of requiring them to keep a reasonable lookout for trespassers and licensees on their tracks at places other than public crossings. This has been done, however, and, in justification of the court's action in doing so, Judge Brannon said in *Gunn v. Railroad Co.*, 42 W. Va. 676, 680, 26 S. E. 546, 547 (36 L. R. A. 575):

"The public interest and necessity, not merely the company's, demand that the company have sole possession of its track; but, as people live and move along the route, they do go upon the track; children, in their thoughtlessness" often "wander upon it; and sheer necessity calls for such care as is exacted by this rule."

Judge Holt's observation upon the same subject, in *Gunn v. Railroad Co.*, 36 W. Va. 165, 175, 14 S. E. 465, 468 (32 Am. St. Rep. 842), is in part as follows:

"Again, that some one shall always be on the lookout on a running train is, from its nature, and as shown by experience, one of the most important safeguards—indispensable, in fact, for the passenger on the going train as well as the passenger on the coming train; for those off, as well as those on the train. The enforcement of such lookout is so imperative, on the ground of public policy, that the law may impose it as a duty, due to one who may himself be in the wrong."

This denial to railroad companies of the immunity accorded by law to other property owners, and imposition upon them of duties toward trespassers and bare licensees, to which other property owners are not subjected, are clearly based upon the peculiarities of their property, their methods of business, and their relation to the public. Whether these facts, circumstances, and considerations justify the discrimination, we need not inquire. It suffices to show that railroad companies, as property owners, have been put in a class distinctively their own.

The process of reasoning by which this discrimination has been effected cannot consistently be applied to coal companies. They owe no duty to passengers and shippers such as the exercise of care in the operation of their engines and appliances. They handle their own property, and such loss as may be occasioned by unskillful or careless management of their works is their own. No other

person has any interest in it and it does not concern the public. They do not operate long stretches of track, running through all sorts of communities and exposed to constant invasion by trespassers and licensees. There is no substantial ground upon which their property and business can be distinguished from those of other companies and individuals generally. Any ground upon which they could be denied the immunity of the general rule would be applicable to all other classes of owners and result in the abrogation of the rule itself.

The fallacy of the argument in support of the writ of error lies in the assumption that every moral wrong is a legal one, giving a right of action for damages. There is moral wrong, even cruelty and inhumanity, in the doing of many things which the law does not prohibit, and in the failure to do many things which the law does not require. Such acts and duties are not legally prohibited or imposed, because to prohibit or impose them would be inconsistent with legal rights on the part of the actors which, in the opinion of mankind, it would be unwise to impair or burden, such as rights of property and personal liberty. The law does not assume to regulate, govern, or control the conduct of men in all respects, but only so far as the common good is deemed to require it.

Our re-examination of the principle of the *Martin Case* confirms and strengthens, rather than weakens, our conviction of its correctness. Hence we affirm the judgment complained of.

MILLER, J., dissents. LYNCH, J., absent.

(76 W. Va. 154)

HUNTER v. JOHNSON.

(Supreme Court of Appeals of West Virginia
April 6, 1915.)

(Syllabus by the Court.)

TRIAL \S 139—DIRECTION OF VERDICT—EVIDENCE.

The court can not properly direct a verdict against a party where the evidence in the case would support a verdict in his favor if returned by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. \S 139.]

Error to Circuit Court, Monroe County.

Action by Carter B. Hunter against A. E. Johnson. Judgment for defendant, and plaintiff brings error. Reversed, and new trial awarded.

G. A. Rivercomb, R. L. Clark, of Union, and R. Kemp Morton, of Charleston, for plaintiff in error. R. F. Dunlap, of Hinton, John W. Arbuckle, of Lewisburg, and Jno. L. Rowan, of Union, for defendant in error.

ROBINSON, P. This is an action to recover damages for alleged deceit by the defendant in the sale of bank stock to the plain-

tiff. It is similar to *Lowance v. Johnson*, 84 S. E. 937, decided here on writ of error at this term. In each case the defendant is the same person, some of the same stock is involved, and the facts have much similarity. In the case at hand, after the evidence on behalf of both parties had been introduced, the court directed a verdict for the defendant.

Upon a review of the record we are of opinion that the trial court erred in directing a verdict. The case was one for jury determination under the evidence. The basic question to be determined was whether the plaintiff was deceitfully induced by the defendant to buy the stock. This was determinable from so many conflicting facts and circumstances, and so dependent in some particulars on the credibility of witnesses testifying before the jury, that the case was peculiarly one for jury finding. From the facts and circumstances proved and by the drawing of reasonable inferences, the jury would have been warranted in finding that the defendant willfully deceived the plaintiff as to the value of the stock, and induced him to buy the same by fraudulent misrepresentation of material facts in relation thereto. In determining this, they were the judges whether there was such a difference in the knowledge, experience, and situation of the two parties as to enable the one to take advantage of the other unlawfully, whether the plaintiff relied solely on the defendant's representations, and whether ordinary prudence required the plaintiff to test the truth of the representations made to him. They were the judges of other questions arising on the evidence.

We do not say that the jury should have found for the plaintiff. We can not constitute ourselves jurors—triers of pure fact. What we mean is that under the law the evidence would have supported a verdict for the plaintiff if the case had been properly submitted to the jury and they had found one in his favor. Where the evidence is such that it would support a verdict for a party if one was found by the jury for him, the trial court can not direct a verdict for the opposite party, though a verdict returned by the jury for the latter might have standing under the evidence. "The court should never interfere in doubtful cases of fact, dependent on the credibility of witnesses and where it would not be justified in setting aside the verdict, it matters not which way may be the finding." *White v. Hoster Brewing Co.*, 51 W. Va. 262, 41 S. E. 181.

It is argued that because the plaintiff became a director in the bank after the purchase of the stock, he should have discovered the alleged fraud sooner. But how can this avail when he sues within the period of limitation? 14 Amer. & Eng. Enc. of Law, 171.

The defendant's cross-assignments of error are not well taken. The declaration is sufficient, and the evidence complained of was properly admitted.

The court should have submitted the case to the jury, giving them by instructions the well settled rules of law applicable in the premises. For the error of directing a verdict, the judgment must be reversed, the verdict set aside, and a new trial awarded.

(76 W. Va. 125)

MANKIN et al. v. DICKINSON et al.
(No. 2632.)

(Supreme Court of Appeals of West Virginia.
April 6, 1915.)

(Syllabus by the Court.)

1. JUDGES ⇨16—SPECIAL JUDGE—SELECTION BY AGREEMENT—VALIDITY.

An agreement made pursuant to section 11, chapter 112, serial section 4558, Code 1913, selecting a special judge to try a cause, purporting to be signed by counsel for all the parties, is not void because not signed by a guardian ad litem for infant defendants.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 46, 53-59; Dec. Dig. ⇨16.]

2. EQUITY ⇨153 — PLEADING — ORIGINAL BILL—DESIGNATION AS CROSS-BILL.

Though a bill be styled a cross-bill, it will be treated for what it really is, and if it contains proper matter calling for the relief prayed for it will be treated as an original bill.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 386-389; Dec. Dig. ⇨153.]

3. MORTGAGES ⇨32, 38 — DEED AS SECURITY — WHAT CONSTITUTES.

The general rule is that though land be conveyed by debtor to creditor by deed absolute, to secure the repayment of a loan, but with a collateral contract for the repurchase and reconveyance of the property, the deed and contract will be treated as a mortgage and not an absolute conveyance. But the deed and contract involved in this case, considered in connection with the objects and purposes of the parties, as disclosed by the record, and their subsequent transactions and dealings relating to the property, did not constitute a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-66, 84-94, 108-111; Dec. Dig. ⇨32, 38.]

4. MORTGAGES ⇨338, 346 — SALE BY TRUSTEE—INJUNCTION.

Where there is no real impediment in the way of the trustee in the execution of a deed of trust, and the amount of the debt secured is certain, there is no necessity for the trustee to resort to a suit to remove impediments, or to have the debt adjudicated. To such cases the rules applicable to creditors' suits and the like have no application. Nor will a sale by the trustee in such case be enjoined at the suit of the debtor to await the litigation of unrelated controversies between some of the parties.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1026-1035, 1044; Dec. Dig. ⇨338, 346.]

Poffenbarger, J., dissenting.

Appeal from Circuit Court, Fayette County.
Suit by Cal Mankin and others against R. H. Dickinson, administrator, and others. From decree for plaintiffs, defendants Bessie Woods and others appeal. Affirmed.

Miller & Bobbitt and D. W. Taylor, all of Charleston, for appellants. R. T. Hubbard, Jr., of Fayetteville, for appellees.

MILLER, J. The bill, styled a cross-bill, was filed by Bessie Woods, a defendant in the original suit, after final decree therein fulfilling all the purposes of the original bill, but which decree provided that nothing therein should—

“in any way prejudice the defendants, Lutie O. Woods, Bessie Woods and Sam C. Woods, or either of them as to any rights they or either of them may have to recover against the defendant, Cal Mankin, with reference to any controversy that may exist between said last mentioned parties in this cause.”

The joint answer of these and other defendants to the original bill alleged a series of transactions between the plaintiff Mankin and themselves and others, out of which it was conceived certain rights and equities between them remained to be adjusted, but they were not pertinent to the issues presented by the original bill, as the court evidently concluded, and there was no prayer for relief against Mankin based thereon. Wherefore the saving in their favor in said decree.

From the decree dismissing the so called cross-bill, and denying plaintiff any relief thereon, she has appealed.

[1] The first point made is that there was error in the selection of a special judge to try the case. The selection was by agreement purporting to be signed by counsel for all the parties pursuant to section 11, chapter 112, serial section 4558, Code 1913. Appellant does not claim that the agreement was not properly signed on her behalf, but contends that it is void because it does not appear to be signed by the guardian ad litem for some of the infant defendants, heirs of J. D. Woods, plaintiff's father. While it is true, as held in *Myers v. Myers*, 6 W. Va. 360, that an infant defendant can only appear and defend by guardian ad litem, we do not think that rule should be carried to the extent of denying counsel to a guardian ad litem. The contract is signed by counsel, not only for the adult heirs of J. D. Woods, including plaintiff, but also for all the other heirs of said Woods. The guardian ad litem did appear and defend by answer in proper person, and the requirements of the case referred to were thereby fully met. It is not pretended that any interests of the infants were affected by the supposed error, and appellant and her counsel were responsible for the signing of the contract on behalf of the infants. We do not think this point has any substantial merit, and it must be overruled. That a guardian ad litem may have counsel seems well settled. 22 Cyc. 685; *Owens v. Gunther*, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130, and note.

[2] In support of the decree it is interposed by counsel for Mankin that a cross-bill can-

not be filed after final decree and the end of the term, and considerable argument was submitted orally and in the briefs of counsel on this point. We deem the point inconsequential. As many times decided, no matter what the pleading may call itself it will be treated in equity for what it really is, and if the court may rightfully do so it will be treated as an original bill. *Martin v. Smith*, 25 W. Va. 579; *Pethel v. McCullough*, 49 W. Va. 520, 39 S. E. 199; *Silman v. Stump*, 47 W. Va. 641, 35 S. E. 833; *Jones v. Crim & Peck*, 66 W. Va. 301, 303, 66 S. E. 367; *McLanahan v. Mills*, 73 W. Va. 246, 80 S. E. 351.

[3] The first ground alleged for relief against Mankin is, that the deed made by plaintiff and J. D. Woods and Lutie O. Woods, her father and mother, to Mankin, March 25, 1907, whereby, in consideration of one dollar cash in hand paid, the grantors conveyed to Mankin a certain house and lot in the town of Oak Hill, Fayette County, and the contract executed between Mankin and wife and Bessie Woods contemporaneously with the making and delivery of said deed, and whereby Mankin and wife, in consideration of one dollar in hand paid, thereby gave and granted to Bessie Woods the exclusive right to re-purchase said property, in consideration of fourteen hundred dollars; and the actual costs of any additional improvements, said amount to be paid cash in hand, the contract to be void after twelve months from date, and whereby on so electing, and complying with the terms of the contract, Mankin and wife covenanted and agreed to make and deliver to her a deed of general warranty for said lot, constituted together a mortgage by Bessie Woods and others to Mankin, and not an absolute deed of conveyance, for the purpose of securing repayment to him of certain debts and liens existing against the property, estimated at nine hundred dollars, and five hundred dollars represented by the note of Mankin to Bessie Woods executed on the same day.

The general proposition contended for by counsel is supported by the numerous decisions cited, that where land is conveyed by debtor to creditor, to secure the repayment of a loan of money, and the borrower makes a deed absolute to the lender, but with a collateral contract or agreement for the re-purchase of the property, the transaction constitutes a mortgage, and not an absolute sale. *Davis v. Demming*, 12 W. Va. 246; *Thacker v. Morris*, 52 W. Va. 221, 43 S. E. 141, 94 Am. St. Rep. 928; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Lawrence v. Du Bois*, 16 W. Va. 443; *Hoffman v. Ryan*, 21 W. Va. 416; *Kyger v. Depue*, 6 W. Va. 288; *Klinek v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Hursey v. Hursey*, 56 W. Va. 148, 49 S. E. 367; *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515.

But do the pleadings and proofs bring this case within the rule of those decisions? Ac-

cording to pleadings and proofs, the agreement, not evidenced by any writing between the parties, was that Bessie Woods, in whom the legal title was invested, should sell and convey the property to Mankin, and assign to him a certain collateral contract relating to one of the liens thereon, and that in consideration thereof Mankin should assume and pay the debts and liens against the property, estimated by both parties, after examining the records, to be about nine hundred dollars, and in addition pay the five hundred dollars; and should also execute an option contract to reconvey the property to Bessie Woods within twelve months in consideration of fourteen hundred dollars to be paid him in cash. The contract so executed between the parties was not one for a loan of money. The proposition to Mankin was to sell him the property outright, not to borrow money. Evidently he was attracted to the proposition because of the opportunity presented to make a profit. The collateral contract assigned Mankin was one between J. D. Woods and certain of the other heirs of S. B. Woods, his father, whereby the latter in consideration of the agreement of the former to keep his mother, agreed to release to him their interest in a deed of trust debt on the property in favor of their father, the late Samuel B. Woods, and to procure all the other heirs to also release their interests, and thereby relieve the property of that lien, which at the time Mankin purchased it, still existed, and was one of the debts and liens which with the aid of said collateral contract Mankin was to pay off and release.

That these papers were not intended by the parties to constitute a mortgage is established beyond controversy by the subsequent transactions between them. It is alleged and proven that within four months after the date thereof Bessie Woods elected to re-purchase the property, and did so, and that in compliance with the terms of the option contract, Mankin and wife, as directed by her, executed and delivered to Sam C. Woods, her brother, a deed of general warranty for the property, in consideration of fourteen hundred dollars, cash in hand paid, by surrender, through the bank where the deed was deposited by Mankin, of Mankin's note for five hundred dollars and payment to him of nine hundred dollars in money. Mankin's deed exhibited with the bill bears date July 16, 1907.

Moreover, it is further shown that at the time of the transactions just referred to, and as a means of raising the money to re-purchase the property from Mankin, Bessie Woods and her brother and mother borrowed from one Blake the nine hundred dollars to make the cash payment to Mankin, and secured Blake by a deed of trust on the same property. With this transaction Mankin had nothing to do. By the making and delivery of his deed to Sam C. Woods, as stated, and

accepting the cash payment and surrender of his note, Mankin became wholly disconnected from the property, except that it appears he had not fully performed his contract to pay off and procure a release of the old trust debt in favor of the heirs of Samuel B. Woods, and of which we will speak later.

But as the bill alleges and the proof shows, when the money borrowed from Blake fell due and was not paid and he was about to sell the property under his deed of trust, these same people, the Woods heirs, applied to the Merchants & Miners Bank, of Oak Hill, for another loan of nine hundred dollars, which was declined, and then it was that they procured Mankin for their accommodation to endorse a note for that amount, and gave a new trust deed to secure him as endorser, both note and deed of trust then being accepted by the bank as security for the new loan. With the money thus raised these people paid off the Blake debt, and it is alleged and proven that Mankin's connection with this transaction was that of an accommodation endorser only. The oral agreement at the time of the loan was that payments were to be made on the note at the rate of twenty-five dollars per month, or seventy-five dollars per quarter, but only the first quarterly payment was made, when the note was reduced and renewed at ninety days for eight hundred and twenty-five dollars, endorsed by Mankin, and thereafter nothing more was paid by the makers, and the note was protested.

Mankin then being called upon by the bank to take up the note, in July, 1909, together with the bank and Lee, trustee, presented their original bill to which the present so called cross-bill was filed, alleging many of the facts above recited, the main object of which bill being to enjoin the sale of the property by A. H. Huddleston, trustee, in the deed of trust of January 22, 1894, securing the payment to the late S. B. Woods, of the sum of four hundred and seventy-six dollars, and to obtain a settlement of the balance due thereon, and to enforce specific performance of the collateral contract, assigned to Mankin, and with which bill Mankin tendered payment of the amount that might be found due therein to the S. B. Woods heirs, who had not executed said contract, and to obtain a decree for the same amount against those who had signed it.

That bill was answered by some of the defendants, including Bessie Woods, and on final hearing, on pleadings and proofs, it was adjudged that the estate of J. D. Woods, then deceased, was indebted to the administrator of the estate of Samuel B. Woods, in the sum of one hundred and ninety-three dollars, which the decree recites was paid by Mankin to Dickinson, administrator for Samuel B. Woods, and Mankin was thereby given a decree over against those heirs who had signed said contract for the same amount, and the preliminary injunction against Hud-

dleston, trustee, was thereby perpetuated, and the administrator of the estate of Samuel B. Woods was required to and did execute a release of said deed of trust on the property covered thereby.

So it appears that it was not until this suit was thus begun and concluded that Mankin had fully complied with his oral agreement with Bessie Woods and others, to pay off and discharge the debts and liens against said property, although prior to that time he had executed said option contract with Bessie Woods, by reconveying the property to her brother, and had accepted from her full payment therefor. In his testimony he gives as his reason for not having paid and settled this lien sooner that he had thought for a while that he could get along without a lawsuit with the Samuel B. Woods heirs, and without litigation obtain specific execution of their contract to release and obtain release of said deed of trust; and that he had allowed the matter to linger along in that way hoping to get the matter settled without suit.

As a result of this suit plaintiffs succeeded in clearing away all prior liens on the property, leaving the deed of trust to Lee, trustee, in favor of Mankin, endorser, as the first and only lien thereon; and then it was that on the demand of the creditors, Mankin and the bank, that Lee, trustee, advertised the property for sale to satisfy the note endorsed by Mankin, and appointed the 22d day of July, 1911, as the day of sale.

On July 20th, two days before the day appointed for this sale, the appellant, Bessie Woods, instituted the present suit upon her so called cross-bill, making the process to answer returnable on the first Monday in August following, and although this bill was apparently sworn to on July 18, 1911, the record shows that it was not filed until August rules following, and it is claimed that the defendants Lee, trustee, and Mankin, had no notice of the objects and purposes of said bill.

This so called cross-bill alleges many of the facts and exhibits most of the deeds and contracts already referred to; sets forth plaintiff's theory of the purposes and proper construction thereof. She alleges among other things that the deed made to her, and by her, or at her direction by Mankin and wife to her brother Sam C. Woods, was without consideration passing from either of them, and was held by them respectively in trust for the widow and heirs of her father J. D. Woods, and the relief prayed for was that the said Sam C. Woods might be decreed to be holding the title thereto in trust as aforesaid, that the money received by the said Mankin be declared a trust fund in his hands for the same persons, and that Mankin and Lee, trustee, be enjoined and restrained from selling the property under the trust deed from Sam C. Woods to Lee, trustee, that said deed be declared null and void, and

that Mankin be required to account for all moneys received by him, and for a reference of the cause to a commissioner for that purpose, and that any balance that might be found due from Mankin might be credited on the note executed by her brother Sam C. Woods to Mankin, and endorsed by him for their accommodation to the bank, and for general relief.

As already intimated, we hold, as the court below held, that the transactions with Mankin did not constitute a mortgage or render him trustee for the widow and heirs of J. D. Woods, and that appellant was not entitled to the relief prayed for on those theories of her bill. Every fact in the record evidenced by deed or contract in writing, and the conduct of the parties, repel all these theories of the transactions between the parties. That the original contract with Mankin may have been a good one for him, and a bad one for the other parties thereto finds some color in the facts proven, but that the contract was as Mankin contends we can have no doubt from the record. It is quite evident that both parties to the contract estimated the debts which he would have to pay at about nine hundred dollars, and if he had had to pay the full amount estimated the transactions would have offered him no profit. But as he was assigned the collateral contract with some of the heirs of Samuel B. Woods, and if without too much expense incurred in enforcing that contract he should succeed in doing so a profit of two or three hundred dollars seemed in sight for him. It is now questionable, however, whether from all the transactions he will not sustain an actual loss. But this is neither here nor there, except as pertaining to the morals of the transactions, which are not controlling, at least in this particular case.

[4] But one other point remains deserving consideration, that is, that the court erred, not shown by the pleadings, but on the facts appearing in the evidence, in not setting aside the sale of the property by Lee, trustee, on July 22, 1911, after the institution of plaintiff's suit. As already stated, process issued on the bill July 20, 1911; the sale, as previously advertised, took place on July 22, 1911, but the bill was not filed until the August rules, 1911. And it is claimed that neither Mankin nor the trustee knew of the objects and purposes of the bill until long after the day of sale. Mankin is shown by the evidence to have been the purchaser of the property at the price of nine hundred and fifty dollars; that he took up and paid off the note, paid the expenses of sale, and that the total cost of the property to him was about ten hundred and sixty-seven dollars. Though as stated the prayer of the bill was for an injunction restraining the trustee from selling, and though plaintiff knew that the sale was to take place on the day named, no injunction was ever applied for, and the trustee proceeded with and completed the

sale and executed a deed to Mankin for the property.

On this showing appellant invokes the rules applicable to suits by lien creditors, and when the title to the property is outstanding in trustees; and to suits by trustees in deeds of trust rendered necessary by existing impediments in the way of a proper execution of the trust by them, for the purpose of removing such impediments; and to cases where there is uncertainty in the amount of the debt, or there is usury entering into the debt secured, or clouds upon the title and the like. Of such are our cases of *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810; *Parsons v. Snider*, 42 W. Va. 520, 26 S. E. 285; *Martin v. Kester*, 49 W. Va. 647, 39 S. E. 599, and *Stafford v. Jones*, 65 W. Va. 567, 64 S. E. 723, and other cases unnecessary to cite.

This suit by appellant is not a creditors' suit, nor is it alleged that there is any prior lien or impediment in the way of the proper execution of the trust by Lee, trustee. The only allegation in the bill relied on in support of this contention is that the money originally received by Mankin was trust money, and that Mankin, being endorser on the note secured in the deed of trust to Lee, should be compelled to pay any balance that might be found due from him on the alleged trust account, to the reduction of said note. But we have concluded there was no foundation in fact for any such relief. The bill makes no offer to pay the note due the bank, and which constituted a lien upon the property. And the bank could not be held up by the plaintiff to enable her to litigate her alleged rights as against Mankin. And in so far as there existed at any time any impediment in the execution of the deed of trust to Lee, trustee, that impediment had been wholly removed by the final decree pronounced on the original bill of Mankin and Lee, trustee, and the bank, and the trustee had thereby discharged any duty devolving upon him, and there is no allegation in the bill that there ever existed at any time thereafter any lien, encumbrance or cloud on the property to interfere with the proper execution of the deed of trust by Lee, trustee. So we think that under our decisions there is no case presented calling for the interposition of a court of equity, or justifying the court in interfering with the trustee, and that unrelated matters may be litigated between the parties thereto.

The case of *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775, in some of its features, is much like the case presented here. In that case there was a bill of injunction to restrain a trustee from selling trust property, real estate, which was heard, the injunction dissolved and the bill dismissed. The prop-

erty was then sold by the trustee and a deed made to the purchaser, after which the decree dismissing the bill was set aside and the purchaser at the trust sale and others were brought in as defendants. The amended bill filed sought to set aside the sale made by the trustee on the ground that the same was improperly made by reason of the facts disclosed in the bill, and that the reversal of the order dismissing the suit vacated the sale, and upon other grounds pertaining to specific facts which the plaintiff failed to show. The court below dismissed the bill, and this court on appeal decided that there was no error. In *George, Trustee, v. Zinn*, 57 W. Va. 15, 24, 49 S. E. 904, 110 Am. St. Rep. 721, opinion by Judge Poffenbarger, it was held, declining to carry the doctrine of *Keck v. Allender*, 37 W. Va. 201, 16 S. E. 520, and *Hartman v. Evans*, supra, to the extent of requiring a trustee, where there is really no impediment in the way of the proper execution of the trust, to resort to equity to remove supposed impediments, point 2 of the syllabus, that:

"A trustee in a deed of trust cannot, as a matter of course, resort to a court of equity to have sale made under its decree, instead of selling under the power vested in him by the deed of trust, and, unless he shows such impediment to the exercise of his powers as renders it inequitable for him to proceed without the aid of the court, he will not be entertained."

It does not appear from anything alleged or proven in this case that the sale of the property or the price obtained was in any way affected by the suit of the appellant. There is no evidence that a greater price could have been obtained at a public sale of the property. As was said in *Lallance v. Fisher*, supra, point 5 of the syllabus:

"Such sale will not be set aside for inadequacy of price alone, unless the inadequacy is so gross as to justify the presumption of fraud. A sale for one half the estimated value is not such inadequacy."

We are, therefore, unable to see error in the decree calling for reversal.

It is greatly to be regretted if plaintiff and her co-heirs have lost their home. But the record discloses the fact that they have made little progress to save it, during the twenty years or more covered by the transactions referred to in the record. Their efforts have been mainly directed to putting off the day of payment. We would be glad to see a way out for them, but limited as we are by legal rules and principles governing us and controlling the affairs of men, we do not see how we can properly disturb the decree.

We are, therefore, of opinion to affirm the decree below, with costs to the appellees incurred here and in the court below on appellant's bill.

POFFENBARGER, J., dissents.

(76 W. Va. 156)

McKINLEY LAND CO. v. MAYNOR.(Supreme Court of Appeals of West Virginia.
April 6, 1915.)*(Syllabus by the Court.)***1. VENDOR AND PURCHASER — 308 — PURCHASE-MONEY NOTES — DEFENSE — INCOMPLETE TITLE.**

Recovery on a note given as consideration in a sale to which only the ordinary general covenants of title apply, cannot be defeated merely on the ground that the vendor did not have complete title, when the property sold has been delivered to the vendee as contemplated and his possession thereof under the sale has in no wise been disturbed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 862, 877-893; Dec. Dig. § 308.]

2. COVENANTS — 102 — GENERAL WARRANTY — BREACH.

A covenant of general warranty of title is not broken until there is an ouster or eviction of the vendee from the property, or equivalent disturbance, by paramount title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 157-168; Dec. Dig. § 102.]

3. TRIAL — 168 — DIRECTION OF VERDICT — EVIDENCE.

A trial court, if requested, may direct a verdict for the party who has adduced evidence sufficient to warrant a verdict in his favor, when no evidence appreciably tending to overthrow the case so made has been adduced by the opposite party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. § 168.]

Error to Circuit Court, Raleigh County.

Action by the McKinley Land Company against J. H. Maynor. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Summerfield and McGinnis & Hatcher, all of Beckley, for plaintiff in error. T. K. Laing and File & File, all of Beckley, for defendant in error.

ROBINSON, P. McKinley Land Company, owning a certain tract of land, sold and conveyed to Maynor all the merchantable timber thereon which would measure twelve inches or more "two feet from the ground outside the bark," with the right to enter and remove the same from the land within two years. The consideration was two thousand dollars. Maynor paid five hundred dollars in cash, and executed to the land company his three several negotiable notes of five hundred dollars each, payable in six, nine, and twelve months respectively. He made default in the note payable in twelve months. By this action in assumpsit for recovery on the note, the land company has judgment against him for the amount thereof, with interest.

The case was tried before a jury on the general issue. When all the evidence of both parties was in, the court directed the jury to find for the plaintiff. That such course was warranted, plainly appears.

The land company introduced the note and proved that it had not been paid. Maynor

put in evidence the writings witnessing the sale of the timber to him. By them it was agreed that if the land company could not deliver to him the timber under eighteen inches, the note payable in twelve months—the one sued on—should be canceled. The gist of Maynor's defense was that a coal company holding a mining lease which covered the particular tract among others, had right under the lease to take all such of the timber under eighteen inches as might be necessary for the mining operation.

[1] The mere fact that the land company did not have complete title is not a sufficient defense to a recovery on the note under the facts and circumstances appearing in evidence. When Maynor purchased, he knew that the mining lease covered the small timber. Yet there were circumstances of a claimed forfeiture of the lease and impending bankruptcy of the mining company, which we need not here detail, that evidently made the parties believe the lease would be no interference with his taking all the timber embraced in the contract. The land company stipulated that the note should be canceled "in the event we cannot deliver timber under eighteen inches." In other words, Maynor agreed to pay \$500.00 for this small timber in case it was delivered to him. Delivered to him how? Certainly just as the contract contemplated that all the property embraced in it should be delivered to him—by his being put in possession of the land and allowed to cut the timber therefrom within two years. The contract provided for no other delivery by the land company to Maynor. The timber was sold outright to him for the consideration named, but his right to take it off was limited to two years. If he so took it, or could have taken it, that was the delivery contemplated by the agreement. Then, was the small timber delivered to Maynor? Did he take it, or could he have taken it under the purchase? If so, he owes the amount of the note given as a consideration for the title and right purchased, otherwise he does not owe it.

Maynor went on the land and operated under the contract for the time limit in cutting and removing the timber. There is not a word of evidence to show that his right to any of the timber was questioned by the mining lessee or by any one else. Nor is there a word to show that he was prevented from exercising the right to take the small timber which he had purchased, or that he was even threatened with disturbance if he undertook to exercise dominion over the same. On the other hand, the evidence is indeed uncontroverted that Maynor cut and removed at least a portion of the timber under eighteen inches. If he did not cut and remove all the timber of that size, as far as the evidence discloses there was nothing to prevent him from so doing. That which he purchased in the way of small timber was at his hand to

take—was delivered to him. If he did not take it at all, but allowed his right to expire without taking it, the fault is his own. The evidence establishes that nothing prevented his taking everything that the land company contracted he should have. It establishes that there was no failure in the delivery of the small timber to him, such of the same as he saw fit to take within the time limit. The contingency upon which the note was to be canceled did not happen.

Counsel for both parties in argument consider the contract in regard to the cancellation of the note as constituting a virtual warranty of title as to the small timber. Let us take it so. Maynor was not ousted—not even threatened with ouster. If the mining lessee had undertaken to evict Maynor, it may be that the land company could have successfully defended the title it had transferred to him. If the lease was forfeited as the land company claimed, it could have done so. But we need not deal with such contingencies. Maynor went into possession of all the timber, cut and removed what he wanted, including at the least a part of the timber under eighteen inches, and never was disturbed in any way from cutting and removing any or all of it. He can claim no recovery for a breach of warranty of title, for he has not shown an ouster or eviction from the property purchased by reason of any superior title. No one was in possession of this small timber under a paramount title. The mining lessee had no such possession of the same, even if it held paramount title. While such possession would in itself be an ouster or eviction, we do not have it in this case. We do, however, have possession of the small timber by Maynor with not even a sign of his being disturbed therein. If he had been compelled to surrender to the mining lessee, the case would be different. He was not so compelled, nor did he even voluntarily surrender out of consideration of a paramount title. Instead of so surrendering, he cut such of the timber under eighteen inches as he saw fit to do.

[2] A covenant of general warranty of title is merely a covenant to warrant and defend the title against the claims of all persons whatsoever. It is not broken until there is an eviction of the vendee from the property, or equivalent disturbance, by title paramount. *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 80; *Rex v. Creel*, 22 W. Va. 373; 11 Cyc. 1125. The mere existence of an outstanding paramount title will not authorize a recovery on the warranty. In substance and effect the covenant is a guaranty against an actual eviction, or a constructive eviction by possession of another under paramount title. Hence it is not broken until

there is an eviction actual or constructive. It is not broken as long as the enjoyment of the property is not disturbed. It is not broken as long as there is no necessity that the title of the vendee be defended. *Maupin on Marketable Title*, secs. 142, 144, 146, 177.

It would seem by the better reason and authority that these principles are applicable to all sales of property under warranty of title, whether real or personal. *Williston on Sales*, sec. 221. The obligation of the vendor is virtually that the vendee shall have the quiet enjoyment of what he has purchased. *Rawle on Covenants for Title*, secs. 112, 114. The vendor is not bound by the warranty to transfer a good title to the vendee. But the vendor by the personal covenant is bound to make good any loss that may spring from his having transferred a bad title.

Maynor obtained all that he purchased. He obtained that for which he gave the note as a consideration, the undisturbed right to take the small timber under his purchase. The note was given for "value received"; the value for which he gave it was received by him. There has been no breach by the land company of an obligation to deliver the small timber to Maynor in the way contemplated by the sale. He has no case against a recovery on the note. Indeed before the institution of the action, he so recognized the matter in a letter which he wrote to a representative of the land company. It is plain that his defense is totally without merit.

[3] The court properly directed a verdict for the plaintiff. The case is not one in which a verdict for the defendant would be at all warranted. A trial court, if requested, may direct a verdict for the party who has adduced evidence sufficient to warrant a verdict in his favor, when no evidence appreciably tending to overthrow the case so made has been adduced by the opposite party. *La Rue v. Lee*, 63 W. Va. 388, 60 S. E. 388, 14 L. R. A. (N. S.) 968, 129 Am. St. Rep. 978; *Butcher v. Sommerville*, 67 W. Va. 261, 67 S. E. 726.

The assignment as to error in admitting evidence for the plaintiff and in excluding evidence offered by the defendant, is based on no bill of exceptions or ground for new trial saving error in these particulars. But we may say that if the evidence for the plaintiff to which the defendant objected on the stenographer's transcript had been excluded, and the evidence which the defendant was not allowed to introduce had gone in, there would have been nothing controlling toward a different decision than that we announce. The judgment will be affirmed.

LYNCH, J., absent.

(16 Ga. App. 239)

DAVIS v. CITY OF WAYCROSS.
(No. 5984.)

(Court of Appeals of Georgia. May 3, 1915.)

*(Syllabus by the Court.)***1. CRIMINAL LAW §1071 — CERTIORARI — PETITION — "FAILURE TO SHOW JURISDICTION" — "PROOF OF VENUE."**

The allegation in the petition for certiorari that "no jurisdiction was shown in the recorder's court" is not such a "distinct allegation in the petition for the writ of failure to prove the venue" as is contemplated and required by the Practice Act of 1911 (Acts 1911, p. 149). Failure to show jurisdiction and lack of proof of venue are not synonymous. To have authorized the judge of the superior court to grant the writ on account of the fact that the venue was not proved, the particular point should have been specifically made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2702; Dec. Dig. §1071.]

2. SUFFICIENCY OF EVIDENCE.

The evidence, though apparently weak, was sufficient to authorize the judgment of guilty, and the court did not err in denying the writ of certiorari.

Error from Superior Court, Ware County; J. W. Quincey, Judge.

Henrietta Davis was convicted in the recorder's court of the city of Waycross, and from denial of a writ of certiorari brings error. Affirmed.

John J. Moore, of Waycross, for plaintiff in error. Parker & Walker and E. R. Smith, all of Waycross, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 233)

JOHNSON v. STATE. (No. 5789.)

(Court of Appeals of Georgia. May 3, 1915.)

*(Syllabus by the Court.)***1. CRIMINAL LAW §1178—APPEAL—EXCEPTION—ABANDONMENT—BRIEF.**

No reference being made in the brief of the plaintiff in error to the exception taken to the overruling of the demurrer attacking the sufficiency of the indictment, that exception will be treated as abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. §1178.]

2. VARIANCE.

Under a ruling by a majority of the court in *Paulk v. State*, 5 Ga. App. 573, 63 S. E. 659, there is no material variation in the allegations of the indictment and the proof offered in support thereof.

3. INSTRUCTIONS.

The instruction to which exception is taken, when considered in connection with the charge of the court as a whole, is not materially erroneous.

4. VERDICT APPROVED.

There was sufficient evidence upon which to base a verdict of guilty, and this verdict, having the approval of the trial judge, will not be disturbed.

Error from Superior Court, Jenkins County; H. C. Hammond, Judge.

Cæsar Johnson was convicted of crime, and brings error. Affirmed.

G. C. Dekle, of Millen, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 260)

HOLIFIELD v. STATE. (No. 6221.)

(Court of Appeals of Georgia. May 3, 1915.)

*(Syllabus by the Court.)***CRIMINAL LAW §1159—APPEAL—QUESTIONS OF FACT—PROVINCE OF JURY.**

The jury are the final arbiters of the facts; and, while the evidence in the present case is weak and unsatisfactory, it cannot be said that it was insufficient to authorize the verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. §1159.]

Error from Superior Court, Butts County; R. T. Daniel, Judge.

John Hollifield was convicted of crime, and brings error. Affirmed.

C. L. Redman, of Jackson, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 251)

SAILERS v. STATE. (No. 6244.)

(Court of Appeals of Georgia. May 3, 1915.)

*(Syllabus by the Court.)***CRIMINAL LAW §938—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The court did not err in overruling the defendant's motion for a new trial, based upon newly discovered evidence. The affidavit of one of the alleged newly discovered witnesses contains testimony which is merely impeaching in its nature, while the other, aside from being of a like nature, attempts to set forth the substance of a conversation and agreement had between the prosecutor and the defendant in the presence of the witness before the trial, and could not therefore, as to the defendant, have been newly discovered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. §938.]

Error from City Court of Jefferson; G. A. Johns, Judge.

Proceedings between the State and J. C. Sillers. From the judgment, Sillers brings error. Affirmed.

W. W. Stark, of Commerce, for plaintiff in error. P. Cooley, Sol., of Jefferson, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 252)

HARVEY v. STATE. (No. 6435.)

(Court of Appeals of Georgia. May 3, 1915.)

*(Syllabus by the Court.)***CRIMINAL LAW** \S 953—**NEW TRIAL—NOTICE—SUFFICIENCY—DISMISSAL.**

The court did not err in dismissing a motion for a new trial, which by an order of the judge was set for hearing at a certain place and time in vacation, where on the day thus fixed for the hearing the solicitor general appeared and moved to dismiss the motion (this being his first opportunity), for the reason that no copy of the rule nisi issued thereon had ever been served upon him, and it appeared that there was no service or acknowledgment of service of either "the original motion and the rule nisi, or a copy thereof, and the said solicitor general stated in his place upon the hearing of said motion that he had not waived, and that he then and there declined to waive, service upon himself of the rule nisi in question," and the "movant then introduced in evidence the further statement of the said solicitor general, then and there made by him in his place, upon the hearing of said motion for a new trial, that counsel for movant simply told him (the solicitor general) that he (movant's counsel) had filed a motion for a new trial in the case of State v. Harvey, and this was all the notice he (the solicitor general) ever received from movant or movant's counsel, about the motion for a new trial in question."

(a) No reason appears and no excuse was offered for the failure to serve counsel for the state, or to obtain from him an acknowledgment of service, which might, in the discretion of the court, have authorized a continuance of the hearing until service could be perfected, nor does it even appear that any motion for such a continuance was made.

(b) This court cannot hold that a mere statement by movant's counsel to counsel for defendant in error that he had filed a motion for a new trial would dispense with the service of a copy of the motion itself and of the rule nisi, as required by the original order of the trial judge, or be a compliance with the requirements of section 6080 of the Civil Code of 1910. See *Thornton v. State*, 16 Ga. App. —, 84 S. E. 973, and citations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2359-2362; Dec. Dig. \S 953.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Proceeding between A. L. Harvey and the State. From the judgment, Harvey brings error. Affirmed.

Fondren Mitchell, of Thomasville, for plaintiff in error. H. J. MacIntyre, Sol., of Thomasville, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 249)

DAWSON v. CITY OF GLENNVILLE. (No. 6189.)

(Court of Appeals of Georgia. May 3, 1915.)

*(Syllabus by the Court.)***1. CRIMINAL LAW** \S 1132 — **CERTIORARI — HEARING IN VACATION — ORDER IN TERM TIME.**

Under section 4852 of the Civil Code of 1910, a judge of the superior court has the power to hear and determine a certiorari in va-

cation as well as in term time, without any order passed in term time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2980-2983; Dec. Dig. \S 1132.]

2. CRIMINAL LAW \S 1137 — **CERTIORARI — HEARING IN VACATION—NOTICE.**

One who at the hearing of a certiorari consents that the presiding judge may reserve his decision until vacation will not be heard to complain that he did not receive notice of the time and place of the judge's decision in the case. After having consented to the rendition of the judgment in vacation, the duty rested upon him of ascertaining the result of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. \S 1137.]

3. INTOXICATING LIQUORS \S 236 — **VIOLATION OF ORDINANCE — PROSECUTION — PRESUMPTION—REBUTTAL.**

Upon the trial of one charged with a violation of a city ordinance prohibiting the carrying of spirituous liquors for unlawful sale, proof that the accused received money from another person, accompanied by a request to procure whisky for the latter, and that the accused went off and returned and delivered two bottles of whisky to that person, would authorize the inference that the accused sold the whisky, and that he was keeping it for sale. This inference was not rebutted by the uncorroborated statement of the accused that he had bought the whisky from another person and paid him for it. *Bray v. Commerce*, 5 Ga. App. 605, 63 S. E. 596; *Langston v. Hazlehurst*, 9 Ga. App. 449, 71 S. E. 592; *Simpson v. Eastman*, 16 Ga. App. —, 84 S. E. 721, and cases therein cited.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. \S 236.]

4. VERDICT AND DENIAL OF NEW TRIAL AP-PROVED.

The evidence authorized the verdict, and the judge of the superior court did not err in overruling the motion for a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

J. C. Dawson was convicted of violating a city ordinance, and from the judgment of the superior court on certiorari, brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. O. L. Cowart, of Glennville, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 239)

HARRIS v. STATE. (No. 5972.)

(Court of Appeals of Georgia. May 3, 1915.)

*(Syllabus by the Court.)***CRIMINAL LAW** \S 1160 — **APPEAL — DENIAL OF NEW TRIAL—EVIDENCE.**

There being sufficient evidence to sustain a verdict of guilty, the discretion of the trial judge in overruling the motion for a new trial, based solely upon the usual general grounds, will not be interfered with.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. \S 1160.]

Error from City Court of Madison; K. S. Anderson, Judge.

Oscar Harris was convicted of crime, and brings error. Affirmed.

Williford & Lambert, of Madison, for plaintiff in error. A. G. Foster, Sol., of Madison, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 248)

SHEPHERD v. STATE. (No. 5995.)

(Court of Appeals of Georgia. May 3, 1915.)

(Syllabus by the Court.)

1. MALICIOUS MISCHIEF \S 1. — "PUBLIC BUILDING"—INJURIES.

A town calaboose is a public building within the intent and meaning of section 777 of the Penal Code of 1910. All buildings held, used, or controlled exclusively for public purposes by any department or branch of government, state, county, or municipal, are public buildings; and this is true without reference to the ownership of the building or of the realty upon which it is situated.

[Ed. Note.—For other cases, see Malicious Mischief, Cent. Dig. \S 1-5; Dec. Dig. \S 1.

For other definitions, see Words and Phrases, First and Second Series, Public Building.]

2. MALICIOUS MISCHIEF \S 9—INJURY TO PUBLIC BUILDINGS—INSTRUCTIONS—EVIDENCE.

The defendant having been charged in the indictment with destroying, injuring, and defacing a certain calaboose, "the same being a public building belonging to the town of Fairburn," and there being no evidence whatever to show the truth of this allegation, it was error for the court to charge the jury that, "if you find from the evidence that the town of Fairburn was in possession of such building, and used the same as a station house and calaboose for the purpose of confining municipal prisoners, then you would be authorized to find that the town owned the building." Use and possession do not necessarily constitute title or ownership.

[Ed. Note.—For other cases, see Malicious Mischief, Cent. Dig. \S 15; Dec. Dig. \S 9.]

3. MALICIOUS MISCHIEF \S 5 — INJURY TO PUBLIC BUILDINGS—PROSECUTION—PLEADING AND PROOF—OWNERSHIP.

"The rule is well settled that the ownership must be proved as laid in the indictment. Such proof, being descriptive of the identity of the offense, is held necessary even where ownership is needlessly alleged." *Berry v. State*, 92 Ga. 48, 17 S. E. 1006, and cases there cited. It was therefore error for the court to overrule the defendant's motion for a new trial, based upon the ground that the state failed to show ownership of the building in the town of Fairburn, as alleged in the indictment.

[Ed. Note.—For other cases, see Malicious Mischief, Cent. Dig. \S 12; Dec. Dig. \S 5.]

Error from Superior Court, Campbell County; R. W. Freeman, Judge.

Johnnie Shepherd was convicted of injuring public property, and brings error. Reversed.

J. W. Culpepper, of Fayetteville, for plaintiff in error. Geo. M. Napier, Sol. Gen., of Atlanta, for the State.

RUSSELL, C. J. Judgment reversed.

(16 Ga. App. 253)

MOORE v. STATE. (No. 6351.)

(Court of Appeals of Georgia. May 3, 1915.)

(Syllabus by the Court.)

DENIAL OF NEW TRIAL.

No error of law is complained of, and, since the evidence for the state amply supports the verdict returned, the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Liberty County; W. W. Larsen, Judge.

Proceeding between Ida Moore and the State. From the judgment, Ida Moore brings error. Affirmed.

Ben A. Way, of Hinesville, for plaintiff in error. W. F. Slater, Sol. Gen., of Savannah, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 234)

STRICKLAND v. STATE. (No. 5832.)

(Court of Appeals of Georgia. May 3, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW \S 854—VERDICT—VALIDITY.

"One who is accused of crime has the right to insist upon all the formalities attached by law to a legal trial. Where, without his consent or over his objection, the jury charged with the determination of his guilt or innocence is dispersed prior to their return into court, a purported verdict, returned by one of the jury after they have separated as a whole and have been permitted to mingle with the public, and the defendant has thus been deprived of his right to poll the jury, is a nullity." The ruling in this case is controlled by the decision of this court in *Hopkins v. State*, 6 Ga. App. 403, 65 S. E. 57, and the decisions of the Supreme Court in *Barfield v. Mullino*, 107 Ga. 730, 33 S. E. 647, and *Prescott v. Augusta*, 118 Ga. 549, 45 S. E. 431.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2039-2047; Dec. Dig. \S 854.]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Dan Strickland was convicted of a misdemeanor, and brings error. Reversed.

H. H. Elders, of Reidsville, and C. L. Covert and L. P. Strickland, both of Glennville, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, for the State.

RUSSELL, C. J. The defendant was on trial for a misdemeanor, and the jury was out considering the case when the noon hour of court arrived. The court took a recess, and the jury were left by the court in the charge of a bailiff, without any instruction or intimation which permitted them to disperse. There was no agreement on the part of the defendant, or his counsel, that the jury might disperse after agreeing to a verdict, or that a sealed verdict might be returned. During the recess the bailiff permitted the jury to disperse, and to go out and mingle with the people generally. When

court reconvened, after the dinner recess, the jury reassembled in the jury room, and, after a few moments, came into court and returned what purported to be their verdict. The defendant and his counsel objected to receiving the jury's finding, and moved the court to declare a mistrial. Over the objection of the defendant and his counsel, the court received the verdict in open court, and imposed sentence. The defendant promptly, and during the term, moved to set aside the verdict and judgment for the reasons above stated. The court overruled the motion to set aside the verdict, and exception is taken to that judgment.

We think the court erred in refusing to order a mistrial upon the defendant's motion, and thereafter erred in not sustaining the motion to set aside the verdict. The case is controlled by the ruling of the Supreme Court in *Nolan v. State*, 55 Ga. 521, 21 Am. R. 281, *Slvey v. State*, 71 Ga. 553, *Barfield v. Mullino*, supra, *Prescott v. Augusta*, supra, *Bagwell v. State*, 129 Ga. 170, 58 S. E. 650, and the decisions of this court in *Griffin v. State*, 5 Ga. App. 45, 62 S. E. 685, and *Vaughan v. State*, 9 Ga. App. 613, 71 S. E. 945, and especially by the ruling in *Hopkins v. State*, 6 Ga. App. 403, 65 S. E. 57, in which the facts are practically identical with those in the case at bar. Counsel for the state made a counter showing upon the hearing of the motion to set aside the verdict, and there appear in the record affidavits from jurors stating that they wrote the verdict before dispersing for dinner, and that there was nothing which could have prejudiced the rights of the defendant, and that the verdict rendered was the result of their conviction under the facts and the law of the case, that after writing the verdict they sealed it up in an envelope, as is often done under direction of the court, and then dispersed to get their dinner, and reassembled after dinner and reported their finding to the court. These jurors affirmed that the verdict was as free from any and all undue influence as it would have been if rendered in open court without their having separated. The lower court seems to have been of the opinion that the separation was harmless to the accused, and to have overruled, for this reason, the motion to set aside the verdict.

Regardless of whether it could be held that the plaintiff in error waived the point, if, after knowledge that the jury had dispersed, he had not made a motion for mistrial, and had thus seemingly acquiesced in the permission which the bailiff gave the jury to disperse, we are clear that when the attention of the court was called to the matter by the defendant's demand for a mistrial, it was error not to withdraw the case from the further consideration of the jury, and to refuse to order a mistrial.

"The highest public policy and the maintenance of the purity of our jury system demand that the verdict of the jury shall not only be un-

tainted by illegal, improper, and prejudicial influences, but even that it shall be above suspicion." *Griffin v. State*, 5 Ga. App. 45, 62 S. E. 685.

This is the rule in both civil and criminal cases, and if the rule is to be relaxed, its observance is certainly less important where only property rights are concerned than where the liberty of the citizen is involved. It frequently happens that in the trial of misdemeanor cases the jury is permitted to disperse while the trial is in progress, during temporary recesses of the court, and frequently, in such cases, the court allows the jury to separate after a verdict has been agreed to, signed, and sealed in an envelope, which is sometimes delivered to the clerk and sometimes retained by the foreman. But in these cases the permission to disperse depends upon the consent of the parties, and especially the consent of the defendant, to the separation.

"When a jury has retired to consider a case submitted to them and make up their verdict, they should not be allowed to disperse until they have returned a verdict in open court, or a mistrial has been declared, unless the parties or their counsel consent that the verdict may be rendered in some other manner." *Barfield v. Mullino*, supra.

When a jury engaged in the trial of a citizen for his life or liberty disperse, and the members thereof mingle freely with the outside world before the rendition of a verdict, the probable finding of the jury is placed under such suspicion, and the opportunity for the exercise of influence in molding the verdict is so apparent as to raise a conclusive presumption that the finding later returned into court is not the result of free, independent, untrammelled, conscientious conviction of the jury upon the evidence alone. The contention that an order declaring a mistrial will subject the country to the useless expense of another trial, when a showing has been made that the verdict is the same that it would have been if the jury had not dispersed, is a commercial argument which amounts to nothing when the administration of justice is concerned. We have said this much in regard to the overruling of the motion for a mistrial, because if the motion for a mistrial had been granted, the defendant could not, upon another trial, have pleaded former jeopardy, for the second trial would have been rendered necessary by his motion for the mistrial.

In the *Hopkins Case*, supra, as in this case, the jury dispersed at the noon recess; in this case they dispersed without the court's knowledge, and in the *Hopkins Case* despite the court's order. It is true that in the *Hopkins Case* the defendant had expressly refused to consent for the jury to disperse, whereas in the present case it does not appear that the defendant's consent was asked or refused. In the *Hopkins Case* we held that the defendant was entitled to a discharge, and that the verdict was a nullity, because, by the separation of the jury, the

defendant was deprived of his right to poll the jury, and the dispersal of the jury should be held, at least, equivalent to a mistrial without the consent of the defendant and not caused by such necessity as is recognized by law. In the present case a motion for a mistrial was made and should have been granted, and, since the verdict returned is for that reason a nullity, the court should have granted the motion to set it aside. In the Hopkins Case, *supra*, we held:

"One who is accused of crime has the right to insist upon all the formalities attached by law to a legal trial. Where, without his consent or over his objection, the jury charged with the determination of his guilt or innocence is dispersed prior to their return into court, a purported verdict, returned by one of the jury after they have separated as a whole and have been permitted to mingle with the public, and the defendant has thus been deprived of his right to poll the jury, is a nullity."

The solicitor general, in support of the contention that the dispersal of the jury was harmless, cites the case of Storey v. Weaver, 66 Ga. 296 (1), and Roberts & Copenhagen v. State, 14 Ga. 8 (4), 58 Am. Dec. 528. The ruling in Storey's Case is not in point. There the motion to set aside the verdict (which was rendered by default in a civil case) was based upon the ground that, due to a misunderstanding, the defendant's counsel failed to file a plea in his behalf, and that he had a meritorious defense; the evidence as to the cause of the failure to timely file a plea was vague and conflicting, but it is perfectly plain that the defense that the defendant would have filed was wholly worthless. Upon this state of facts the Supreme Court affirmed the judgment in overruling the motion to set aside the verdict, and it was upon this state of facts that the court held that a motion to set aside and vacate a judgment and reinstate the case cannot be determined by any fixed rule, but depends upon the circumstances in the case. There is nothing in the record in that case like the separation of the jury before the rendition of the verdict, to afford a reason for impeaching the fairness of the trial.

The ruling in Roberts & Copenhagen v. State, *supra*, is relied upon by state's counsel as authority in support of the proposition that where the trial judge has satisfied himself, by a careful examination of jurors on oath, that casual intercourse on the part of the jurors with outsiders was not injurious to the prisoner, and so announces, the court may not on this account, disturb a verdict. But no motion for a mistrial was made in that case. The ruling was placed upon the principle announced in Monroe v. State, 5 Ga. 85, that a separation of the jury raises a presumption of hurt and injury to the prisoner, a presumption that he cannot be fairly and properly tried by them, and places upon the prosecution the burden of showing, beyond a reasonable doubt, that the defendant has sustained no injury on account of the separation; but where a motion for a mis-

trial is made before any verdict has been received, and it appears that the jury dispersed without rendering a verdict, and that the purported finding is in fact not a verdict, but, as stated in Silvey v. State, 71 Ga. 553 (2), "a mere resolution, which it was in the power of the jury to alter or change at any time before it was delivered into court," the ruling in the Roberts Case does not support the contention that the motion for mistrial should not be granted.

In Silvey's Case the bailiff told the jury that when they agreed upon a verdict they could write it out, give it to the foreman, and go home; and accordingly the jury wrote out the verdict, gave it to the foreman, and dispersed. The next morning the court, after making an effort to purge the jury, received the purported verdict over the objection of the defendant. The Supreme Court held that the purgation fell short of showing that the accused had not been injured, and that the agreement by the jury to find a verdict in a certain way, reducing it to writing and delivering it to the foreman, was not a verdict, because the jury could change it at any time before its delivery into court; and the judgment of the lower court, refusing to set aside the verdict, was reversed.

In the Silvey Case there was no motion for a mistrial; and in the Hopkins Case, *supra*, we endeavored to point out the distinction between a case where a motion for a mistrial is made and one where the point is raised for the first time in a motion to set aside the verdict, or as a ground of a motion for a new trial. When no motion for mistrial is made, after the defendant is aware of a separation of the jury, he will be presumed to be satisfied with the showing to the effect that no injury has resulted to him, and to have waived the irregularity in the trial, whereas by a motion for a mistrial he waives nothing, but impliedly asserts his conviction that he has been injured, or is likely to suffer injury. By a motion for mistrial, the defendant raises the point that any verdict found will be a nullity, by reason of the fact that he has been injured through the separation of the jury, and he raises it at a time when, if he be guilty, the state may legally establish that fact upon another trial. Under these circumstances the state's interests are not hazarded by a plea of former jeopardy. When the point is raised for the first time after a trial, certainly, if the defendant knew before the verdict of the separation, he should be estopped to assert that he was injured, and should be deprived of the right of pleading a jeopardy which he had voluntarily encountered and assumed. Misconduct on the part of the jury, while they still have the case under consideration (from which presumably injury may have resulted to the defendant), throws the burden upon the state to show affirmatively that no injury has resulted. *Westmoreland v. State*, 45 Ga. 225 (3), 282. But if no inquiry is made by the court

prior to the return of the verdict and while the jury still has the case under consideration, along the lines suggested in the Roberts Case, supra, the trial is vitiated by the separation of the jury, and the verdict is a nullity.

Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 250)

WOLF v. STATE. (No. 6241.)

(Court of Appeals of Georgia. May 3, 1915.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS \Leftrightarrow 224—UNLAWFUL SALE — BURDEN OF PROOF—QUESTION FOR JURY.

On the trial of one charged with a violation of the law by selling intoxicating liquor, "proof that the accused received money from another person, accompanied with a request to procure whisky for the latter, and shortly thereafter delivered whisky to such person, puts the onus on the defendant of explaining where, how, and from whom he got the liquor"; and it is for the jury to say whether this burden has or has not been successfully carried. *Highsmith v. Waycross*, 7 Ga. App. 611, 67 S. E. 677, and cases cited.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. \Leftrightarrow 224.]

2. CRIMINAL LAW \Leftrightarrow 1178—ASSIGNMENTS OF ERROR—ABANDONMENT—BRIEF.

The special assignments of error contained in the amendment to the motion for a new trial, not being referred to in the brief of counsel for plaintiff in error, will be treated as abandoned.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3011-3013; Dec. Dig. \Leftrightarrow 1178.]

Error from City Court of Nashville; C. A. Christian, Judge.

Caesar Wolf was convicted of unlawfully selling intoxicating liquor, and brings error. Affirmed.

J. C. Smith, C. Bradford, and W. R. Smith, all of Nashville, for plaintiff in error. J. H. Gary, Sol., of Nashville, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 249)

GILBERT v. STATE. (No. 6043.)

(Court of Appeals of Georgia. May 3, 1915.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT \Leftrightarrow 253—SALES \Leftrightarrow 6—UNLAWFUL DISPOSITION OF PROPERTY—INDICTMENT — INSTRUCTIONS — PROOF — "SALE"—"PLEDGE"—"PAWN."

Proof that a farm tenant placed in pawn, to obtain money from another, a portion of his crop raised on the rented premises, before paying off and discharging his obligations to his landlord for rent and supplies, will not support an indictment (based on sections 720 and 721 of the Penal Code 1910), which charges that the accused did "sell" a part of said crop, and does not allege that he did so "sell or otherwise dispose of" the property, etc.

(a) "A pledge, or pawn, is property deposited with another as security for the payment of a

debt." Civ. Code 1910, § 3528. "A sale, in its broadest sense, may be defined as the transfer of the property in a thing for a price in money." 35 Cyc. 25. In the former the title does not pass; in the latter it does.

(b) Under such an indictment, instructions from the court, which authorized the jury to convict the defendant if he did in fact "sell or otherwise dispose of the property," and failed to confine the jury solely to evidence tending to support the charge as to the mere sale as alleged in the indictment, were erroneous.

(c) Since a decision of the question is not necessary in this case, we make no ruling as to whether the words "otherwise dispose of" would include a pawn, loan, or other similar disposition thereof. See *Scott v. State*, 6 Ga. App. 332, 64 S. E. 1005.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1031-1033; Dec. Dig. \Leftrightarrow 253; *Sales*, Cent. Dig. § 14; Dec. Dig. \Leftrightarrow 6.

For other definitions, see *Words and Phrases*, First and Second Series, *Pawn*; *Pledge*; *Sale*.]

2. DENIAL OF NEW TRIAL APPROVED.

The court erred in overruling the motion for a new trial.

Error from City Court of Sparta; R. W. Moore, Judge.

Erwin Gilbert was convicted of violating Pen. Code 1910, §§ 720, 721, and brings error. Reversed.

A. G. Foster, of Madison, for plaintiff in error. R. L. Merritt, Sol., of Sparta, for the State.

WADE, J. Judgment reversed.

(16 Ga. App. 240)

McBRIDE v. GRAEBER. (No. 5988.)

(Court of Appeals of Georgia. May 3, 1915.)

(Syllabus by the Court.)

1. HABEAS CORPUS \Leftrightarrow 46—JURISDICTION—CITY COURT.

The judge of a city court who, by the law which establishes it, is invested with "power to issue writs of habeas corpus, and to hear and dispose of the same in the same way and with the same power as judges of the superior courts," may grant such a writ, directed to any person having another in illegal custody within the territorial limits of the county over which the jurisdiction of his court extends.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 36; Dec. Dig. \Leftrightarrow 46.]

2. HABEAS CORPUS \Leftrightarrow 46—JURISDICTION—CITY COURT—DETENTION UNDER SENTENCE OF SUPERIOR COURT.

Where the application shows that the person held in custody is detained under a void sentence of the superior court, the fact that it is a sentence of the superior court will not prevent a judge of the city court who has power to grant the writ of habeas corpus from taking jurisdiction of the proceeding.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 36; Dec. Dig. \Leftrightarrow 46.]

3. BIGAMY \Leftrightarrow 1—VENUE.

Under the law of force in Georgia, the crime of bigamy is committed in the jurisdiction in which the accused enters into the second or bigamous contract of marriage, and not in another jurisdiction in which he carries on bigamous cohabitation.

[Ed. Note.—For other cases, see *Bigamy*, Cent. Dig. §§ 1-15; Dec. Dig. \Leftrightarrow 1.]

(Additional Syllabus by Editorial Staff.)

4. BIGAMY ⇐1—"MARRIAGE."

The word "marriage," when applied to a bigamous marriage, means going through a form of marriage.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 1-15; Dec. Dig. ⇐1.

For other definitions, see Words and Phrases, First and Second Series, Marriage.]

5. BIGAMY ⇐1—WHAT CONSTITUTES.

"Bigamy" is properly defined as the crime of having two wives or two husbands at the same time. More accurately stated, the crime of bigamy is committed by the act of marrying while the spouse by a former marriage is still alive and the former marriage is still in force.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 1-15; Dec. Dig. ⇐1.

For other definitions, see Words and Phrases, First and Second Series, Bigamy.]

Error from City Court of Leesburg; W. G. Martin, Judge.

Habeas corpus by J. B. Graeber against J. M. McBride, Warden. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Graeber presented his petition for habeas corpus to the judge of the city court of Leesburg, in Lee county, Ga. The petition was brought against J. M. McBride, as warden of the Lee county chain gang, and alleged that the petitioner was illegally restrained of his liberty; the mode of restraint being by confinement and hard labor on the public roads of Lee county, and the place of his detention being also in that county. He further alleged that he was restrained under and by virtue of an illegal and void sentence pronounced against him by the superior court of Wayne county, Ga., at the November term, 1913, thereof, which sentence was based on his plea of guilty to a defective indictment in that court. The indictment, a copy of which is attached to the petition, charges J. B. Graeber with "the offense of bigamy, for that the said J. B. Graeber, on the 10th day of June, in the year of our Lord one thousand nine hundred and twelve, in the county aforesaid, with force and arms, having been legally married to Marie E. O'Connell, the said lawful wife being still and then alive, did marry Bettie Lou Weaver, under the name of Elizabeth Stewart, in the state of Florida, county of Duval, and, after having married said Bettie Lou Weaver in said state of Florida, and knowing that his lawful wife, Marie E. Graeber, was still living, did cohabit and live as man and wife with said Bettie Lou Weaver in said county of Wayne, thus having and did knowingly have a plurality of wives at the same time, contrary to the laws of said state," etc. The petitioner complained that Wayne superior court was without jurisdiction to impose sentence upon him on a plea of guilty to a crime which appeared from the indictment itself to have been committed in another state, and that the said superior court imposed its sentence for an act for which no penalty or punishment what-

soever is prescribed under the laws and statutes of force in the state of Georgia, and that his detention and restraint was therefore illegal, and he prayed the grant of the state's writ of habeas corpus, directed to the said warden, commanding and requiring him to produce the person of the petitioner before Hon. W. G. Martin, judge of said city court, at such time and place as the court might direct. The writ duly issued, and at the hearing the respondent first entered a demurrer to the petition and moved to dismiss it, upon several grounds, which are, in substance, as follows: (1, 2) Because the city court of Leesburg was without jurisdiction to pass upon the petition, since the petition sought to attack the validity of a judgment of the superior court of Wayne county in a court of inferior jurisdiction; (3) because the petition sought to have the city court of Leesburg pass upon a criminal statute over which that court had no jurisdiction, to wit, the statute relating to bigamy, which is a felony; (4) because the city court of Leesburg had no jurisdiction to pass upon the pleadings and judgment in a court of superior jurisdiction in felony cases. The demurrer was overruled, and the respondent filed his answer, denying all the allegations of the petition except as to the nature of the process under which the petitioner was restrained of his liberty, and the mode of that restraint. Upon the indictment attached to the original petition appears a formal waiver of arraignment and a plea of guilty, properly signed.

At the conclusion of the hearing the judge of the city court passed an order discharging the petitioner from further detention by the warden of Lee county chain gang, on the ground that the detention was under an illegal sentence, based upon a plea of guilty to a void indictment; and further ordered that the petitioner be "committed to the superior court of Wayne county, Ga., to answer the offense of adultery and fornication, or such other offense as the grand jury may find, growing out of the alleged bigamous marriage," and directed that the respondent, J. M. McBride, deliver him "to any sheriff or deputy sheriff of Georgia, who shall deliver him to the jailer of Wayne county, Ga., to be safely kept until discharged by due process of law." The respondent excepted to this judgment, and brought to this court the questions raised by the petition, the demurrer, and the answer. The judge of the city court, in certifying the bill of exceptions, incorporated therein a recital that the only evidence introduced on the trial consisted of a certified copy of the indictment, with the plea of guilty and other entries thereon, and a like copy of the sentence of the superior court; all of which exactly correspond to the certified copies attached to the petition as exhibits.

T. E. Patterson, of Griffin, and J. B. Hoyl, of Leesburg, for plaintiff in error. W. H. Burt, of Albany, for defendant in error.

WADE, J. (after stating the facts as above). [1, 2] The first question for determination is the question as to the jurisdiction and power of the judge of the city court of Leesburg to issue a writ of habeas corpus which seeks to release from custody one restrained under and by virtue of a sentence imposed upon him by a superior court of this state, for the commission of an offense only cognizable by that court, and which the city court of Leesburg would have no jurisdiction to originally try. In the case of Pitts v. Hall, 60 Ga. 390, the Supreme Court said:

"The ordinary undertook to turn out the defendant by writ of habeas corpus, the superior court reversed the ordinary on certiorari, and this is the judgment sought to be corrected. The ordinary had no right to interfere with the sentence of the superior court. Code 1873, § 4023 [Penal Code of 1910, § 1305]. The process was lawful, and it would be dangerous to let such a court, or any court, interfere with the sentence of any other court superior to itself."

This would seem to be an explicit ruling on the point involved, but it will be found, from a careful examination of the decision in that case (and it is so declared by the Supreme Court in *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305-317, 43 S. E. 780, 61 L. R. A. 739) that these remarks of Judge Jackson, touching the danger resulting from the interference by an inferior court with a sentence of a court of superior dignity, were purely obiter. Any doubt which may have existed on this point before that time was definitely removed by the ruling in *Simmons v. Georgia Iron & Coal Co.*, supra, in which it is clearly and distinctly held that:

"The judge of a city court, the jurisdiction of which extends over the whole of the county in which it is located, has power to grant the writ directed to any person having another in illegal custody within the territorial limits of the county, and to make it returnable to any place within the county, notwithstanding such person may be a nonresident of the county."

And again:

"The fact that the application may show that the person held in custody is detained under a void sentence of the superior court would not prevent the judge of a city court having power to grant the writ from taking jurisdiction of the proceeding."

To attempt to add anything to the learned and interesting discussion of the writ of habeas corpus to be found in the case just referred to would be useless; nor is it necessary for the purposes of this case to refer to what is there said as to whether the sufficiency of a petition for habeas corpus can be tested by demurrer, notwithstanding it seems that a motion may be made to quash such a writ because of insufficient averments in the petition. In the opinion in that case (117 Ga. 315, 43 S. E. 784, 61 L. R. A. 739) it is said that a city court for Bartow coun-

ty was created by an act of the Legislature giving it jurisdiction over the whole of that county, and "by section 23 of the act it was provided that 'the judge of said city court shall have authority to grant writs of habeas corpus, except when the person detained of his liberty is charged with a capital felony,'" and that "the statutory right of the judge of that court to issue the writ of habeas corpus must be derived solely from this act." The court says further (117 Ga. 317, 43 S. E. 785, 61 L. R. A. 739):

"We are not aware of any difference in rank among the various judges of the state when acting as habeas corpus judges; and we see no reason, in principle, why one such a judge presiding in a city court might not discharge a person wrongfully held in custody under a void sentence imposed by the superior court. The sole question to be inquired into is whether the detention is illegal; and, if it is, the prisoner ought to be discharged, without regard to who or what was the direct or indirect cause of the detention."

The act establishing the city court of Leesburg (Acts 1905, pp. 266-276) provides explicitly, in section 13:

"That the judge of said city court shall have power to issue writs of habeas corpus, and to hear and dispose of the same in the same way and with the same power as judges of the superior courts."

Also section 1 of that act declares that the city court of Leesburg shall have civil and criminal jurisdiction "over the whole county of Lee." These provisions obviously bring this court under the same rule declared by the Supreme Court in reference to the city court of Cartersville.

In England it was an offense against the canon law, but not against the common law, to marry a second time during the life of the first husband or wife, or to cohabit under such a marriage. By statute enacted during the reign of James I bigamy was, however, made a felony when committed within the limits of England or Wales, and many defects therein have been cured by later enactments. "In most of the United States the nature and punishment of bigamy are defined by statutes which are variations of the later English enactments. Bigamy is now an offense in all the states of the Union, though the degree of the crime varies." 4 Am. & Eng. Enc. L. (2d Ed.) 36. Generally speaking, "to constitute the offense of bigamy, there must have been a prior valid marriage, coupled with an entering by one of the parties thereto into a second marriage while to his or her knowledge the other party to the prior marriage is alive, and such marriage is still undissolved." 5 Cyc. 689, 690. In England it now appears that under the existing statutes there may be a conviction for bigamy wherever the guilty person is apprehended or held in custody, without regard to the question where the second marriage took place, though under the earlier statutes there could be no conviction except at the place of the marriage. 4 Am. & Eng. Enc. L. (2d Ed.) 39. "Generally in the Unit-

ed States no conviction for bigamy can be had except in the jurisdiction where the bigamous marriage was solemnized;" though by express statute in some of the states the defendant may be tried and convicted where the bigamous cohabitation occurs, even though the marriage took place outside of the state where the indictment was found. *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516; *Com. v. Bradley*, 2 Cush. (Mass.) 553; *State v. Johnson*, 12 Minn. 476 (Gil. 378) 93 Am. Dec. 241; *State v. Palmer*, 18 Vt. 570; 4 Am. & Eng. Enc. L. (2d Ed.) 40. "The time when, and the place at which, the prior marriage took place are not material ingredients of the offense, because the second marriage alone is unlawful; the first having nothing criminal in it." 5 Cyc. 693. "The place where the second marriage was performed is material. * * * Where, however, the statutes so provide, the place of the second marriage is not important, and it may have been solemnized elsewhere than within the jurisdiction of the county or state where the charge of bigamy is made." 5 Cyc. 694. See, also, *Cox v. State*, 117 Ala. 103, 23 South. 806, 41 L. R. A. 760, 67 Am. St. Rep. 166. Cohabitation under the second marriage is not requisite, but the crime of bigamy is complete when the second marriage is solemnized. 5 Cyc. 694; 4 Am. & Eng. Enc. L. (2d Ed.) 39.

[4, 5] "It is now held by all the courts that the word 'marriage,' when applied to a subsequent marriage, means going through a form of marriage." 4 Am. & Eng. Enc. L. (2d Ed.) 39. "Bigamy is popularly described as the crime of having two wives or two husbands at the same time. To state the matter more accurately, it may be said that the crime of bigamy is committed by the act of marrying while the spouse by a former marriage is still alive and the former marriage is still in force. In some states the statutes have gone further and made punishable the mere act of illegal cohabitation with the second spouse. Under such statutes the gist of the offense may be either the second marriage or the illegal cohabitation. At common law, entering into a second marriage while the first remained undissolved was designated 'polygamy,' but the words 'bigamy' and 'polygamy' are used interchangeably at the present time." 3 R. C. L. 796. The sections of the Penal Code of this state defining this crime are as follows:

Section 367: "Polygamy, or bigamy, consists in knowingly having a plurality of husbands or wives at the same time."

Section 368: "If any person being married shall marry another person, the lawful husband or wife being alive, and knowing that such lawful husband or wife is living, such person so offending shall be punished by confinement at labor in the penitentiary for not less than two years nor longer than four years, and the second marriage shall be void."

Section 370: "If any unmarried man or woman shall knowingly marry the wife or husband of another, such man or woman shall be punished by imprisonment and labor in the peniten-

tiary for not less than one year nor longer than three years."

[3] The defendant in this case pleaded guilty, in the county of Wayne, to an indictment for bigamy, alleged to have been committed by marrying one Bettie Lou Weaver in the state of Florida and county of Duval, and, after having married the said Bettie Lou Weaver in the state of Florida, knowing that his lawful wife was still living, by cohabiting and living as man and wife with the said Bettie Lou Weaver in the county of Wayne, thus knowingly having a plurality of wives at the same time. It appears from what we have already said, that in some jurisdictions, cohabiting with a bigamous wife is placed by statute on the same plane as the act of going through a bigamous ceremony of marriage, but no such statute exists in Georgia. It is true that by the common law and the law of this state, a mutual agreement to be husband and wife, made by parties able to contract, and followed by cohabitation, is recognized as a valid marriage. *Dale v. State*, 88 Ga. 552, 15 S. E. 287; *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362; *Clark v. Cassidy*, 64 Ga. 662; *Drawdy v. Hesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190. If the indictment had alleged that the defendant contracted such a common-law marriage with his bigamous wife in the county of Wayne, and this allegation had been sustained by proof, a conviction for bigamy possibly might have been warranted under our statutes, even though one of the parties was not legally "able to contract"; but it is unnecessary to pass upon that question in this case, since the indictment above referred to does not charge that the defendant entered into a common-law marriage within the limits of the county of Wayne, and thereafter cohabited with the person with whom he contracted such a marriage, but charges that the defendant, while knowing that his lawful wife was still living, did cohabit and live in that county as man and wife with the woman to whom he had been married in the state of Florida. Undoubtedly the defendant, under the allegations of the indictment, could have been convicted under a charge of adultery, or adultery and fornication, as the proof may have warranted, but it appears to us clear that the offense of bigamy, as defined by our statutes, was not in any manner charged by the indictment.

It is urged that, since there was no demurrer to the indictment, but, on the contrary, the defendant admitted his guilt thereunder, and entered his formal plea of guilty, he could not be discharged from the sentence imposed upon him. It is sufficient to say that a plea of guilty of the commission of an act which is neither a crime under the common law nor by statute would certainly not authorize the restraint or detention of the person making by his plea the admission that he did the things alleged in the indictment, where they were not in violation of law.

Suppose the defendant had been indicted for lese majesty, which is understood to be a recognized crime under the laws of force in Germany, but which, as generally understood, is not an offense under the common law or under the law of Georgia, and suppose, further, that certain facts constituting the alleged offense were set out in an indictment, and the defendant thereupon waived arraignment and entered his plea of guilty, was sentenced to serve a term in the penitentiary, and was actually restrained of his liberty under the judgment of a competent court; could it be urged for a moment that the writ of habeas corpus would not avail to release him from custody, simply because he had not interposed a demurrer to the indictment, but had entered a plea of guilty to the acts therein alleged? The whole matter depends upon this: no crime under the common law or under the statutes of Georgia relating to bigamy was charged in the indictment, and consequently, when the defendant pleaded guilty to the allegations made in the indictment, he did not thereby plead guilty to a commission of a crime; since none was charged.

It appears to be well settled that the venue in such a case, in the absence of a special statute allowing a trial in the county where the defendant is apprehended (*State v. Sweet-sir*, 53 Me. 438; *State v. Griswold*, 53 Mo. 181; *Reg. v. Whitley*, 2 Moody, 186, reversing 1 C. & K. 150, 47 E. C. L. 150; *Rex v. Fraser*, 1 Moody, 407; *Rex v. Gordon*, R. & R. 36; *Collins v. People*, 1 Hun [N. Y.] 610; *Id.*, 4 *Thomp. & C.* [N. Y.] 77), must be laid in the county where the second marriage was celebrated (5 Cyc. 696). "The basic principle that jurisdiction over crimes is local, and that no state can punish for a crime committed in another state, applies to prosecutions for bigamy, which must be laid in the jurisdiction where the crime, which is the second marriage, was committed." 3 R. C. L. p. 797. In the case of *Nelms v. State*, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377, it was held that:

"A married man whose wife is living commits bigamy by marrying another woman, whether he cohabits with her or not, and though he be arrested immediately after the performance of the marriage ceremony. 'Consensus non concubitus facit nuptias.'"

It is evident that in this jurisdiction, under our statutes defining the crime of bigamy, in which it is definitely stated that one is guilty of this crime who "shall marry another person," etc., or shall "knowingly marry the wife," etc. (sections 368-370), the actual ceremony or contract of marriage itself is referred to, whether the marriage be performed with or without pomp and circumstance by a minister of the Gospel, or by an officer of the law authorized to perform the ceremony, or (possibly) by a simple agreement to take each other for husband and

wife, followed by cohabitation, and constituting a common-law marriage. As was said further in that case:

"A man takes a wife when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made, and this unlawful contract the law punishes."

The trial judge did not err in ordering the discharge of the prisoner, and his judgment is hereby affirmed.

(16 Ga. App. 251)

KEMP v. STATE. (No. 6283.)

(Court of Appeals of Georgia. May 3, 1915.)

(*Syllabus by the Court.*)

1. INTOXICATING LIQUORS §223 — UNLAWFUL SALE—PROSECUTION—PROOF.

The conviction of the accused for the offense of selling intoxicating liquor was authorized by direct proof showing the commission of the crime charged against him at any time within two years prior to the finding of the indictment. *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 587; *Wheeler v. State*, 4 Ga. App. 325, 61 S. E. 409; *Johnson v. State*, 7 Ga. App. 48, 66 S. E. 148.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 263-274; Dec. Dig. § 223.]

2. CRIMINAL LAW §1160 — APPEAL — VERDICT—EVIDENCE.

While the evidence was weak, the jury found it sufficient and resolved all doubts against the defendant, and their verdict, having been approved by the trial judge, will not be set aside by this court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3084; Dec. Dig. § 1160.]

Error from Superior Court, Liberty County; W. W. Larsen, Judge.

Albert Kemp was convicted of selling intoxicating liquor, and brings error. Affirmed.

W. C. Hodges, of Hinesville, for plaintiff in error. W. F. Slater and N. J. Norman, Sols. Gen., both of Savannah, for the State.

WADE, J. Judgment affirmed.

(143 Ga. 390)

L. CARTER CO. v. O'QUINN. (No. 815.)

(Supreme Court of Georgia. April 20, 1915.)

(*Syllabus by the Court.*)

INJUNCTION §137, 151—INTERLOCUTORY INJUNCTION—HEARING — DETERMINATION OF DEMURRER.

In response to a rule nisi to show cause against the grant of an interlocutory injunction, the court may consider a demurrer as cause for refusing such injunction. However, the demurrer cannot be determined as independently presenting an issue for adjudication on its merits, where the hearing is in vacation and no compliance is had with Civ. Code 1910, §§ 4852, 4853, respecting the hearing in vacation of matters determinable by the judge without reference to a jury, and no order in term has been taken to hear the demurrer in vacation.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 307-309, 336; Dec. Dig. § 137, 151.]

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

Action by the L. Carter Company against L. E. O'Quinn. Judgment for defendant, and plaintiff brings error. Reversed.

J. H. Thomas and D. M. Clark, both of Jesup, for plaintiff in error. Jas. R. Thomas and W. B. Gibbs, both of Jesup, for defendant in error.

EVANS, P. J. The L. Carter Company brought a petition against L. E. O'Quinn to recover damages for an alleged trespass and to enjoin its continuance. A rule nisi was granted, calling on the defendant to show cause before the judge at chambers why an interlocutory injunction should not issue. The time set for the hearing was postponed from time to time, and finally a consent order was passed, setting the hearing of the application for injunction at chambers on a date between the return and trial terms of the cause. On the hearing provided for in this order the defendant presented to the court a written demurrer. The plaintiff objected to the consideration of the demurrer, on the grounds that it had not been filed at the appearance term, and that it could not be adjudicated upon the hearing of the application for a temporary injunction. The court overruled these objections, and entered a judgment sustaining the demurrer and dismissing the plaintiff's case. Error is assigned on this judgment.

While on an interlocutory hearing a demurrer may be considered along with the other pleadings, in determining whether an injunction should be granted, such grant is not a conclusive adjudication upon the demurrer. *Gordon v. Fritts*, 138 Ga. 770, 76 S. E. 40. On such an interlocutory hearing the court adjudicates the propriety of the grant or refusal of the writ of injunction. If such hearing occurs after the appearance term, the court's jurisdiction to determine the demurrer by independent judgment on that pleading, in the absence of a term order setting the hearing in vacation, is dependent on compliance with Civil Code 1910, §§ 4852, 4853. These sections empower the judges to hear in vacation, without previous term order, such matters which they may hear in term without a jury, on giving the written notice therein prescribed. The next section (4854) declares that:

"Said judges cannot exercise any power out of term time, except authority is expressly granted; but they may by order granted in term, render a judgment in vacation."

In *Lott v. Wood*, 135 Ga. 821, 70 S. E. 661, it was held that, without the notice required by the statute, or order passed in term time, or the waiver of it, a vacation hearing of a certiorari is coram non iudice and void. It has also been held that the absence of authority by a term order, and a failure to

give the notice required by these Code sections, rendered void a vacation judgment on demurrer to an affidavit of illegality. The court was without jurisdiction at chambers to dismiss the plaintiff's petition on demurrer, and his judgment must be reversed.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 407)

SEABOARD AIR LINE RY. v. OCILLA SOUTHERN R. CO. (No. 327.)
(Supreme Court of Georgia. April 23, 1915.)

(Syllabus by the Court.)

RAILROADS \S 134 — LEASE OF RAILROAD PROPERTY—ACTION AGAINST LESSOR—PETITION—SUFFICIENCY AGAINST DEMURRER.

Owners of steel rails and fastenings entered into a written contract to "demise, lease, and farm let" them to an individual, at a stipulated rental to be paid semiannually, and with the privilege on the part of the lessee of purchasing the property at a fixed price, before the termination of the lease in any way. It was provided that on failure to pay any installment of rent, after notice, the lessors might take possession of the property, and the lessee agreed to pay for any of it which might have been otherwise disposed of. It being understood that the property would be used in constructing about six miles of a railroad, the lessee conveyed the right of way for that distance, and its appurtenances, as a security for the payment of the amounts agreed to be paid by him. The contract provided that there should be no assignment of the lease without the written consent of the lessors, but that, it being contemplated that the lessee intended to construct and operate a railroad, the lessors would give authority to sublet the rails and fastenings to any railroad corporation formed for the purpose of maintaining and operating the road, provided the written assent of the lessors should be first given, in order to insure a reasonable and proper use of the property leased by reliable subtenants, the payment of rentals when due, and the prompt return of the property upon the termination of the term. The lessors (or the successor to the rights of the original lessors) filed an equitable petition against the original lessee and the railroad company which was alleged to have been organized and to be operating the railroad, including that part of it on which the leased rails were laid and the leased fastenings were used, and which company was alleged to have adopted the contract. It was sought to obtain a return of the property, to recover judgment and enforce the security for the amounts of money due, and to have general equitable relief. *Held*, that it was error to dismiss the action as to the defendant railroad company on general demurrer.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 423-433; Dec. Dig. \S 134.]

Error from Superior Court, Irwin County; W. F. George, Judge.

An action by the Seaboard Air Line Railway against J. A. J. Henderson and the Ocilla Southern Railroad Company. A demurrer filed by the defendant company was sustained, and plaintiff brings error. Reversed.

The Seaboard Air Line Railway brought its petition against J. A. J. Henderson and the Ocilla Southern Railroad Company, alleging,

in substance, as follows: S. Davies Warfield and R. Lancaster Williams, as receivers appointed by the United States court, and then in charge of and operating the Seaboard Air Line Railway, under proper authority of the court of their appointment, on March 20, 1909, entered into a contract of lease with Henderson for certain steel rails, angle bars and fishplates for a term of six years, with the right of renewal for three years in addition, upon certain terms and conditions set out in the contract attached to the petition. The rails, bars, and plates were, in pursuance of the contract, delivered to Henderson, accepted by him, and laid upon the right of way described in the contract as and for trackage for the railroad referred to therein, and were thereafter used in and about the operation of said railroad. On November 4, 1909, all the property, rights, franchises, contracts, claims, and demands of the receivership were, by order of the proper court, transferred, set over, assigned, conveyed, and delivered to the plaintiff. After the execution of the lease contract and the delivery of the rails, plates, and bars to Henderson, but at what particular time or by what particular method the plaintiff does not know, Henderson subleased or transferred the rails, plates, and bars, and the lease contract to the Ocilla Southern Railroad Company; it being the railroad corporation formed for the purpose of maintaining and operating the railroad referred to in said lease contract. The company accepted, and has ever since used, the property in and about the operation of its railroad, under and by virtue of the terms, conditions, and covenants of the lease contract, all of which it adopted as its own, with full knowledge thereof. Henderson was then, and has since remained, the president of the company. The rental was payable semiannually in advance. Default was made in making the payment due on January 1, 1912, amounting to \$400.98, and again default was made in making the payment due on July 1, 1912. These defaults continued for more than 60 days. On September 14, 1912, the plaintiff notified Henderson and the Ocilla Southern Railroad Company that it declared the lease forfeited, canceled, annulled, and terminated, except in so far as it enabled the plaintiff to enforce its rights thereunder, and that after the expiration of 10 days the plaintiff would take possession of the leased property, but that such notice was not to be considered as a waiver of any other breach of the contract not referred to therein. Other failures to pay have also occurred since the notice. Henderson and the defendant company refused and failed to deliver the leased property to the plaintiff. The plaintiff is advised and believes that it could not take possession of such property, and that the ordinary methods of procedure at law are not available, because the rails, plates, and bars have become impressed with a public use—the operation of the trains of

the railroad company in connection with the discharge of the duties of the railroad company to the public. Plaintiff is remediless by the strict rules of the common law, which are inadequate to grant the necessary relief, and under them a multiplicity of suits would be necessary. The prayers are that the defendants be required to return the rails, plates, and bars to the plaintiff at Ocilla, free of cost to the plaintiff; that they be required to pay to the plaintiff such damages as it may be entitled to for the breach of any covenant in the contract of lease, as well as the rental, with interest thereunder from the respective dates of maturity; that the damages to which the plaintiff may be entitled, other than the installments of rent and interest, which are not at this time capable of computation (such as the cost of removing the rails and fastenings upon the right of way, the damage arising from misuse of them or such of them as may have been disposed of), may be ascertained; that the plaintiff have judgment for the installments or rent past due, with interest thereon, and for damages which may be ascertained; that "defendant" be required to deposit in the registry of the court a sum of money sufficient to pay the amount of rental and interest due to the plaintiff; that a bond be required to be given to insure the plaintiff against loss by the continued use of the property, and because of the "defendant's" failure to keep any of the covenants of the lease, and particularly that as to returning the track and fastenings and the cost of replacing any not returned; that the plaintiff's lien be established, as provided in the contract of lease, upon all the rights of way, and the rights, privileges, franchises, and appurtenances thereto appertaining for the six miles over and along which the rails and fastenings had been laid; and for general relief and process.

Attached to the petition was a copy of the contract executed by Warfield and Williams, as receivers, and by Henderson. It provided that the receivers "demised, leased, and to farm let" to Henderson 63,360 lineal feet of 50-pound steel rails, with the angle bars or fishplates necessary to the laying of the rails, for trackage for a distance of 6 miles running southwardly from the track of the Seaboard Air Line Railway at Ocilla to a point designated on an attached map. The term specified was six years, with a right of renewal for three years more by giving written notice to the lessors. The lessee covenanted to pay the sum of \$801.97 annually, payable in semiannual installments. He further covenanted to subject the property to ordinary uses only, except in cases of emergency, for the purposes for which it was intended to be used, and upon the termination of the lease to return it to the lessors at Ocilla, at his expense, in like condition as when delivered to him, ordinary wear and tear excepted; and, in case he should fail to pay any amount

due as rents within 60 days after its maturity, the lessors should have the right "to terminate this lease, and at the expiration of 10 days thereafter, to retake possession of and move said rails and fastenings, and to collect from said lessee, the cost of removing and returning said rails and fastenings to said Ocilla, and an amount of money equivalent to such cost in the event they are moved elsewhere, and upon the expiration of 10 days after the exercise of the right to terminate the lease thenceforth this indenture and the estate, rights, and privileges hereby granted, and the other clauses and articles contained herein shall cease and determine and be void, except to enable the said lessors or their successors to collect such rent and other sums due by the said lessee hereunder." The lessee agreed to replace such of the property as might have been "consumed by use or otherwise disposed of" with other similar property of equal value. As security for the payment of the rental and other moneys agreed to be paid, the lessee transferred, assigned, and conveyed to the Seaboard Air Line Railway, as a part of the receivership estate, the right of way, with the privileges, franchises, and appurtenances for the six miles over and along which the rails should be laid. In case of default by the lessee, it was provided that the lessors, after giving 10 days' written notice, might enter upon, use, and enjoy, through legal proceedings or without them, such rights of way, privileges, franchises, and appurtenances, and should have the right to sell them at public or private sale. The lessor agreed that the lessee should have the right to buy the rails and fastenings before the termination of the lease, at a specified price. It was further agreed that the lease should not be assigned without the written consent of the lessors, and that, if it should be so assigned, it should be lawful for the lessors to declare it terminated, and to re-enter and take possession of the property. Then followed this provision:

"It is understood by and between the parties, however, in this connection, that the said lessee intends to construct, maintain, and operate a railroad from Ocilla, Irwin county, Ga., southwardly to or in the direction of Nashville, in the county of Berrien, Ga., and that the said rails or fastenings are to be laid for trackage for the six (6) miles running southwardly from the track of the Seaboard Air Line Railway at Ocilla, at a point indicated by the mark 'X X X' on the [map] hereto attached. And the said receivers shall give full power and authority to the said Henderson to sublease the said rails and fastenings to any railroad corporation formed for the purpose of maintaining and operating said railroad, provided, the written assent of said receivers to the acceptability to them of the said railroad organization as such sublessees be first given. It is understood, however, that the purpose for requiring this assent of the said receivers is only to insure a reasonable and proper use of the said rails and fastenings for the purposes for which they [are] leased, by reliable subtenants, the payments, when due, of the rentals herein stipulated, and the prompt return, as herein provided, of said property to said lessors."

It was agreed that the terms of the lease should be binding on the receivers and their successors, on the Seaboard Air Line Railway and its successors or assigns, and on any purchaser who might buy the property of that company at receiver's sale, and that all covenants by the lessee should inure to the benefit of such parties.

The court sustained a general demurrer filed by the Ocilla Southern Railroad Company, and the plaintiff excepted.

Tom Eason, of McRae, and Anderson, Cann & Cann, of Savannah, for plaintiff in error. H. J. Quincey, of Ocilla, for defendant in error.

LUMPKIN, J. (after stating the facts as above). It was error to dismiss this case as to the Ocilla Southern Railroad Company on general demurrer. The petition alleged that the plaintiff leased the rails and fastenings to Henderson; who either assigned the lease or sublet the property to that company, which was in possession and had adopted the contract, and that the defendants had failed to pay the rent and refused to deliver the leased property. In regard to rights of way it has been held that, when a railroad company is in possession of land using it as a right of way, although not having acquired the legal title thereto, the landowner will be estopped from ejecting the company from the premises, if it is shown that either the original entry was with his consent, or that the entry without his consent was so long acquiesced in that to allow the company to be ejected would either dismember the property of such company, or essentially interfere with its ability to discharge the public duties incumbent upon it, but that this is subject to the qualification that the landowner is entitled to some compensation for his property, and that this must be ascertained and paid to him before the corporation is vested with a complete right to hold and enjoy such property as its own. *Charleston, etc., Railway Co. v. Hughes*, 105 Ga. 1, 17, 30 S. E. 972, 70 Am. St. Rep. 17. The destruction of the ability of a railroad company to perform its duties to the public was considered important in reaching that result. If this or similar reasoning should be considered applicable to rails and fastenings intended to be attached and actually attached to the railroad as a part of a track to be used by a railroad company, under a contract of the character of that here involved, so as in any way to affect the agreement as to the right of the lessor of such rails and fastenings to remove them on failure to pay rent for them, there would be no question that the railroad company in possession and use of the property would be not only a proper, but a necessary, party defendant to an action to enforce the contract. If, on the other hand, it should be held that the rails and fastenings, though thus leased

and used, stand like ordinary personal property hired, with a reservation of a right to retake possession upon failure to pay rent (Webster Lumber Co. v. Keystone Lumber, etc., Co., 51 W. Va. 545, 42 S. E. 632, 66 L. R. A. 33, and note at page 58), then the railroad company was, under the allegations, in possession and use of the property, and wrongfully refused to deliver it. In that event it could be properly made a party to an action to recover the property.

In addition to this, it was alleged that the company adopted the contract of Henderson; and it was sought to enforce a lien upon a portion of the right of way in the possession and use of the company for the purpose of obtaining payment of the sums of money alleged to be due to the plaintiff. The requirement of a written assent in advance by the lessors to a sublease to a railroad company was expressly stated to be for the benefit and protection of the lessors, and could be waived. The Oclilla Southern Railroad Company was a proper party to such a proceeding. See, in this connection, Williams v. Terrell, 54 Ga. 462. This contract was called a lease, the payments to be made were termed "rent," and the technical words "demise, lease, and farm let" were used, and a privilege of purchase was given. The writer of this opinion has to some extent employed the terms which the parties themselves have used. If such a contract be considered like a lease of realty, see Potts-Thompson Liquor Co. v. Potts, 135 Ga. 451, 69 S. E. 734. The action invoked the equitable jurisdiction of the court. It was dismissed on general demurrer. We need not decide the important questions above indicated, in advance of a trial and a full development of the facts, or declare what may be a proper decree to be entered with respect to the company. But in no event was it right to dismiss the case as to it.

Counsel for the defendant in error relied on the decisions in Waycross Air Line R. Co. v. Southern Pine Co., 115 Ga. 7, 41 S. E. 271, and Atlantic & Birmingham R. Co. v. Southern Pine Co., 116 Ga. 224, 42 S. E. 500, both of which cases grew out of the same transaction. An examination of the facts there involved will show that they were entirely different from those in the present case. In them there was no question of lease and sublease or assignment of a lease; none as to the propriety of dismembering a railroad and tearing up a part of its track on failure to pay rental for rails, or as to what should be the proper judgment or decree in such a situation; no question of making a person in possession of property sought to be recovered, and refusing to deliver it, a party defendant; and no effort to enforce a conveyance given as security for a debt, and covering several miles of a right of way in possession of a railroad com-

pany and used by it in the conduct of its business. They involved personal contracts between a firm and a railroad company as to erecting a sawmill and shipping lumber over the railroad, a sale by such firm to another, with an agreement on the part of the purchaser to erect the mill and ship the lumber over the railroad, and a sale by such purchaser to another, with a like agreement between them.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 402)

NASH et al. v. BROOKS et al. (No. 324.)
(Supreme Court of Georgia. April 23, 1915.)

(Syllabus by the Court.)

DENIAL OF NEW TRIAL.

The judgment rendered by the court, to whom the case was submitted for decision without the intervention of a jury, was authorized by the evidence; and there was no error in overruling the motion for new trial, the several grounds of which complained merely, in effect, that the judgment was contrary to law and the evidence.

Error from Superior Court, Gwinnett County; J. B. Park, Judge.

Action between J. O. Nash and A. M. Brooks and others. From the judgment, the parties first mentioned bring error. Affirmed.

M. D. Irwin, of Lawrenceville, for plaintiffs in error. O. A. Nix and John C. Houston, both of Lawrenceville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 392)

PARKS v. CRAIG. (No. 317.)
(Supreme Court of Georgia. April 22, 1915.)

(Syllabus by the Court.)

DENIAL OF NEW TRIAL APPROVED.

There is no merit in any of the special assignments of error. The verdict is supported by the evidence, and the court did not err in refusing the motion for a new trial.

Error from Superior Court, Gilmer County; H. L. Patterson, Judge.

Action between Thomas Parks and Alfred Craig. From the judgment, Parks brings error. Affirmed.

Thos. A. Brown, of Blue Ridge, and A. N. Edwards, of Ellijay, for plaintiff in error. A. H. Burtz, of Ellijay, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 333)

HICKS v. WILLIAMS et al. (No. 319.)
(Supreme Court of Georgia. April 22, 1915.)

(*Syllabus by the Court.*)

CUSTODY OF CHILD.

A father brought a writ of habeas corpus to recover his minor child from the possession of its maternal grandparents. The respondents set up, in opposition to the writ, that the father had relinquished to them his right of possession. On the hearing the judge remanded the child to the custody of the respondents, and provided in his order that it should not be carried beyond the jurisdiction of the court, and that, when it became old enough to enter school, the judgment, upon notice to either side, might be reviewed, and the question of the proper custody of the child reconsidered. *Hicks v. Williams*, 135 Ga. 433, 69 S. E. 547. Subsequently a petition was filed by the father for a review of the former order, and for a reconsideration of the question of the child's custody. On the hearing the court adjudged that no sufficient reason to modify the former order was made to appear, and refused the prayer of the petition. On exception to this order, *held*, that the court did not abuse his discretion.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by L. H. Hicks against J. S. Williams and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hewlett, Dennis & Whitman, of Atlanta, and Griffith & Matthews, of Buchanan, for plaintiff in error. G. R. Hutchens, of Rome, I. N. Cheney, of Bremen, and J. S. Edwards, of Buchanan, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 335)

KING v. KING. (No. 314.)

(Supreme Court of Georgia. April 20, 1915.)

(*Syllabus by the Court.*)

1. HOMESTEAD § 213 — INTERFERENCE WITH HOMESTEAD PROPERTY—INJUNCTION—PETITION—DESCRIPTION OF PROPERTY.

An equitable petition brought by the beneficiary of an alleged homestead to enjoin one in possession of and claiming the legal title to the land alleged to have been set apart as a homestead from collecting the rents and profits of the land, and to cancel the defendant's deeds as a cloud upon the title of the head of the family, who applied for and procured the homestead, and to enjoin the defendant from otherwise interfering with the homestead property, was subject to a special demurrer on the ground that the following description of the homestead property was too vague and indefinite, to wit: "About seventy-two acres of lot of land No. 220 in the 7th district and 3d section of Gordon county, * * * duly set apart by the ordinary of said county as a homestead for petitioner and her then minor children."

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 394-396; Dec. Dig. § 213.]

2. HOMESTEAD § 52, 213—SETTING APART—PROCEEDINGS—INJUNCTION—EVIDENCE.

Where an application for homestead was filed on December 13, 1894, and the ordinary,

on December 19, 1894, directed the county surveyor to survey and lay off a homestead and make a plat of the land, and the return of the surveyor was made on January 4, 1895, showing that the survey and plat were made on January 1, 1895, and this was filed and recorded on January 9, 1895, in the office of the clerk of the superior court, but the proceedings do not disclose that the ordinary approved the return of the surveyor by order or otherwise, such proceedings do not constitute the setting apart of a homestead as contemplated by law, and such homestead is void.

(a) On the trial of the petition referred to in the first headnote, it was error to admit in evidence the proceedings in an application for homestead which on their face showed that the homestead as such was void.

(b) The court erred in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 70-72, 394-396; Dec. Dig. § 52, 213.]

3. SUFFICIENCY OF PETITION.

The petition was not subject to general demurrer.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by Mrs. Annis King against E. F. King. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Annis King brought her petition against E. F. King, and alleged substantially as follows: Her husband, A. J. King, is the owner of a tract of land consisting of "about seventy-two acres of lot of land No. 220 in the 7th district and 3d section of Gordon county." On the 4th day of January, 1895, "said tract of land was duly set apart by the ordinary of said county as a homestead for petitioner and her then minor children." The children have all arrived at the age of 21 years, and she is the only surviving beneficiary of the homestead. Plaintiff's husband is old and feeble, and cannot contribute anything to her support, and she is not able physically to perform any labor, and is dependent on the proceeds "of said tract of land" for a support, having no others means on which to subsist. The defendant, through and under a pretended deed, which was obtained through fraud and misrepresentation, has taken charge of and rented the tract of land, and the tenant now has a growing crop on it. The defendant will collect the rent when the crop is gathered unless he be restrained from so doing by the court. He has rented the land for the next year, and has forbidden plaintiff from going on or controlling the land in any way whatever. The deed under which he is claiming is fraudulent, and was procured by misrepresentation both to the plaintiff and her husband, A. J. King; the latter being, at the time of signing it, a fugitive from justice, and he signed it without any adequate consideration. It was procured without first obtaining an order from the superior court to sell the land and reinvest the proceeds of the sale, nothing has ever been paid for the land, and the deed is void. The defendant

is insolvent, and is unable to respond in damages that will accrue in case he is allowed to collect the rents of the land. The damage will be irreparable, and the plaintiff has no adequate remedy at law. By amendment the plaintiff alleged as follows: A. J. King, under whom she holds by right of a homestead which appears of record in the clerk's office, is old and infirm and now in prison. The defendant (who is the son of plaintiff and of A. J. King) represented to them that George W. Brown, a son-in-law of plaintiff, was trying to get title to and possession of the tract of land without paying for it, and that he (defendant) wanted A. J. King and the plaintiff to sign a paper authorizing defendant to take charge of the land and defeat Brown in his effort to beat them out of it. Plaintiff cannot read and write and does not know a letter. She had to and did rely on what the defendant told her—that the paper she was signing was nothing but a contract authorizing the defendant to act for her in the matter, and she believed him and signed the paper, not knowing it was a deed; and upon these fraudulent acts and misrepresentations he took charge of the land and is collecting the rent therefrom. The deed was not read to her at the time of signing or at any time. The sale of the land has never been approved by the court. The plaintiff prays that the defendant be restrained from interfering in any way with her free and undisturbed use of the land, that he be restrained from collecting the rents of the land for the years 1913 and 1914 and ever thereafter, and that he be required to deliver up his deed for cancellation as a cloud on the title of A. J. King.

The defendant in his answer denied the material allegations of the petition, and averred as follows: He is in possession of the land and has rented it to a tenant who has a growing crop thereon, and he expects to collect the rent, as he has a legal right to do. He denies that he is holding possession through fraud and misrepresentation. He went into possession under a warranty deed and for a valuable consideration, the deed being signed by the plaintiff and her husband. G. W. Coffee was employed by the plaintiff and her husband to procure an order from the judge of the superior court for leave to sell the land as required by law, as in the case of the sale of homestead property; and the order was granted by the presiding judge of the court. Defendant denies that he is insolvent and unable to respond in damages and to account for the rent of the land. He bought the land in the utmost good faith, paid value for it, and is entitled to the rents, issues, and profits thereof. No homestead was ever granted to the plaintiff as alleged, and the paper purporting to be a homestead was never granted as provided by law.

The defendant also demurred to the petition as amended, because: (1) It set forth

no cause of action. (2) There is no sufficient description of the property involved. (3) The alleged homestead is not set out nor made an exhibit to the petition. (4) It is not alleged from whom the defendant procured the alleged deed, whether from plaintiff or A. J. King or from some one else. (5) The petition showing that the defendant is in possession of the land, claiming under a deed, the plaintiff's remedy is by ejectment, not injunction. (6) There is no prayer for the recovery of the land.

The court overruled the demurrer, and the defendant excepted. The case proceeded to trial, and, after evidence submitted by both parties, the court directed a verdict and entered a decree in favor of the plaintiff against the defendant. Error is assigned on this direction, and because of certain other rulings which are noticed in the opinion.

M. B. Eubanks, of Rome, and F. A. Cantrell, of Calhoun, for plaintiff in error. Geo. A. Coffee, of Calhoun, for defendant in error.

HILL, J. (after stating the facts as above).

[1] 1. The petition alleged that "about seventy-two acres of lot of land No. 220 in the 7th district and 3d section of Gordon county . . . was duly set apart by the ordinary of said county as a homestead for petitioner, and her then minor children." The defendant filed a special demurrer to the effect that there was no sufficient description of the property involved in the case. The court overruled the demurrer, and the defendant excepted. It is insisted that, considered in connection with the homestead proceedings set out in the record, the description is sufficient. But, as decided in the following division of this opinion, as there is no valid homestead we fail to see how the record in the homestead proceedings can aid the description of the land in order to make it sufficient. Even if the homestead was valid, there is nothing in the petition for homestead which gives a fuller description of the land than that contained in the plaintiff's petition. But by referring to the petition for homestead it will be seen that the applicant asked for a homestead to be laid off and set apart "on or out of one hundred and twenty-two acres of land, being a part of lot of land number 220 in the 7th district and 3d section of said county." This description is not sufficient. Nor will a resort to the return of the surveyor suffice, for he merely says that he did "lay off and plat for Andrew J. King and family a homestead of 108 acres No. R and 11-P, of the value of seven hundred dollars, correct plat of which is hereto attached." But the record shows no plat from which we can get a fuller or more accurate description than that set out in the plaintiff's petition, which we hold is an insufficient description. Besides, on special demurrer, if the description of the land as contained in the pleadings is insufficient, resort cannot be had to the evidence to splice out

the description. The so-called homestead proceedings were in the record, over objection of the defendant, as evidence offered by the plaintiff and not as a part of the plaintiff's pleadings. When the defendant asked for a fuller description of the land alleged to be homestead property in the petition, he was entitled to have it, and the court erred in overruling the special demurrer on this ground. *Social Benevolent Society v. Holmes*, 127 Ga. 586, 56 S. E. 775.

[2] 2. On the trial of the case the court admitted in evidence, over objection of the defendant, the homestead proceedings on the application of A. J. King, as the head of a family consisting of himself, his wife (the plaintiff in the court below), and certain minor children, for a homestead in certain lands belonging to A. J. King. The objection was that the certified transcript of a homestead proceeding of A. J. King, offered by the plaintiff, did not show that a homestead had ever been allowed, approved, or granted by the ordinary, and that, taking as true the plaintiff's allegation that it was granted on January 5, 1895, the ordinary was without jurisdiction to grant the homestead; the petition for homestead having been filed on December 18, 1894, and the order to the surveyor being dated on the 19th of December, the following day, and that the hearing and order were within 20 days from the date of such order. An inspection of the record fails to disclose any order of the ordinary approving or allowing the homestead as required by law. If the allegation of the petition that it was granted on January 5, 1895, be taken as true, then the case falls within the ruling made in *West v. McWhorter*, 141 Ga. 590, 81 S. E. 859, where it was held by this court that a homestead granted by an ordinary within 20 days from the date of setting the hearing on the application and the approval of the homestead by the ordinary is void. The record in the present case shows that the petition for homestead was filed on December 18, 1894. The order of the ordinary directing the county surveyor to survey and lay off a homestead and make a plat of the same as provided by law was dated December 19, 1894. The return of the surveyor was sworn to on January 4, 1895, and shows that the survey and plat were made on January 1, 1895; and this was filed and recorded January 9, 1895, in the office of the clerk of the superior court. The record does not show any order of approval by the ordinary. So in either event—if there is no approval, or if the approval was within the 20 days from the application or order of the ordinary to the surveyor, as alleged in the petition—no valid homestead is shown. The burden is on the plaintiff to show that there was a valid homestead, which she has failed to do. Without that she has no standing in court. If the homestead fails, her suit fails, for her whole cause of action is based on the

validity of the homestead. The record showing that the certified transcript of the homestead proceedings was not sufficient to create a homestead, the court erred in allowing it in evidence, especially when it was not coupled up with any other evidence showing it to be a valid homestead. We hold, therefore, that the court erred in directing a verdict for the plaintiff.

Nor was the defendant estopped to deny the existence of the homestead because on the trial he offered in evidence certified copies of the petition and orders (other than order of approval) in the application of A. J. King and Mrs. Annis King for leave to sell the alleged homestead property in the superior court of Gordon county, the petition merely alleging that "a homestead on real property and exemption of personalty was duly set apart to the said A. J. King by the ordinary of said county," etc. Especially is this so where the defendant in his answer expressly avers "that no homestead was ever granted to plaintiff as alleged, and that the paper purporting to be a homestead was never granted as provided by law."

[3] 3. The petition was sufficient to withstand a general demurrer. *Vaughn v. Fitzgerald*, 112 Ga. 517, 37 S. E. 752; *A. & W. P. R. Co. v. A. B. & A. R. Co.*, 125 Ga. 529, 540, 54 S. E. 788.

Judgment reversed. All the Justices concur except FISH, C. J., absent on account of sickness.

(143 Ga. 368)

ELDER v. STATE. (No. 302.)

(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 393—EVIDENCE—SELF-INCRIMINATION.

The court erred in admitting in evidence the testimony of certain witnesses for the state, to the effect that the foot of the accused fitted certain tracks; the conformability of the defendant's foot to the tracks being material evidence in the case. The admission of this evidence violated the constitutional guaranty that no person shall be compelled to give testimony tending in any manner to criminate himself, as, under the circumstances, the placing of his foot in the tracks by the defendant was not voluntary, for, though no physical force was used in placing the foot in the track, the defendant at the time was in the custody of the sheriff and handcuffed and surrounded by companions of the sheriff, and the command from the sheriff, directing the prisoner to put his foot in the tracks, was virtual coercion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. — 393.]

2. CRIMINAL LAW — 736—CONFESSIONS—IMPROPER INFLUENCES—QUESTION FOR JURY.

"Whether subsequent confessions, of themselves wholly unexceptionable, were made under previous influences still operating on the mind, is a question, not of law for the court, but of fact for the jury."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1219-1221, 1701, 1702, 1705, 1716; Dec. Dig. — 786.]

3. INSTRUCTIONS.

There was no merit in the exceptions to the charge.

4. MISCONDUCT OF SPECTATOR.

The ground of the motion for a new trial complaining of the overruling of the motion for a mistrial, made during the trial and based upon certain alleged misconduct of a spectator present at the trial, which was claimed to be prejudicial to the accused, is not passed upon, as it is not probable that such an incident will happen at the next trial.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Jim Elder was convicted of murder, and brings error. Reversed.

Calvin George and Middlebrooks & Bur-russ, all of Madison, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

BECK, J. Jim Elder was indicted for the murder of Charlie Weaver. The jury returned a verdict of guilty, and the accused made a motion for a new trial, which being overruled, he excepted.

[1] One of the grounds of the motion for a new trial complains of the admission in evidence of testimony of certain witnesses for the state, who gave evidence tending to show that, when the accused put his foot in certain tracks, his foot fitted the tracks. This was very material evidence in the case, as the tracks led from a field near a house in which the decedent was killed to the house of the accused, and there was some evidence tending to show that an effort had been made to obliterate these tracks. One or more witnesses for the state, who saw the accused place his foot in the tracks, testified that he did it voluntarily. But the statement that he did it voluntarily was a mere conclusion of the witness. The facts and circumstances do not justify this conclusion. The accused was in charge of the sheriff and certain other persons when he was brought to the place where the tracks were under examination. He was under arrest and handcuffed. According to the evidence, he had the appearance of a man who was scared. He did not, until commanded to do so, approach the tracks and put his foot in them. He did this only when the sheriff, who had him in custody, whose command he would not have dared to disobey under the circumstances, bade him in peremptory terms to put his foot in the tracks. It is true the sheriff says that he did not try to persuade him to do this, and that he did not threaten him, but the facts stand that this officer, who had a badly frightened man in his custody, said to him, "Put your foot in that track," and then the conformability of the foot to the track was testified to by the witnesses for the state on the trial.

Under the ruling in the case of Day v. State, 63 Ga. 667, which is followed in the

case of Evans v. State, 106 Ga. 519, 82 S. E. 659, 71 Am. St. Rep. 276, the evidence as to the foot of the accused fitting the track should have been excluded upon objection being made thereto under the provision of the Constitution of this state, which declares that "no person shall be compelled to give testimony tending in any manner to criminate himself." We have not overlooked the fact that in the case of Day v. State it appears that actual physical force was used to put the foot of the accused in the track with which it was sought to compare his foot. But we think in the present case, under the circumstances, there was such a show of force as amounted to the actual use of force and to coercion. If the accused in this case had been assured by the officer having him in charge or by some member of the posse that he was in no danger, and had been asked if he was willing to put his foot in the track, and then, under this assurance that no harm was threatening him, he had consented and voluntarily placed his foot in the tracks, the conformability of the foot to the tracks might have been testified to on the trial; but, in the interest of justice, we think that the evidence gotten by the means and under the circumstances shown to exist at the time should have been excluded, and, as it was not excluded, the case should be remanded for another trial.

[2] 2. The accused in this case made a confession to certain named persons under circumstances that clearly rendered it inadmissible in evidence, and the court properly excluded that confession. But another confession was made subsequently (as we infer from other facts appearing in the record, though this is not perfectly clear) to the confession which was improperly secured, and apparently this latter confession was freely and voluntarily made. No threats of harm were uttered against the accused, no show of force equivalent thereto, no promises were held out to him, and nothing was done at the time of making the last confession to induce the prisoner to make it. Evidence of this confession was objected to, however, on the ground that, hope of being benefited having been previously held out to the defendant at the time when he made the first confession, it was still operative at the time when he made the other confession and influenced the accused to make it, and that the second confession, as well as the first, fell within the inhibition of the statute making incompetent evidence of confessions obtained by fear of punishment or hope of reward. But we are of opinion that evidence of the last confession in this case should have gone to the jury, so that they could pass upon the question, upon proper instruction from the court, whether the last confession was freely and voluntarily made. This is in effect the ruling in the case of Milner v.

State, 124 Ga. 86, 52 S. E. 302, which follows the ruling in *Pines v. State*, 21 Ga. 227.

[3] 3. There was no merit in the exceptions to the charge of the court.

There were numerous other grounds of the motion for a new trial relating to the admission of evidence which the plaintiff in error contends should have been excluded; but as the grounds of the motion do not show what objection, if any, were urged at the time of the offering of the evidence, no question is raised for determination by this court.

[4] 4. The ground of the motion for a new trial complaining of the overruling of the motion for a mistrial, made during the trial and based upon certain alleged misconduct of a spectator present at the trial, which was claimed to be prejudicial to the accused, is not passed upon, as it is not probable that such an incident will happen at the next trial.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 330)

MCNEIL v. HARRIS. (No. 285.)

(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

INSTRUCTIONS APPROVED.

The charge was adjusted to the issues, and the evidence authorized the verdict.

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action between S. M. McNeil and J. W. Harris. From the judgment, McNeil brings error. Affirmed.

Geo. H. Perry, of Cuthbert, for plaintiff in error. H. A. Wilkinson, of Dawson, and Jas. W. Harris, of Cuthbert, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 330)

COLQUITT LIVE STOCK & SUPPLY CO. v. COACHMAN.

COACHMAN v. COLQUITT LIVE STOCK & SUPPLY CO.

(No. 286.)

(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

1. ASSIGNMENTS OF ERROR.

In none of the rulings of the court complained of were there errors of sufficient gravity involved to require the grant of a new trial.

2. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize the verdict in favor of the plaintiff.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Action by B. P. Coachman against the Colquitt Live Stock & Supply Company. Judg-

ment for plaintiff, defendant brings error, and plaintiff files cross-bill of exceptions. Affirmed on main bill, and cross-bill dismissed.

P. D. Rich, of Colquitt, for plaintiff. Bush & Stapleton and W. I. Geer, all of Colquitt, for defendant.

BECK, J. Judgment affirmed on the main bill of exceptions; cross-bill dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 335)

MARCHMAN v. BROWN. (No. 292.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. CERTIORARI \S 54—VENUE \S 5—ANSWER—OBJECTION.

Where, to a judgment rendered by the ordinary upon application to remove alleged obstructions from a private way, a certiorari is sued out to the superior court, and the answer of the ordinary to the writ of certiorari states incorrectly the facts as shown upon the trial, or is incomplete in that it fails to send up pleadings which should have been incorporated in the record, the proper remedy for the party complaining of the incorrectness or incompleteness of the answer is by exception to it, and not by motion to dismiss the petition for certiorari. *Star Glass Co. v. Longley*, 64 Ga. 576.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. \S 133; Dec. Dig. \S 54; Venue, Cent. Dig. \S 4-11; Dec. Dig. \S 5.]

2. VENUE \S 16—OBSTRUCTIONS OF WAY—PROCEEDINGS TO REMOVE.

Proceedings of the character indicated are in the nature of proceedings to abate a nuisance, and should be brought in the county in which the obstructions are situated. And if obstructions are placed in a road which crosses the line between two counties, some of them being in one county and some in the other, proceedings for their removal should be brought in each of the two counties, respectively, where such obstructions are.

The ordinary of either of the two counties is without jurisdiction to pass upon an application for the removal of obstructions not lying in the county in which he holds office, and the ordinary whose judgment was under review in the superior court correctly so held.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. \S 23, 25-27; Dec. Dig. \S 16.]

3. OBSTRUCTION OF PRIVATE ROAD—DECISION ON APPEAL.

There was sufficient evidence to authorize the judge of the superior court, upon hearing the petition for certiorari and the answer of the ordinary thereto, to remand the case for a new hearing as to the alleged obstructions complained of in the county of Greene. The court erred, however, in adjudging that the ordinary of that county had jurisdiction to entertain the application for the removal of the obstructions in that part of the road lying in the adjoining county of Hancock. Consequently the judgment of the court below is affirmed in so far as it reversed the judgment of the ordinary of Greene county in regard to the obstructions in that part of the road lying in said county, but it is reversed in so far as it directs the ordinary of Greene county to pass upon the merits of the complaint as to the obstructions in that part of the road which lies in the adjoining county of Hancock.

Error from Superior Court, Greene County; J. B. Park, Judge.

Action between S. M. Marchman and J. P. Brown. From the judgment on certiorari to review a judgment of the ordinary, Marchman brings error. Reversed in part, and affirmed in part.

Lewis, Davison & Lewis, of Greensboro, for plaintiff in error. Sam'l H. Sibley, of Union Point, for defendant in error.

BECK, J. Judgment reversed in part and affirmed in part. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 333)

MELTON et al. v. JAMES. (No. 309.)
(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐70—WRIT OF ERROR—DISMISSAL—GROUNDS.

A motion by the respondent in a motion for new trial to dismiss it was overruled by the court. The respondent had the option to sue out a direct bill of exceptions assigning error on the judgment, or to have certified and filed exceptions pendente lite. If the latter course be followed, the ruling on the motion to dismiss becomes a pendente lite ruling, which is reviewable only after the termination of the motion for new trial, on exception taken to the final judgment rendered thereon. *Durrence v. Waters*, 140 Ga. 762, 79 S. E. 841; *Bradley v. Lithonia, etc., R. Co.*, 143 Ga. —, 84 S. E. 590. It not appearing that the motion for new trial has been disposed of, and the only exception being to the pendente lite ruling, the writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-373, 386, 411; Dec. Dig. ⇐70.]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action between W. M. Melton and others and D. W. James. From the judgment, the parties first mentioned bring error. Writ of error dismissed.

Glessner & Park, of Blakely, for plaintiffs in error. Little, Powell, Hooper & Goldstein, of Atlanta, and Rambo & Wright, of Blakely, for defendant in error.

EVANS, P. J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 376)

DUNN v. BEASLEY et al. (No. 306.)
(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

1. EXCHANGE OF PROPERTY ⇐11—CONTRACT—REPUDIATION FOR FRAUD—RIGHT.

Where two persons swap horses, in order for one of them to repudiate the contract as void on the ground of fraud perpetrated by the other, and to employ the action of trover to recover the horse which he had given in ex-

change, the fraud must be actual. *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 183.

(a) The ruling actually made in *Newman v. Claffin*, 107 Ga. 89, 32 S. E. 943, in view of the facts involved in the case, is not in conflict with the statement of the principle above announced.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 20, 20½; Dec. Dig. ⇐11.]

2. EXCHANGE OF PROPERTY ⇐11, 12—MISREPRESENTATIONS—STATEMENT OF THIRD PERSON—ACTUAL FRAUD.

This was an action of trover for the recovery of a horse. On the trial it appeared that the plaintiff had swapped horses with one of the defendants, and that the horse which he received had a disease of the lungs, from which it died. In making the trade the defendant represented the horse as sound, except for a wire cut on the ankle, and that he had traded for it a week before from a named person who represented it as sound. The plaintiff knew the third person, and had confidence in his representations, and traded on the faith of such statements by the defendant. In making the trade with the third person the latter did not in so many words say that the horse was sound, but, in response to the direct question by defendant as to whether it was sound, replied, "You are aware of the wire cut on her leg," without saying more. *Held*, that this response by the third person, under the circumstances under which it was made, is to be construed as a representation that, with the exception of the wire cut on the leg, the horse was sound.

(a) There was no evidence to show that the defendant knew of the diseased condition of the horse's lungs when he made the representation to plaintiff that the horse was sound.

(b) In the absence of such knowledge, there was no evidence upon which to predicate an issue as to actual fraud. *Waterman v. State*, 114 Ga. 262, 40 S. E. 262.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 20, 20½, 23; Dec. Dig. ⇐11, 12.]

3. NONSUIT.

The trial judge, at the conclusion of the plaintiff's evidence, properly granted a nonsuit.

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by J. M. Dunn against William Beasley and others. From a judgment of nonsuit, plaintiff brings error. Affirmed.

M. C. Tarver, of Dalton, for plaintiff in error. Wm. E. Mann, of Dalton, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 342)

BLAKELY OIL & FERTILIZER CO. v.
CITY OF BLAKELY et al.
(No. 295.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

INTERLOCUTORY INJUNCTION.

Under the evidence submitted, there was no abuse of discretion on the part of the trial judge in refusing the interlocutory injunction prayed.

Error from Superior Court, Early County; W. C. Worrell, Judge.

Action by the Blakely Oil & Fertilizer Company against the City of Blakely and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. Walter G. Park and Glessner & Collins, all of Blakely, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 367)

CORNELIA WHOLESALE GROCERY CO.
v. HOGSED BROS. (No. 304.)

(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

TRIAL — §340—VERDICT—JUDGMENT—RIGHT TO AMEND.

Suit was brought, alleging that the defendant was indebted to the plaintiff in the sum of \$174.16, with interest from July 2, 1912, on an open account, a copy of which was attached to the petition. The debit side of this account covered about four pages of typewritten matter, and which, under the headings "Date," "Amount," "Days," contained entries not intelligible on inspection by this court. There was also attached a typewritten page of credits, equally lacking in clearness. The total of the debits claimed appeared to aggregate \$563, including a charge for interest. The total of the credits, including an allowance for interest, appeared to aggregate \$389.20. The case being in default, a verdict was taken in favor of the plaintiff against the defendant for \$389.20, with 7 per cent. interest thereon from July 5, 1912, to the date of the verdict, which was March 3, 1913. Judgment was entered accordingly. On November 10, 1913, the plaintiff filed a motion to amend the verdict and judgment, by changing the finding from the amount stated to \$174.16, with interest at 7 per cent. from July 2, 1912. Held, that under such facts there was no error in overruling the motion to amend. The plaintiff having apparently taken a verdict by default, not for the amount alleged to be due it, but for the amount of credits which appeared in its open account to be due its adversary, it could not, at a later term of court, in effect, take an entirely new verdict for an amount which would have been the difference between the aggregate of the debits set out in its account against its adversary and the credits due to such adversary, with interest from an earlier date than that specified in the verdict, under the name of amending the verdict and judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 795-799; Dec. Dig. § 340.]

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by Hogsed Brothers against the Cornelia Wholesale Grocery Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. J. & Sam Kimzey, of Cornelia, for plaintiff in error. J. W. H. Underwood, of Cleveland, and W. A. Charters, of Gainesville, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

LUMPKIN, BECK, and ATKINSON, JJ., concur in the foregoing ruling on the facts stated, but do not go to the extent of holding broadly that if a petition claimed a specific amount, and the jury found more than was claimed, the plaintiff could not write off the excess, or have a verdict and judgment amended for that purpose. But the facts of this case do not require such a holding.

(143 Ga. 366)

LINDERMAN v. ATKINS. (No. 303.)
(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

1. BILLS AND NOTES — §342 — FAILURE OF CONSIDERATION—NOTICE—TRANSFEREE.

Where a person executed a negotiable promissory note, and a deed to land to secure the debt, and received a bond for reconveyance of the land upon payment of the debt, the consideration of the note being the promise of the payee to make a certain advancement in money and to pay off certain indebtedness of the son of the maker, and the note was indorsed in blank and delivered to a third person, the mere facts that the transferee of the note was a banker in a town and knew the payee as a customer in the bank, and, after the note fell due, instituted suit thereon against the maker after his son had died, without joining the indorser as a party defendant, and had not taken a formal transfer of the land conveyed as security, would not of themselves be sufficient to charge notice to the transferee of any failure of consideration of the note by reason of the failure of the payee to advance the agreed amount of money or pay off the debts of the son; nor would such facts be sufficient to put the transferee upon inquiry as to any such failure of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 853-855, 864, 865; Dec. Dig. § 343.]

2. BILLS AND NOTES — §358 — BONA FIDE HOLDER—SECURITY FOR PRE-EXISTING DEBT.

A transferee of a negotiable promissory note, who received the note from the payee before maturity, as collateral security for a pre-existing debt, without notice of any equities existing between the maker and the payee, is a bona fide holder for value in the due course of trade. *Kaiser v. U. S. National Bank*, 99 Ga. 258, 25 S. E. 620; *Harrell v. National Bank of Commerce*, 128 Ga. 504, 57 S. E. 869.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 913-923, 961; Dec. Dig. § 358.]

3. BILLS AND NOTES — §358, 497—SECURITY FOR PRE-EXISTING DEBT—DEFENSE—BURDEN OF PROOF.

Where such a holder of a negotiable promissory note, who has received it from the payee merely as collateral security, sues the maker of such note, if the maker has a valid defense against the original payee, he can by appropriate plea set up such defense; and if it be sustained, the holder can recover no more than the debt which the collateral secured. *Hatcher v. Independence National Bank of Philadelphia*, 79 Ga. 547, 5 S. E. 111; *Laster v. Stewart*, 89 Ga. 181, 15 S. E. 42. But in such a suit the presumption is that the secured debt is sufficient to consume the collateral, and the onus

of pleading and proving a less amount and the maker's equity against the original payee is on the defendant. Daniel on Negotiable Instruments, § 832 (a); Duncan & Sherman v. Gilbert, 29 N. J. Law (5 Dutch.) 527.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 913-923, 961, 1448, 1675-1681, 1683-1687; Dec. Dig. § 358, 497.]

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence demanded the verdict for the plaintiff, and there was no error in refusing to grant a new trial.

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by T. E. Atkins against Mrs. A. P. Linderman. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. J. & S. J. Smith, of Commerce, and Jno. J. & R. M. Strickland, of Athens, for plaintiff in error. P. Cooley, of Jefferson, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 325)

UNDERWOOD et al. v. STANFORD et al.
(No. 284.)

(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR § 780—PARTIES IN INTEREST — SETTLEMENT OF ADMINISTRATOR'S ACTION.

An administrator filed a petition in the court of ordinary, alleging in substance as follows: More than a year had elapsed from the grant of letters of administration. The administrator had reduced the estate to cash, paid the debts, and had remaining in his hands a sum of money to be paid to the heirs of the decedent. The heirs were unknown to him, persons asserting themselves to be heirs were claiming adversely to each other, and their claims were confusing and conflicting. In order to ascertain who were the heirs of the decedent and to distribute the estate in accordance with law, he prayed that an accounting might be had and a citation directed to all of the distributees of the estate be issued. An order was passed directing the issuing and publication of the citation prayed. At the term to which the citation was returnable, a judgment was rendered, which recited that the matter came on regularly to be heard; that the sum in the hands of the administrator was claimed by one McKibben, as the lawful son and heir of the decedent (whose name was Underwood), "and by William Underwood and others, as brother and nephew and nieces" of the decedent; and that, after hearing evidence, McKibben was adjudged to be the only lawful heir and entitled to the entire estate. On the same day an agreement was signed by attorneys for McKibben, "claimant," and attorneys "for administrator and adverse claimants," reciting that evidence had been taken by depositions in the case before the ordinary, and agreeing that such depositions might be used on any appeal trial. Still on the same day an appeal was entered by one William H. Underwood and others, whose names were signed by one of the same attorneys who signed the above-recited agreement. The statement of the case at the head of the appeal described McKibben as "claimant" and William H. Underwood and

the other appellants as "claimants adverse to" him. *Held*, that it was error for the judge of the superior court to dismiss such appeal on the ground that it appeared to be entered by mere strangers to the case, and that it was a nullity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3121; Dec. Dig. § 780.]

Error from Superior Court, Harris County; S. P. Gilbert, Judge.

Proceedings between W. H. Underwood and others and L. L. Stanford, administrator, and others. From the judgment, the parties first mentioned bring error. Reversed.

John M. Hudson, as administrator of J. F. Underwood, deceased, filed his petition in the court of ordinary, alleging that more than a year had expired since the grant of letters of administration to him; that he had sold the property of the estate, paid all of the debts, and had left in his hands ready for distribution to the heirs \$1,633.69; that the heirs of the estate were unknown to him, and persons claiming to be heirs of said J. F. Underwood were claiming adversely to each other, and their claims were confusing and conflicting; and that, in order to ascertain who were the heirs and to distribute the estate in accordance with law, he prayed that a settlement of his accounts as administrator be had, that citation issue, "directed to all the distributees of the estate of J. F. Underwood, late of said county, deceased, requiring them to be then and there present, either in person or by attorney, to show to the court what portion of the funds now in the hands of the said administrator they all and singular claim they are entitled to receive as an heir and distributee of said estate, to establish their said claim or claims, and to receive payment thereof from the administrator of said estate, so that your petitioner may make a full and complete settlement of the estate of J. F. Underwood in his hands as administrator, as said court will then and there make an account of the said estate in the hands of petitioner as administrator." The ordinary ordered that a citation should issue to all of the heirs and distributees of the estate, requiring them to appear at a named term of court to make a full settlement with the administrator, and that the citation should be published in the official organ of the county once a week for four weeks. At the term to which the citation was returnable a judgment was entered, which contained the following:

"The above-stated matter coming on regularly to be heard, and the administrator reporting that he had in his hands for distribution to the legal heir or heirs of J. F. Underwood the sum of \$1,633.69, and that same was claimed by Lucien McKibben, as the lawful son of J. F. Underwood, and by William Underwood and others, as brother and nephew and nieces of said J. F. Underwood. After hearing evidence it is considered, ordered, and adjudged that Lucien McKibben is the lawful heir and only heir of J. F. Underwood, and as such is entitled to inherit his entire estate. It is further

ordered that J. M. Hudson, administrator of J. F. Underwood, pay to Lucien McKibben the said sum of \$1,833.69, less costs that may be a legitimate charge on said fund."

On the same day on which this judgment bears date (but whether before or after it was rendered does not appear), a written agreement was made which recited that it was "agreed between counsel for the claimants to the estate of J. F. Underwood, deceased, that the evidence taken by depositions might be read in any appeal as fully as though such depositions were taken after such appeal had been entered." This agreement was signed by "El. M. Smith and McLaughlin & Shanks, Attorneys for McKibben, Claimant," and by "L. L. Stanford and A. L. Hardy, Attorneys for Administrator and Adverse Claimants." It was filed in the office of the ordinary. On the same day on which the judgment was rendered, an appeal was entered to the superior court. The caption of the entry of appeal stated the case as follows:

"In re John M. Hudson, Administrator of Estate of J. F. Underwood. Citation before the ordinary to heirs for a settlement. Lucien McKibben, claimant, and William H. Underwood, Marietta Dick, Emma J. Rawls, J. T. Parker, Mrs. Eliza Miller, Mrs. Martha Carney, Mrs. Elizabeth Braddy, claimants adverse to Lucien McKibben. In Harris County Court of Ordinary. December Term. Trial and judgment in favor of Lucien McKibben."

It was then stated that the parties mentioned in the caption as adverse claimants (restating their names), being dissatisfied with the judgment, entered an appeal and gave a named person as surety. The names of the appellants were signed to the appeal by one of the attorneys who signed the agreement in regard to the use of the depositions on an appeal. This was approved by the ordinary, and the appeal was transmitted to the superior court, where the appeal bond was allowed to be amended.

On motion the presiding judge dismissed the appeal, holding that it did not appear in the pleadings, or even in the appeal and bond, that the appellants were heirs or were parties to the issue in the court of ordinary, or that they had been served by citation, and therefore that the appeal was a mere nullity. The appellants excepted. In this court it appeared that Hudson, the administrator, had died, and that L. L. Stanford had been appointed temporary administrator of the estate, and he was made a party in lieu of the deceased administrator.

L. L. Stanford and A. L. Hardy, both of Hamilton, for plaintiffs in error. McLaughlin & Shanks, of Columbus, and E. M. Smith, of McDonough, for defendants in error.

LUMPKIN, J. (after stating the facts as above). By the Civil Code of 1910, § 4812, it is declared that every application to the ordinary for the granting of any order shall be by petition in writing, and that if notice

of such application, other than by published citation, is necessary under the law or in the judgment of the ordinary, he shall cause a copy of such application, together with a notice of the time of hearing, to be served by the sheriff or some lawful officer. In *Mitchell v. Pyron*, 17 Ga. 416, an application was made for the grant of letters of administration on the estate of a decedent. No objections were made or filed thereto. Within four days after the grant of the letters a certain person, alleging himself to be the principal creditor of the decedent, appealed from the order granting the letters to the applicant. A motion was made to dismiss the appeal, because the appellant had filed no objections in the court of ordinary, and because there was no issue in that court, and the appellant was no party there. The motion was overruled, and the case was brought to this court, where the judgment was affirmed. In the opinion it was stated that it was not denied that the citation was regular; that if the applicant was a creditor, as was alleged, he was sufficiently served, and would have to be regarded as a party to the proceeding; and that the allegation that he was a creditor was untraversed, and would be treated as true for the purpose of the motion to dismiss. This decision was rendered in 1855, before the adoption of the original Code, but is in harmony with the provision of the Code above cited. In *Brantley v. Greer*, 71 Ga. 11, it was held that where a proceeding originates in the court of ordinary, and calls upon an executor or an administrator to account, a citation is all the pleading that is necessary. *Lyons v. Armstrong*, 142 Ga. 257 (3), 260, 82 S. E. 651. The same Code section which provides that any person interested as distributee or legatee may cite the administrator to appear before the ordinary for a settlement of his accounts also provides that the administrator, if he so chooses, may cite all of the distributees to be present at the settlement of his accounts by the ordinary. Section 4073.

In the instant case the administrator desired to have a full settlement of his accounts, alleging that the debts were paid, and the estate reduced to cash, which was ready for distribution. He further alleged that the heirs were unknown to him; that persons asserting themselves to be heirs of the decedent were claiming adversely to each other; and that their claims were confusing and conflicting. The ordinary ordered a citation to issue and to be published. At the term of the court of ordinary to which the citation was returnable, a judgment was entered which recited that the fund in the hands of the administrator was claimed by one Lucien McKibben, as the lawful son of J. F. Underwood, the decedent, and by William Underwood and others, as brother and nephew and nieces of the decedent, and that evidence was heard. It was adjudged that McKibben was the only heir of the decedent,

and as such was entitled to the estate in the hands of the administrator. On the same day an agreement was made between the attorneys of McKibben, as claimant, and the attorneys for the administrator and "adverse claimants," reciting that evidence had been taken by depositions, and that these might be used on any appeal of the case. An appeal was entered by William H. Underwood and others, describing themselves in the caption of the appeal as claimants adverse to Lucien McKibben. The appellants' names were signed to the appeal by one of the attorneys who signed the agreement in regard to the use of the depositions already taken. Under these circumstances, we are unable to agree with our brother of the trial bench that there was nothing to show that the appellants were related to the deceased, or in any way interested in the distribution of the estate, or were parties to the issue in the court of ordinary, and that mere strangers to the record, without apparent interest in the estate, could not appeal to the superior court and there for the first time set up their interest. Nor do we think that the appeal was a nullity.

Reliance was placed on the decision in *Smith v. Smith*, 101 Ga. 296, 28 S. E. 665. In that case a widow applied for a year's support, and appraisers made a return setting apart a city lot for that purpose. No objection was filed by any one to the return, and it was recorded as required by law. After this, three persons, who alleged themselves to be the children and heirs at law of the decedent, and who were in possession of the lot, entered an appeal to the superior court. The widow filed an equitable petition, praying for the appointment of a receiver to take charge of the lot, alleging that the appellants were insolvent and were acting for delay only. The defendants answered that they were in possession under a gift made by the decedent more than seven years before his death. A receiver was appointed. When the case came on for trial, it appeared that the defendants had voluntarily dismissed their appeal. The plaintiff moved for a decree requiring the receiver to deliver to her the house and lot and the accrued rental, and that the petition be dismissed. The court granted this decree. The plaintiff could not, of course, have the property taken from the possession of another and placed in the hands of the receiver, dismiss her petition without a trial, and at the same time ask that the property be delivered to her. The proper decree was that, upon dismissal of the action, possession should be restored by the receiver to the person from whom he obtained it. The proceeding there involved was not like that now under consideration. The court of ordinary could not there determine the claim of title adverse to the estate, and the appeal and dismissal of

the appeal could not settle that question. The decision in that case was fully discussed in *Dix v. Dix*, 132 Ga. 630, 637, 64 S. E. 790. It does not control the present case.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 294)

MERRITT v. BANK OF CUTHBERT.

(No. 321.)

(Supreme Court of Georgia. April 22, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1140 — BILLS AND NOTES \S 534 — JURY \S 12 — DECISION — PROVISION FOR ATTORNEY'S FEES — JUDGMENT BY COURT — VALIDITY.

The obligation in a note to pay attorney's fees is enforceable only upon compliance with the statutory requirements, and in a suit on the note judgment cannot be entered by the court for such fees. But where judgment is rendered by the court separately for principal, interest, and attorney's fees, this court, on exception to the judgment, may require it to be purged of the attorney's fees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4462-4476; Dec. Dig. \S 1140; Bills and Notes, Cent. Dig. \S 1946, 1947; Dec. Dig. \S 534; Jury, Cent. Dig. \S 27-34, 82, 99, 101, 103; Dec. Dig. \S 12.]

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Action by the Bank of Cuthbert against J. G. Merritt. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

Geo. P. Munro, of Buena Vista, and M. A. Walker, of Preston, for plaintiff in error. J. F. Souther, of Preston, for defendant in error.

EVANS, P. J. The plaintiff declared on a note stipulating for attorney's fees, alleging that he had served the defendant with the notice required by law of his intention to bring suit and to claim the attorney's fees stipulated in the contract. The defendant answered the suit, but his pleas were stricken; and judgment was entered by the court, without a verdict, for the principal, interest, and attorney's fees claimed in the suit. The point is made that the court was without jurisdiction to enter a judgment including attorney's fees. The Constitution declares that:

"The court shall render judgment without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation." Civil Code 1910, \S 6516.

In construing this constitutional provision it has been held that in a case admitting of doubt the question of rendering judgment by the court without a jury is one not involving jurisdiction, but the proper exercise of jurisdiction, and the improper decision of it is mere error, which will not render the judgment void. *Georgia Railroad Co. v. Pendleton*, 87 Ga. 751, 13 S. E. 822; *Crow v. American Mortgage Co.*, 92 Ga. 815, 19 S. E. 31. However, the court has no jurisdiction to

render a judgment upon a written contract, without the intervention of a jury, unless such judgment can be rendered without resort to any evidence except that afforded by the contract sued on. *Harris v. Woodard*, 133 Ga. 104, 65 S. E. 250. The obligation to pay attorney's fees in addition to the specified rate of interest upon a note is unenforceable, unless the debtor, after having received 10 days' written notice of the holder's intention to bring suit thereon, shall fail to pay the debt evidenced by the note on or before the return day to which suit is brought for the collection of the same. Civil Code 1910, § 4252. Hence, the collection of attorney's fees being dependent upon the existence of the extraneous fact provided by the statute as a condition precedent to the debtor's liability, the court is without power to render judgment for the same without the intervention of a jury. In the judgment rendered by the court, the principal, interest, and attorney's fees were separately stated; and the judgment may be purged of its illegality by allowing the plaintiff to write off the attorney's fees. It appears from the record that after the bill of exceptions was tendered to the judge, and before he signed the same, the plaintiff's counsel voluntarily wrote off the judgment for attorney's fees, and obtained an order from the judge approving and allowing this to be done. This order was taken in vacation, without notice to the plaintiff in error, and after he had lodged his bill of exceptions with the judge. Even if the trial court could have amended the judgment by writing off the attorney's fees, on the initiative of the plaintiff, it could not be done in this manner. We therefore treat the matter as if no attempt at amendment of the judgment had been made, and, in the exercise of the power vested in this court, direct that the judgment be affirmed on condition that when the remittitur is made the judgment of the court the defendant in error will remit and write off the item of attorney's fees from the judgment; otherwise the judgment will stand reversed.

Judgment affirmed, on condition. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 342)

RHODES et al. v. WILLIAMS. (No. 296.)
(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. SLAVES §25—LEGALIZING COHABITATION
—EXTENT OF RELATION—CREATION BY STATUTE—COLORED PERSONS.

By the act of 1866 (Civ. Code 1910, § 2178) it was declared that persons of color who were living together on the 9th day of March, 1866, as husband and wife, sustained that relation to each other, provision being made in case a man had two or more reputed wives, or a woman two or more reputed husbands.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115; Dec. Dig. §25.]

2. LEGITIMIZATION OF CHILD.

By the same act mentioned in the last headnote (Civ. Code 1910, § 2180) every colored child born before the 9th day of March, 1866, was declared to be the legitimate child of its mother; but such child was declared to be the legitimate child of its colored father only when born within what was regarded as a state of wedlock, or when the parents were living together as husband and wife.

3. SLAVES §25—LEGITIMIZING CHILDREN—DESCENT OF PROPERTY.

Under the provision last stated, if a negro woman had two children born to her before the 9th day of March, 1866, by different fathers, both were, by the act above mentioned, made her legitimate children, although one might be the legitimate child of its father and the other the illegitimate child of a different man. In that event they were capable of inheriting from each other, being legitimate on the mother's side.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115; Dec. Dig. §25.]

4. SLAVES §25—LEGITIMIZING CHILDREN—RIGHT TO INHERIT.

If a negro woman had two children born prior to the 9th day of March, 1866, and one of them was legitimate on his father's side, and inherited property from his father, but his half-sister on his mother's side died before he died, leaving an illegitimate daughter, such daughter would not inherit the estate of her mother's half-brother, by representation under her mother.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115; Dec. Dig. §25.]

(Additional Syllabus by Editorial Staff.)

5. DESCENT AND DISTRIBUTION §26 — INHERITANCE — CONSTRUCTION OF STATUTES — "CHILDREN" — "GRANDCHILDREN."

The words "children" and "grandchildren," as used in statutes, generally refer to legitimate descendants, unless there is something which shows a contrary intent on the part of the Legislature.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 76, 77; Dec. Dig. §26.]

For other definitions, see *Words and Phrases*, First and Second Series, Child; Grandchild.]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Ejectment by Rebecca Rhodes and others against Celia A. Smith and Mamie Williams. Judgment for defendant Mamie Williams, and plaintiffs bring error. Reversed.

Rebecca Rhodes and others brought ejectment against Celia A. Smith as tenant in possession, and Mamie Williams as claimant of the title. The latter defended. Both the plaintiffs and the defendant claimed to have derived title under Marshall Swearingen, Sr., colored, who died intestate. The plaintiffs claimed that he died leaving no wife or legitimate child and no father or mother, and that they were his nieces and nephews, and therefore inherited from him. The defendant claimed that the intestate left a legitimate son, Marshall Swearingen, Jr., that the mother of such son also had a daughter named Susie, who was his half-sister, and that the defendant is the daughter of Susie. The mother of Marshall, Jr., and Susie died many years ago. Marshall Swearingen, Jr., died about two years be-

fore the suit was brought. Susie also died prior to the bringing of the suit, but whether before the death of Marshall, Jr., does not clearly appear. Apparently she died before her half-brother. The evidence indicated that Mamie Williams, the defendant, was the illegitimate daughter of Susie, and that Susie was older than her half-brother. The exact dates of the births of Susie and her half-brother were not shown, but the evidence indicated that they were born either during the Civil War, which came to an end in 1865, or shortly before its commencement. It also tended to show that Susie was born out of wedlock. It was conflicting as to whether Marshall, Jr., was the legitimate son of Marshall, Sr. The jury found for the defendant. The plaintiffs' motion for a new trial was overruled, and they excepted.

J. B. Hudson and Jas. A. & Jno. A. Fort, all of Americus, for plaintiffs in error. Wallis & Fort, of Americus, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1-4] Marshall Swearengen, Sr., a negro, owned the property in dispute at the time of his death. If Marshall Swearengen, Jr., was the legitimate son of Marshall, Sr., when the latter died, then the son inherited the land from his father, there being no other heirs. By the act of 1866 (Civil Code of 1910, § 2178) it was declared that persons of color, living together on the 9th day of March, 1866, as husband and wife, sustained that relation to each other, provision being made in case a man had two or more reputed wives or a woman two or more reputed husbands. If, then, Marshall Swearengen, Sr., and Mary Ann French were the father and mother of Marshall Swearengen, Jr., and were living together on March 9, 1866, as husband and wife, the law declared them to be such. If the child was born before that date within what was regarded as a state of wedlock, or when its parents were living together as husband and wife, he was the legitimate son of his father. Civil Code 1910, § 2180. The first step, therefore, was to determine whether Marshall, Jr., was the legitimate son of Marshall, Sr. If the boy was legitimate and inherited the property, the next question is whether it passed by inheritance to the present defendant.

Marshall, Jr., had a half-sister, Susie, each having the same mother, but not the same father. She was older than he, and the evidence indicates she was illegitimate at birth. It does not distinctly appear when she died. It may be inferred from the pleading and evidence that her death occurred before that of her half-brother. But as it is not entirely certain, the matter will be considered in view of either possibility. By the act of 1866, to which reference has already been made, every colored child born before the 9th of March, 1866, was declared to be the

legitimate child of its mother. Therefore the girl Susie, having been born before that date, was the legitimate child of her mother. The boy Marshall, if born before that date, was also the legitimate child of their mother. Thus, each of them being the legitimate child of the same mother, they were legitimate half brother and sister on the mother's side; and, if one of them died leaving real estate, and without descendants, the other could inherit the realty left by the deceased. Accordingly, if Marshall, Jr., was the legitimate son of Marshall, Sr., and inherited the property in controversy from the latter, and if he died before his half-sister, Susie, she inherited from him. The evidence tended to show that the defendant, Mamie Williams, was the illegitimate daughter of Susie. If the defendant's mother became the owner of the lot by inheritance before her death, the illegitimacy of the defendant would make no difference, as, under the statute, she could inherit from her mother. Civil Code 1910, § 3029.

If the mother of the defendant died before her half-brother, Marshall, Jr., then the legitimacy or illegitimacy of the defendant would be an important matter in determining the inheritance. At common law a bastard could not inherit. Such right of inheritance as it has is given by statute. Our statutes have, to some extent modified the common law on this subject. Civil Code 1910, § 3029, which was also contained in earlier Codes, and which was derived from previous legislative acts, declares that bastards have no inheritable blood, except that given to them by express law, but that they may inherit from their mother, and from each other, children of the same mother, in the same manner as if legitimate; that if a mother have both legitimate and illegitimate children, they shall inherit alike the estate of the mother; that if a bastard die, leaving no issue or children, his mother, brothers, and sisters shall inherit his estate equally; and that, in distributions under this law, the children of the deceased bastard shall represent the deceased parent. By the act of 1859 certain provisions were made in regard to inheritance by legitimates from illegitimates. Civil Code 1910, § 3030. By another act also passed in 1859, it was provided that a former act, which restricted the distribution of the estate of an intestate among collaterals to the children of the brothers and sisters of such deceased, should be so amended as to extend to and embrace the children of the intestate's nephews and nieces. The law as thus amended was codified, and will now be found in Civil Code 1910, § 3931, par. 5. It is there declared that brothers and sisters of the intestate stand in the second degree, and inherit, if there is no widow, or child, or representative of child, and that the children or grandchildren of brothers and sisters deceased shall represent and stand in the place of their de-

ceased parent, but that there shall be no representation further than this among collaterals. This provision forms a part of the general rules of inheritance declared in the Code.

[5] The words "children" and "grandchildren," as used in statutes, generally refer to legitimate descendants, unless there is something which shows a contrary intent on the part of the Legislature. *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451. In *Houston v. Davidson*, 45 Ga. 574, it was held that the provision of the act of 1859 that representation among collaterals should extend to the children and grandchildren of brothers and sisters was so far applicable to the law which allowed inheritance from a bastard by his brothers and sisters, or, if they be dead, by their children, as to extend the representation among bastards to children and grandchildren of brothers and sisters inheriting from an illegitimate. That decision was dealing only with the distribution of the estate of an illegitimate child, and the right of representation under the law covering that subject. It was not dealing with the distribution of the estate of a legitimate child, or any claim to inheritance from him by an illegitimate descendant of his sister or brother. As any right to claim under Marshall, Jr., must rest upon his having been legitimate, or having been legitimated by the act of 1866, and thus having inherited the property from Marshall Swearengen, Sr., the case is not one involving inheritance by one illegitimate child, or his children or grandchildren from another. Accordingly, that decision does not control this case.

From what has been said it will be seen that if Marshall Swearengen, Jr., as being a legitimate child of Marshall Swearengen, Sr., inherited the property in controversy from the latter, and if his half-sister, Susie, died before him, leaving the defendant as her illegitimate daughter, the defendant could not inherit the property from Marshall, Jr.

The request to charge, which was refused, was not adjusted to the facts of the case, and was properly declined. So also the complaint of an omission to charge, contained in the second ground of the amended motion, was without merit. But the court did not anywhere instruct the jury on the subject of the defendant's illegitimacy and lack of inheritable blood, if her mother died before the half-brother of the latter. Complaint was made that the court erred in omitting to charge that an illegitimate child has no inheritable blood, save that expressly conferred by statute. As the evidence is not entirely clear in some respects, we will not hold as matter of law that the defendant was an illegitimate child, that her mother died before the death of Marshall Swearengen, Jr., and that therefore the defendant took nothing by inheritance. But this important question should

not have been entirely omitted from consideration in instructing the jury.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 331)

SAFFOLD et al. v. EVANS et al. (No. 287.)
(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

EXECUTION \S 172—INJUNCTION—CANCELLATION OF JUDGMENT—GROUNDS.

Where judgment is rendered against a party, and it is unexcepted to, and subsequently the defendant moves to set it aside on the ground that it is a void judgment, and the court refuses to set it aside, and his refusal is affirmed by this court, the defendant cannot subsequently maintain an action to enjoin the enforcement of a *fi. fa.* based on such judgment, and to have the judgment canceled for invalidity, upon grounds urged, or known to exist, at the time of the filing of the motion to set aside.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 519-539; Dec. Dig. \S 172.]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by F. H. Saffold and others against W. J. Evans and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

See, also, 136 Ga. 375, 71 S. E. 663.

Hines & Jordon, of Atlanta, and Arthur W. Jordon, of Swainsboro, for plaintiffs in error. Travis & Travis, of Savannah, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 336)

COLCLOUGH et al. v. PALMETTO NAT. BANK et al. (No. 293.)
(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

WILLS \S 867—JUDGMENT CREDITORS—RIGHT TO IMPOUND LAND.

Where a testator devises a life estate in certain land to one who is also nominated the executor, and such person offers the will for probate, and a caveat is filed by the heirs of the decedent, pending the determination in the court of ordinary of the issue of *devisavit vel non*, judgment creditors of the devisees of the life estate have no right to have the land impounded in the hands of a receiver for the purpose of collecting the rents to be applied to the life tenant's debt in the event the will is probated, even though such debtor be insolvent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 2204-2209; Dec. Dig. \S 867.]

Error from Superior Court, Greene County; J. B. Park, Judge.

Action by the Palmetto National Bank and others against J. M. Colclough and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Samuel H. Sibley, of Union Point, for plaintiffs in error. Lewis, Davison & Lewis, of Greensboro, for defendants in error.

EVANS, P. J. Certain judgment creditors of J. M. Colclough filed a petition against him, alleging: They caused executions, which had been issued on their judgments, to be levied on a life estate claimed by the defendant in three described tracts of land. The defendant is now offering for probate, in the court of ordinary, a paper purporting to be the will of his sister, Miss Sallie Colclough, in which he is named as executor and relieved from giving bond, and in which will a devise is made to him of a life estate interest in the tracts of land levied on. A caveat to the probate of the will has been filed by certain heirs of the decedent, and the issue made thereby is now pending in the court of ordinary. The defendant is old and paralytic, and it is doubtful that his life estate will continue longer than the present year. The land is in the possession of tenants. After the levy of the executions, the defendant, "either individually or as such executor, filed a claim to said land and stopped the sale of the life estate he claims therein; * * * and petitioners charge, on information and belief, that said claim was filed to enable defendant to collect and use the said rents and profits from said land during this year and any subsequent year during which said claim may be pending and said defendant lives." The defendant is insolvent. The prayer is for a receiver to take charge of the rents, for an accounting of such rents as the defendant may have received, and for process against the defendant, "individually and as executor of Miss Sallie Colclough." The petition was amended by alleging that Miss Colclough died in possession of personal property of more than sufficient value to pay any debts which she may have owed at her death. A rule nisi for an interlocutory hearing issued, in response to which the defendant showed cause by demurrer against the appointment of a receiver. The court appointed a receiver as prayed, with direction to rent out the land and account for the rents and profits, in default of the defendant's giving bond in the sum of \$250, "conditioned upon his accounting for said rents and profits, if his claim to the same be not sustained." Exception is taken to this order.

There can be no doubt that a judgment creditor may pursue the equitable estate of his debtor in a court of equity and have it set apart to the payment of his debt. This equitable remedy is available to a creditor whose judgment debtor is a devisee or legatee, for the purpose of reaching the devise or legacy, to be subjected to the payment of his debt, where the condition of the estate is such that the devisee or legatee may demand that his devise or legacy be turned over to him. Smith's Equitable Remedies of

Creditors, § 21; *Lang v. Brown*, 21 Ala. 179, 56 Am. Dec. 244. But the facts of the instant case do not bring it within the operation of this equitable remedy of a creditor. The judgment debtor was nominated as executor in his sister's will, and filed an application to have it probated in the court of ordinary. A caveat to the probate of this will was filed by certain heirs of the deceased, and the issue formed by the caveat is still pending. In the paper offered for probate as the last will of Miss Sallie Colclough, a life estate in three tracts of land is devised to the judgment debtor. If the will is probated, the debtor will be entitled to receive his devise; but, if the caveators prevail, the estate of Miss Colclough will be distributed among her heirs at law. Although nominated as executor, the debtor is without power to assent to any devise to himself until the will is admitted to probate. The theory of subjecting the interest of a legatee to the judgment of his creditor is based on the right of the legatee to demand his legacy of the executor. Manifestly a legatee has no such right pending the proceeding to probate the will. Suppose this judgment be allowed to stand, and the will be refused probate; we would have the anomalous situation of a court of equity taking possession of property belonging to the legal heirs of Miss Colclough, to subject it to a life interest in another person, which has been judicially determined never to have existed. The plaintiffs prayed process and relief against the defendant, both individually and as executor. There is no allegation of the probate of the will in common form, nor do we think that would make any difference, as an executor of a will probated in common form is but a temporary administrator pending the issue of *devisavit vel non* on application to probate the will in solemn form. Civil Code 1910, § 3883.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 339)

STRINGFELLOW et al. v. STRINGFELLOW. (No. 294.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. PARTITION ⇐26—DEFENSE—PAROL SALE—COTENANTS.

Where land is owned by four persons in common, and one of them dies, leaving a widow as sole heir at law, the latter cannot defeat a partition of the land by merely proving that the other cotenants made a parol sale of the land to her deceased husband and put him in possession, and that he erected valuable improvements on it, where the evidence is without conflict that the purchase money has never been paid, and there is no plea for equitable relief dependent on the erection of valuable improvements.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 68-71, 75; Dec. Dig. ⇐26.]

2. WITNESSES — 138 — TRANSACTIONS WITH DECEDENT — PARTITION PROCEEDING.

A witness not a party to the partition proceeding is not incompetent to testify that he furnished the material which went into the improvements alleged to have been made by the deceased husband of the defendant.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 574, 575; Dec. Dig. — 138.]

Error from Superior Court, Marion County; S. P. Gilbert, Judge.

Action by Sarah Stringfellow and others against Lillie Stringfellow. Judgment for defendant, and plaintiffs bring error. Reversed.

W. D. Crawford, of Buena Vista, for plaintiffs in error. Geo. P. Munro and W. B. Short, both of Buena Vista, for defendant in error.

EVANS, P. J. A mother and three children were the common owners of a lot of land. One of the cotenants died, leaving a widow of his sole heir at law, and the other cotenants instituted a statutory partition proceeding for the purpose of dividing the land equally between the four claimants. The widow of the deceased cotenant filed objections to the partition, denying that the applicants had any interest in the land sought to be partitioned. She further alleged:

That her deceased husband originally owned a one-fourth interest and the applicants owned a three-fourths interest in the land. "That something over three years ago her husband made a trade for the purchase of the interest of the other parties, and after said trade, which was in parol, he built a house on said land and fenced something over 20 acres of the same. Defendant says that, her deceased husband having entered on said land as a purchaser, and having made valuable improvements on the same under said parol contract, the same was binding on the other parties in said case. Wherefore defendant says that plaintiffs have no right to ask for a partition of said land."

On the trial of the case the defendant testified that when the land was purchased by her deceased husband it was in woods; that he cleared 20 or 25 acres, built a house thereon, and put up considerable fencing, and was residing on the land at the time of his death; and that the plaintiffs had made frequent visits to her husband, and had made no claim to the land, but spoke of it as belonging to her deceased husband. The applicants introduced testimony to the effect that the deceased cotenant had declared that he had verbally purchased the land for \$300, to be paid for in the fall of 1912, and that he had not paid a penny on the land, and that he recognized that he no longer had any right or title to the same by virtue of his contract of purchase after the expiration of the time limited for the payment. The testimony relating to the admission of the deceased cotenant as to the nonpayment of the purchase money was without dispute. A verdict was returned in favor of the defendant, and the court refused to grant the applicants a new trial.

[1] 1. Our partition statute was designed to afford to cotenants a direct and adequate means for the division of property held in common, and not force them into equity, except in cases where the rights of the parties could not be fully determined and administered in the statutory proceeding. A defendant in such a proceeding who admits that the applicants were at one time common owners of the land, but who asserts a subsequent parol sale by them to one under whom the defendant claims to hold title in severalty, or who contends that they are equitably estopped from asserting title to the land, should plead the matters set up in resistance of the applicants' right of partition with such particularity as to put the parties on notice of the precise nature of the defense. No demurrer was made to the answer, and the exception is to the sufficiency of the evidence to support the verdict. The defendant in this case is not entitled to hold the verdict which she received at the hands of the jury, unless the evidence, as applied to the appropriate rules of law or equity, authorize the recovery.

The applicants verbally sold their interest in the land to the deceased cotenant, delivering possession to the vendee. Upon the latter's failure to pay the purchase money at maturity, they had the right to sue and recover the land. An action to recover the land by the vendors, in default of the payment of purchase money, is an exercise of the reserved right to rescind. The vendee or his heirs at law could resist the exercise of this right by a tender or payment of the purchase money, or by setting up such matters as equity would require the plaintiffs to recognize before allowing a rescission. If the vendee had erected substantial improvements on the land, the vendors would not be equitably entitled to a rescission of the contract and a recovery of the land without accounting to the vendee for their value. In to this accounting various elements would necessarily enter, such as damages caused by the breach of the contract, the rents, the amount of principal, and interest paid, etc.; the purpose being to equitably restore the status. *Couch v. Crane*, 142 Ga. 22, 82 S. E. 459; *Lytle v. Scottish American Co.*, 122 Ga. 453, 50 S. E. 402. But one tenant in common who has verbally contracted to buy the interest of his cotenants cannot defeat their title to the land without payment or tender of the purchase money, or showing the existence of extraneous facts which will equitably estop the plaintiffs from asserting their title to the land.

The partition application, wherein the several cotenants were seeking to have assigned to them in severalty different portions of the land in possession of the widow of the deceased cotenant, was the substantial equivalent of an action by a vendor to recover the land. In the instant case there is

no dispute that the land originally belonged in common to the applicants and the husband of the defendant. Nor does there seem to be any dispute that the applicants verbally sold their interest to the deceased cotenant. The applicants' testimony was to the effect that time was of the essence of the purchase, and that upon failure of the vendee to pay any of the purchase money within the time limited by the contract the vendee forfeited all rights to his improvements. The defendant seems to have rested her case entirely upon the proposition of the parol sale and valuable improvements thereunder, without alleging or proving the amount of the original purchase money, and whether any part of the same had been paid or tendered. Whatever equities may have accrued to the deceased cotenant from the erection of valuable improvements, he was not invested with the title under a parol sale of the land with all the purchase money unpaid. To allow the verdict to stand would be to defeat the applicants of their right to purchase money, even if there was no provision in the contract for forfeiture on failure to pay the principal within a given time. The verdict is therefore without evidence to sustain it.

[2] 2. A witness was called by the applicants to testify that he furnished the lumber which went into the house and other improvements made by the deceased cotenant. This testimony was repelled upon an objection that the witness was incompetent to testify, because the defendant sustained the relation of personal representative of the deceased cotenant. This was not an action to make the estate of the deceased cotenant liable for the value of the lumber which went into the improvements. The witness was no party to the partition proceedings, and was competent to testify concerning the transaction.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 335)

CITY OF CLARKESVILLE v. McMILLAN.
(No. 290.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — 385 —
STREETS—CHANGE OF GRADE—DIVERSION OF
WATER—LIABILITY FOR DAMAGES.

Where a city lawfully raises the grade of one of its streets, if the grading is executed in such manner as to obstruct or divert the flow of rainwater, so that it would empty on an adjacent proprietor's land to such an extent as to cause injury thereto, the diversion of the water with such result would give rise to a cause of action. Louisville & Nashville R. Co. v. Jackson, 139 Ga. 543 (4), 544, 77 S. E. 796; Nelson v. City of Atlanta, 138 Ga. 252, 75 S. E. 245, and citations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 925-928; Dec. Dig. § 385.]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to support the verdict, and none of the grounds of the motion for new trial show error.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by R. L. McMillan against the City of Clarkesville. Judgment for plaintiff, and defendant brings error. Affirmed.

I. H. Sutton and J. C. Edwards & Sons, all of Clarkesville, for plaintiff in error. McMillan & Erwin, of Clarkesville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 331)

LOUISVILLE & N. R. CO. et al. v. POSTAL
TELEGRAPH-CABLE CO.

POSTAL TELEGRAPH-CABLE CO. v.
LOUISVILLE & N. R. CO.

(No. 288.)

(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

1. EMINENT DOMAIN — 4 — RIGHTS OF WAY—
STATE AND FEDERAL LAWS.

The Act of Congress of July 24, 1866, c. 230, § 1, 14 Stat. 221 (Rev. St. § 5263 et seq. [U. S. Comp. St. 1913, § 10072 et seq.]), giving telegraph companies the right to construct and operate their lines through, along, and over the public domain, military and post roads, and navigable waters of the United States, does not withdraw from the states the right to legislate on the subject of the condemnation of railroad rights of way for telegraph companies.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 14-18; Dec. Dig. § 4.]

2. EMINENT DOMAIN — 120, 128 — CONDEMNATION—RIGHT OF WAY FOR TELEGRAPH LINE—
DAMAGES RECOVERABLE.

The measure of damages in the condemnation of a right of way of a railroad company for the construction of a telegraph line is the value of the land taken and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company. Any rent previously paid by a telegraph company for the use of the right of way in conducting a business, entirely disconnected with and not ancillary to the railroad company in the discharge of its corporate functions and duties, is not a proper element to be considered in the estimate of damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 315-319, 349-351; Dec. Dig. § 120, 128.]

3. VERDICT SUSTAINED.

The verdict is supported by the evidence, and no error of law is made to appear.

Error from Superior Court, Richmond County; Wm. F. Eve, Judge.

Suit by the Louisville & Nashville Railroad Company and others against the Postal Telegraph-Cable Company. Judgment for defendant, and plaintiffs bring error, and defendants file cross-bill of exceptions. Affirmed on main bill, and cross-bill dismissed.

Jos. B. & Bryan Cumming and Jas. M. Hull, Jr., all of Augusta, for Louisville & N. R. Co. C. E. Dunbar, of Augusta, for Postal Telegraph-Cable Co.

EVANS, P. J. The Postal Telegraph-Cable Company commenced proceedings against the Georgia Railroad & Banking Company and its lessees, the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, to condemn a right of way for a telegraph line on the right of way of the Macon & Augusta Railroad, a branch line of the Georgia Railroad & Banking Company. The board of assessors awarded the sum of \$100 as damages for the easement, and an appeal was taken by the condemnnees to the superior court. Pending the appeal the railroad companies filed against the telegraph company their petition in equity to enjoin the further progress of the condemnation proceeding. The equity case and the appeal from the assessors' award were consolidated and tried together as one case. A verdict was returned in which the damages were assessed at \$60. The railroad companies moved for a new trial, which was refused.

[1] 1. The court refused a written request to charge the jury as follows:

"The Congress of the United States, in pursuance of power given it by the Constitution of the United States, has declared the railroads of the country, including that branch of the Georgia Railroad which is known as the Macon & Augusta Railroad, whose right of way the Postal Telegraph-Cable Company is seeking to condemn for a telegraph line, to be post roads and as such subject to the jurisdiction of Congress. The Congress of the United States, also in pursuance of power given it by the constitution of the United States, has also prescribed the terms and conditions on which telegraph companies may construct their lines on the right of way of railroads. I charge you that the legal effect of this legislation by Congress is to withdraw the right of way of railroads from the operation of the authority of the states in the matter of the construction of telegraph lines thereon, and that the acts of the Legislature of Georgia, under which the Postal Telegraph-Cable Company is seeking to condemn a part of the right of way of the Macon & Augusta Railroad, are, as to such proceeding, unconstitutional, null and void; and you should find a verdict for the petitioners, Louisville & Nashville Railroad company, Atlantic Coast Line Railroad Company, and the Georgia Railroad & Banking Company."

The requested instruction was properly refused. The act of Congress approved July 24, 1866 (Rev. Stat. § 5263 et seq.), giving telegraph companies the right to construct and operate their lines through, along, and over the public domain, military or post roads, and navigable waters of the United States, was first up for consideration and construction by the Supreme Court of the United States in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708. It was there held that the act did not confer upon telegraph companies the right to enter upon private property without the consent of the owner, or grant

them the right of eminent domain. The opinion was by Chief Justice Waite, who, after adverting to the absence, in the act, of any attempt by Congress to provide for the appropriation of private property to the uses of the telegraph, said:

"The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with the owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This construction of the statute has been steadfastly adhered to. *Western Union Telegraph Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Western Union Telegraph Co. v. Penn. R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *Western Union Telegraph Co. v. City of Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; *Williams v. City of Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. Ed. 275. In the *City of Richmond Case*, supra, it was said that the act of Congress made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own; but except in this negative sense the statute is only permissive, and not a source of positive rights. The condemnation statute of this state is in aid of a telegraph company acquiring an easement upon a railroad right of way, not inconsistent with the railroad company's use of its own right of way in the discharge of its proper functions and duties, where the telegraph company is unable to obtain such easement by contract. The state's right of eminent domain extends to property already dedicated to a public use, with the restriction that it cannot be subjected to an additional public use, if the second use either destroys or seriously impairs the first use. *A. & W. P. R. Co. v. A., B. & A. R. Co.*, 124 Ga. 125, 52 S. E. 320. It follows, as Congress has not attempted by the act of 1866 to interfere with the state's sovereignty or the exercise of the state's right of eminent domain, that the requested instruction was properly denied.

[2] 2. The court refused to instruct the jury that in ascertaining the value of the easement sought to be acquired by the telegraph company they should take into consideration any rent which the railroad companies receive for the premises and which they may lose by the condemnation. It appears from the pleadings that the Georgia Railroad & Banking Company for a stated consideration granted to the telegraph company a license to erect on its right of way poles for the purpose of carrying telegraph wires, and that the license was to continue for a period of 20 years. It was alleged in the answer of the telegraph company that this contract had expired, and

this allegation was not controverted in the evidence. The measure of damages for the easement sought by the telegraph company is the value of the land actually taken and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company. *Atlantic Coast Line Railroad Co. v. Postal Telegraph-Cable Co.*, 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734. In that case it was pointed out that the appropriation of land to railroad use amounted to a withdrawal of the right of way from any use except what is necessary or auxiliary to the operation of the railroad, and that the railroad right of way can have no general sale or rental value. The contract contained no covenant by the telegraph company to render any service to the railroad company, and the superintendent of the Georgia Railroad & Banking Company testified that the railroad companies "did not use the Postal Telegraph line." Under the facts, the line of the telegraph company was not used by the railroad company as an auxiliary in the operation of its trains or in the discharge of any corporate function. What rent the telegraph company may have contracted to pay for a license to occupy the right of way of the railroad company, for purposes altogether disassociated from the discharge of the railroad company's corporate functions and duties, is not an element to be considered in the computation of damages.

[3] 3. The evidence authorized the verdict, and no error of law is made to appear.

Judgment affirmed on main bill of exceptions. Cross-bill dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 309)

GOSWICK v. ALPHARETTA BANK.
(No. 273.)

(Supreme Court of Georgia. April 14, 1915.)

(Syllabus by the Court.)

1. EVIDENCE §441—PAROL AGREEMENT—PROCEEDS OF DRAFT.

Where a bill of exchange is drawn on a bank payable to the order of a third person, and the payee indorses the draft in blank and delivers it to a second bank to be forwarded for collection, without any written agreement as to the disposition of the proceeds, evidence is admissible to show a parol agreement between the payee and the collecting bank, made at the time of the delivery of the draft for collection, to the effect that the proceeds of the draft should be credited by the bank on a debt of another person, and that it should not go on deposit to the credit of the payee.

(a) Many of the grounds of the motion for a new trial included confused statements showing controversies and colloquies between the court and counsel on the subject of the admissibility of evidence; but in so far as any of them have been sufficient to raise any question for decision, in view of the ruling above announced, they show no error in the rulings of the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.]

2. INSTRUCTIONS.

When considered in connection with other portions of the charge, the excerpts complained of afford no ground for a reversal.

3. GROUND FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The ground of the motion for a new trial based on alleged newly discovered evidence was entirely without merit.

Error from Superior Court, Milton County; H. L. Patterson, Judge.

Action between J. W. Goswick and the Alpharetta Bank. From the judgment, Goswick brings error. Affirmed.

Geo. F. Gober, of Atlanta, and G. B. Walker, of Alpharetta, for plaintiff in error. J. Z. Foster, of Marietta, and J. P. Brooke, of Alpharetta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 397)

MACON GAS CO. et al. v. RICHTER et al.
(Supreme Court of Georgia. April 22, 1915.)

(Syllabus by the Court.)

1. CORPORATIONS §66—GAS COMPANIES—CHARTER—CONSTRUCTION.

Where a charter of a gas company fixed the amount of its capital stock at \$75,000, with a privilege in the board of directors to increase such amount, but with no statement as to the extent to which such increase might be made; and where by an amendment to the charter it was provided that the consent of the holders of two-thirds of the common stock outstanding should be required in order to make any increase in such stock; and where, by a second amendment, the extent to which such stock could be increased was fixed at \$500,000—construing the charter and the two amendments together, the manner of any increase was provided by the charter and the first amendment, and the extent to which it could be made was limited by the second amendment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 173-180, 449; Dec. Dig. § 66.]

2. CORPORATIONS §66—CAPITAL STOCK—CHANGE IN AMOUNT—CONSENT OF STOCKHOLDERS.

Increasing the amount of the common capital stock in a corporation in excess of the amount authorized by the charter is a vital and fundamental change of the original contract, and requires the unanimous consent of all the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 173-180, 449; Dec. Dig. § 66.]

3. CORPORATIONS §189—CAPITAL STOCK—INCREASE—INJUNCTION.

The superior court has jurisdiction to enjoin a corporation from applying for an increase of its common capital stock in excess of the amount authorized by its charter, at the instance of the minority stockholders, in a proper case made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.]

4. CORPORATIONS §189—CAPITAL STOCK—ILLEGAL INCREASE—INJUNCTION—MINORITY STOCKHOLDERS.

Where minority stockholders have purchased stock in a corporation which is seeking to increase its capital stock in excess of the amount

authorized by its charter and is illegally pursuing a course in violation of the rights of the minority stockholders, the latter are entitled to equitable relief to enjoin such illegal increase in the capital stock. And this is so regardless of the purpose for which the minority stockholders purchased their stock. The latter can have the stockholders and directors enjoined from exceeding the powers granted them by the charter.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 706-722; Dec. Dig. ¶ 189.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Bruno Richter and another against the Macon Gas Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Hatcher & Smith and Harris & Harris, all of Macon, for plaintiffs in error. Hardeman, Jones, Park & Johnston and Harry S. Strozier, all of Macon, for defendants in error.

HILL, J. Bruno Richter and Simon J. Dannenberg brought their equitable petition against the Macon Gas Company and its officers, the Georgia Light, Power & Railways, and others, to enjoin them from further proceedings to increase the common capital stock of the Macon Gas Company in excess of the sum of \$500,000. The petition, answer, and demurrer are exceedingly lengthy and comprehensive, and even a concise synopsis of each would unnecessarily lengthen this opinion. Enough of the facts will be brought out to make clear the points decided. The Macon Gas Company was incorporated by the General Assembly of Georgia by an act approved February 17, 1876, with an authorized capital stock of \$75,000, with the privilege of increasing or decreasing the same at the pleasure of the board of directors. In 1898, by proceedings in the superior court, the charter was so amended that the stock should not be increased except by the consent of two-thirds of the holders of the whole amount of common stock; and subsequently the charter was again amended on July 17, 1911, so as to provide for an authorized common capital stock not to exceed in the aggregate \$500,000. Under this last amendment, the Macon Gas Company has issued an aggregate of \$300,000 of common capital stock. The owners of the majority of the common capital stock, who are alleged to be the Georgia Light, Power & Railways and others, seek to increase the common capital stock of the Macon Gas Company to an amount in excess of \$500,000, namely, to \$700,000. The plaintiffs, who are the owners or holders of 15 shares of the common capital stock of the corporation, filed their equitable petition to enjoin the issuance of stock in excess of \$500,000, and from further proceedings to obtain an amendment to its charter authorizing such increase, and from applying to the railroad commission, or taking other steps to effectuate such increase. On the hearing the judge enjoined the defendants from fur-

ther proceedings to increase the capital stock in excess of \$500,000, and the defendants excepted.

[1] 1. The act of 1876 (Acts 1876, p. 245), incorporating the Macon Gas Company, fixed the capital stock at \$75,000, with the privilege of increasing or decreasing the same at the pleasure of the board of directors. In 1898 the superior court of Bibb county allowed an amendment to the charter, as authorized by the Civil Code (1910), § 2823(6), which amendment provided that:

"The amount of common stock outstanding at any time shall not be increased except after obtaining the consent of two-thirds of the whole amount of common stock which shall be at the time of such proposed increase outstanding, given at a meeting of the stockholders called for that purpose."

By another amendment to the charter, granted by the superior court in 1911, it was provided that:

"The corporation shall have authority to increase its common stock from time to time to an amount not to exceed in the aggregate \$500,000."

Construing the amendment of 1911 in connection with the amendment of 1898, we think the amendment of 1911 places a limitation on the power to issue common capital stock of the corporation in excess of \$500,000. Previously to the act of 1911 there was no limitation on the amount of stock which might be issued, but the amendment of 1911 expressly declares that the amount which may be issued shall not exceed in the aggregate \$500,000. When therefore it was sought to increase the common capital stock in excess of the amount authorized in the charter, the stockholders and directors of the corporation were exceeding their charter powers; and they may be restrained, on a proper case made at the instance of the dissenting stockholders, from making an unauthorized increase in the capital stock. *Woodruff v. Columbus Investment Co.*, 135 Ga. 215, 68 S. E. 1103. See *Peck v. Elliott*, 79 Fed. 10, 13, 24 C. C. A. 425, 38 L. R. A. 616; 2 *Thomp. Corp.* §§ 2076-2078; *Angell & Ames, Corp.* (11th Ed.) § 146.

[2] 2. It is insisted by the plaintiffs in error that the unanimous consent of the stockholders of the gas company is not required in order to increase the capital stock beyond that named in the charter; in other words, that such consent is not necessary in order to obtain an amendment to the charter of a public-service corporation, for to increase the amount of the common capital stock of such a corporation in excess of the amount authorized by the charter would, in effect, be an amendment to the charter. This court has held that such an amendment to a charter of a corporation is fundamental and vital, and requires the unanimous consent of the stockholders to its acceptance. *Atlanta Steel Co. v. Mynahan*, 138 Ga. 668, 75 S. E. 980, and cases cited. Increasing

the capital stock of the Macon Gas Company in excess of the amount authorized by its charter would be a fundamental change of the original contract, and cannot be done without the consent of all the stockholders. *Morawetz on Private Corp.* (2d Ed.) § 403. The argument that the proposed act of increase is a legislative act, and cannot on that account be enjoined, is untenable.

[3] 3. Has the superior court equity jurisdiction to enjoin a corporation from applying, in its corporate capacity, for an increase of stock in excess of the amount authorized by its charter to be issued, in the absence of consent of minority stockholders? If a court of equity has a right to enjoin a corporation from issuing stock after it obtains authority to do so, certainly it would have the right to prevent the corporation from changing its contract in a fundamental and vital particular which it would not be permitted to carry out. *Morawetz on Priv. Corp.* § 403. Section 2224 of the Civil Code provides:

"A minority stockholder may proceed in equity in behalf of himself and other stockholders for fraud, or acts ultra vires, against a corporation, its officers and those participating therein, when he and they are injured thereby. But there must be shown— * * * (4) That the majority stockholders are oppressively and illegally pursuing, in the name of the corporation, a course in violation of the rights of shareholders, which can only be restrained by a court of equity; and it must also appear—(5) That petitioner has acted promptly; that he made an earnest effort to obtain redress at the hands of the directors and stockholders, or why it could not be done, or it was not reasonable to require it," etc.

The allegations of the petition bring the petitioners within the class which is entitled to the relief provided in the Code section just quoted from; and the evidence for the plaintiff tended to support the allegations. It is insisted that a minority stockholder cannot institute suit until he shows injury, and until he shows that he has applied to the corporation for redress and it has been refused him. Conceding, for the sake of the argument, that these things have not been shown, the reply is that this doctrine has no application to a case where an attempt is being made on the part of a corporation to change the contract made by its charter in a vital and fundamental particular. And, as already observed, the proposed increase is a vital and fundamental change.

[4] 4. It is contended that the plaintiffs are not entitled to equitable relief, because they have not come into court with clean hands; that the plaintiffs bought up the 15 shares of stock in order to obstruct the interests of a majority of the stockholders, and to make themselves a nuisance, and in order to force the defendants for the sake of peace to purchase their stock at an exorbitant price; that they have no real interest in the corporation, and defendants deny that plaintiff's consent to the issue of stock is necessary, and say that they are at-

tempting to get relief by personally objecting to the increase of the capital stock. The reply to this argument is that, under the facts of this case, the defendants are "illegally pursuing" a course in violation of the rights of the minority stockholders, and thus bring themselves in a position contemplated by the Code section quoted from in a preceding division of the opinion, entitling the minority stockholders to relief. As held in the case of *Central R. Co. v. Collins*, 40 Ga. 582(2):

"If one be a bona fide holder of stock in a railroad company, and file a bill to enjoin the company from making a purchase not authorized by the charter, it is not a sufficient reply to the bill that the plaintiff is not in good faith seeking the interests of the company, but is acting in the interests of a rival road. Each stockholder has a right to stand upon his contract, as provided by the charter."

A minority stockholder has the right to insist on the contract, and to see that the stockholders and directors shall not exceed the powers granted to them by the charter.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 355)

LIVERPOOL & LONDON & GLOBE INS. CO., Limited, v. PEOPLE'S BANK OF MANSFIELD. (No. 300.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. COURTS — §65, 66—TERM—ADJOURNMENT.

Under the facts of this case, and in view of the practical construction placed upon his own conduct by the presiding judge, this court cannot declare, as matter of law, that the term of the superior court at which the cause, which furnishes the basis of the controversy, had been tried, had been finally adjourned more than four days before the entry of judgment upon the verdict which was made therein.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 230-242, 246; Dec. Dig. §65, 66.]

2. TRIAL — §342—VERDICT — VALIDITY—ENTRY.

A suit was brought in the superior court of Newton county, and two summonses of garnishment were sued out, one for an insurance company having an agent resident in that county, and another for an insurance company having an agent resident in Walton county. These summonses were served by the sheriffs of the respective counties. The company having the agent resident in Newton county filed an answer, which was traversed. The clerk of the superior court, in entering the case upon the docket, entered the name of the original plaintiff and defendant and the name of the insurance company having the agent resident in Walton county as garnishee. He, however, entered the names of the attorneys who represented the company, whose answer had been traversed opposite the name of the garnishee, and the other entries showed that there had been an answer and traverse, which entry could not have applied to the company having the agent in Walton county. The issue formed by the traverse of the answer was continued by consent, and the entry thereof was entered opposite the entry of the case, as above stated. During the term, after the continuance was thus had, the issue formed by the answer

and traverse was called up and tried, though counsel for the garnishee was absent, as they contended, because of an agreement with counsel for the plaintiff. An entry of the verdict was made opposite the entry of the case above stated. There was no allegation that counsel for the garnishee was misled by reason of the erroneous entry of the case, or that any injury accrued to his client by reason thereof. *Held*, that the error of the clerk in docketing the case inaccurately will not invalidate the verdict rendered upon the traverse.

(a) A verdict is not illegal because it is entered on the wrong paper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 805, 806; Dec. Dig. § 342.]

3. JUDGMENT § 427—ENFORCEMENT—INJUNCTION—MISUNDERSTANDING OF COUNSEL.

Under the evidence as to the understanding of counsel, this did not require an injunction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 805-807; Dec. Dig. § 427.]

4. GARNISHMENT § 235—NEW TRIAL § 12—JUDGMENT TAKEN AGAINST GARNISHEE—ENFORCEMENT.

A rule nisi for a new trial in a civil case does not operate as a supersedeas, unless the court so orders.

(a) Where a judgment is taken against a garnishee and duly entered, pending a motion for new trial by the judgment debtor without a supersedeas, this furnishes a sufficient basis to proceed against the garnishee, subject to the result of the motion for new trial.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 423-427, 443, 444, 447, 450-452; Dec. Dig. § 235; New Trial, Cent. Dig. §§ 17, 253; Dec. Dig. § 12.]

5. RESTRAINING ORDER—INJUNCTION.

There was no error in dissolving the restraining order previously granted and in denying an injunction.

Error from Superior Court, Newton County; C. S. Reid, Judge.

Action by the Liverpool & London & Globe Insurance Company, Limited, against the People's Bank of Mansfield. Judgment for defendant, and plaintiff brings error. Affirmed.

The People's Bank of Mansfield brought suit against L. R. Sams on three promissory notes, aggregating about \$2,800, to the March term, 1914, of Newton superior court, and a summons of garnishment was served on the agent of the Liverpool & London & Globe Insurance Company, whose office was in Walton county, Ga. The insurance company filed an answer denying any indebtedness. This answer was traversed, and written notice of the traverse was served on the insurance company. On the trial of the traverse the jury rendered a verdict against the garnishee, the insurance company, for \$1,000. The latter then filed a petition against the People's Bank of Mansfield, praying for injunction to restrain the enforcement of the *fi. fa.* and the judgment on which it was founded, and for other relief. The petition alleged substantially that a verdict was rendered against the defendant in *fi. fa.* on July 23, 1914; that a motion for new trial was made by the defendant Sams, and was

not disposed of by the court until October 10, 1914, when, as the judgment showed, by agreement of counsel the motion for new trial was dismissed; and that judgment was entered against petitioner as garnishee on October 5, 1914, based on the verdict rendered on September 23, 1914. It is alleged that this judgment was entered more than four days after the adjournment of the September term of Newton superior court (when the verdict was entered), and is therefore void; the circumstances relative to adjournment being, according to plaintiff's evidence, that on Friday afternoon of September 25, 1914, the presiding judge of the court "discharged the jury, with thanks, for the term, and directed that they could call on the clerk for their 'script,'" and that, shortly after the jury had been discharged, the presiding judge descended from the bench, "and since that time, to wit, September 25, 1914, there has not been at any time any visible evidence of said court being in session." The presiding judge certified that the court transacted no business at the September term, 1914, of Newton superior court, after he left the bench; that he made no written order adjourning the court at that term, nor at any other term.

It is alleged that the defendant in *fi. fa.*, Sams, has brought suit against petitioner to the September term of Newton superior court, on the policy upon which the People's Bank claims the indebtedness of petitioner to Sams, on which claim verdict and judgment has been entered against it as garnishee; that petitioner has filed a meritorious plea and answer, and this case has not been disposed of, and cannot be until the next term of court; that the certified copy of the affidavit and bond for garnishment in this case is not such as is required by law; that petitioner's agent was served by the sheriff of Newton county, and service of summons of garnishment should have been entered on the original and not on a certified typewritten copy; that Sams is insolvent, and, if he should establish a liability against petitioner on the policy of insurance, it would be inequitable and unjust to require petitioner to pay the same alleged indebtedness twice. By amendment it was alleged as follows: When notice of the traverse of the answer of garnishment, returnable July 20, 1914, was served upon the attorneys for petitioner, it was agreed between counsel for plaintiff in the garnishment proceedings and the attorney for petitioner in this case that the traverse should not be tried on the return thereof on July 20, 1914; and the attorney for petitioner understood that, by the agreement, trial of the traverse should be postponed until the termination of the litigation, which was either pending or in immediate prospect, on the question of liability on the policy of insurance. Suit on the policy was duly brought, and was pending in court

at the time the traverse of the answer to the garnishment was put to trial, in the absence of petitioner's attorneys. But for the understanding on the part of petitioner's attorney, who was the sole member of his firm representing the interests of petitioner, he would have been present or represented on the call of the traverse to the answer, and would have resisted the rendition of any judgment thereon; and upon the facts being brought to the attention of the court, it being made to appear that the only claim of liability of the garnishee was based on the policy of insurance, the court would not have anticipated the issue in that case by trying the traverse to the answer of garnishment, etc. Petitioner admits that the attorney for the plaintiff in *fi. fa.* claimed that he did not so understand the arrangement between himself and the attorney for petitioner, and that issue need not be determined in this case further than to determine that there was a misunderstanding. By reason of the misunderstanding, the petitioner was not represented on the call of the traverse to the answer to the garnishment, and it would be inequitable and unjust to allow the judgment to stand under such circumstances, etc. If the issue on the trial of the suit on the insurance policy should be determined against petitioner, it is entirely willing to have whatever amount is so found applied under the garnishment proceedings, but petitioner should not be deprived of its right to contest its liability under the policy of insurance, in view of the misunderstanding of its counsel as to the time when the traverse would be tried.

At the close of the testimony, the court rendered a judgment dissolving the restraining order previously granted and denying the application for injunction; and to this judgment the plaintiff excepted.

Smith, Hammond & Smith, of Atlanta, and C. C. King, of Covington, for plaintiff in error. Rogers & Knox, of Covington, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. After a general term of the superior court has been organized by the presiding judge and put into operation, the term continues until finally adjourned by the presiding judge or by the operation of some provision of law. In *King v. Sears*, 91 Ga. 577, 18 S. E. 830, and *Hines v. McLellan*, 117 Ga. 845, 45 S. E. 279, the court took a recess until a fixed date, and it was held that this did not end the term, but it continued in the interval; and this was the ruling in the former case, although in such interval a term of court was held in another county of the circuit. We need not determine just what express provisions of law would end a term of court without action on the part of the judge, as there is no contention that there was any statutory provision bringing the

term of court to an end in this case before the judgment was rendered. The question is whether, although he did not in express words order an adjournment of the term of court, language and actions of the judge amounted to finally adjourning the term, though in an informal way. On the subject of what transpired the following appears: One of counsel for the garnishee made an affidavit, of which the following is the substance: The September term, 1914, of Newton superior court convened on the third Monday, which was the 21st day of that month, and continued in session daily until the afternoon of the following Friday, which was the 25th day of the month. On the afternoon of that day, the judge of the court, who was presiding, discharged the jurymen for the term, with thanks, and directed them to call on the clerk for scrip for their services. Shortly after the jurymen had been discharged, the judge descended from the bench, and since then, up to the time of the making of the affidavit (November 14th), there was no visible evidence of the court being in session. The affiant added the statement, "In other words, the said court on said date, in common parlance, adjourned." Counsel for the plaintiff in the original case, the defendant in the present case, stated that they had examined the minutes, and that there was no order of adjournment of the September term, 1914, thereof. The presiding judge added the following note:

"The court transacted no business at the September term, 1914, of Newton superior court, after I left the bench. I made no written order adjourning the court at that term nor at any other term."

While no exact formula or words is necessary in adjourning a term of court, the evidence and the note of the presiding judge leave in some doubt the question as to whether he intended, by what he said and did, to adjourn the term of the court finally, and whether, by the note, he meant that that was his usual method of informally adjourning court, or whether there was no final adjournment of court, but what happened amounted to a mere cessation of business without an adjournment. Inasmuch, however, as the regular judge of the circuit, who presided during the week beginning September 21, 1914, refused to grant an injunction against the enforcement of the judgment which would have been entered in vacation if the term of court was finally adjourned on the 25th of September, and the same judge made the note to which we have referred, considering this fact in connection with those above set out, we cannot declare that the judge finally adjourned the term of court on the date mentioned, and decline to so rule. In this connection, see *Pinnebad v. Pinnebad*, 129 Ga. 267, 58 S. E. 879. The statement of the attorney that, "In other words, the said court on said date, in common parlance, adjourned," was evidently a mere statement of

an opinion as to the effect of the facts he had already detailed.

In accordance with what we have said, treating the term of court as not having been finally adjourned when the judgment was entered, it was in time. What has been said in this division of the opinion represents the views of the majority of the Justices of this court. Justices ATKINSON and HILL concur in the ruling that, under the facts set forth in statements of counsel and the certificate of the judge, the court was not adjourned at the time when the judgment was rendered, but do not concur in any intimation that a different ruling might have been made, except for the fact that the judge refused to enjoin the enforcement of the judgment.

[2] 2. The second headnote requires no elaboration.

The verdict was entered on the certified copy of the affidavit and bond, and complaint is made of this fact. The pleadings with respect to the issue against the garnishee consist of the answer of the garnishee and the traverse thereto. The entry of the verdict on the wrong paper will not invalidate it. *Roberts v. State*, 14 Ga. 18, 19; *Sapp v. Parrish*, 3 Ga. App. 234(2), 236, 59 S. E. 821.

[3] 3. It is contended that it was understood by counsel for plaintiff in error that the traverse to the answer of the garnishee should not be tried until the termination of the litigation "which was pending, or in immediate prospect," on the question of the liability of the plaintiff in error on a certain insurance policy in which the defendant in *fi. fa.* was the beneficiary and plaintiff. Under the evidence, this contention affords no cause for an injunction.

[4] 4. Complaint is made that the verdict and judgment were entered against the garnishee pending a motion for a new trial by the defendant in *fi. fa.* It is insisted that the motion for a new trial and order nisi of the court thereon acted as a supersedeas, and that no judgment could be taken while such supersedeas was in effect. It appears affirmatively that a judgment was rendered against the defendant, and that there was no formal order of the court, in connection with the motion for new trial, superseding the judgment; and in such cases the statute declares that:

"A rule nisi for a new trial shall not operate as a supersedeas, unless so ordered by the court, in which case the court may demand bond and security for the eventual condemnation money, when the exigency of the case requires it." Civil Code 1910, § 6081.

In such a case a judgment against the garnishee, duly entered pending a motion for new trial by the judgment debtor, without a supersedeas, furnishes a sufficient basis to proceed against the garnishee, subject to the result of the motion for new trial. *Holbrook v. Evansville, etc., R. Co.*, 114 Ga. 1, 39 S.

E. 937. Applying the above principle to the present case, it was not error to enter up a judgment against the garnishee, where a motion for a new trial was made, but no order for a supersedeas was taken.

[5] 5. There was no error in dissolving the restraining order previously granted and denying an injunction.

We feel it our duty to call the attention of our brethren of the superior court bench to the great danger and possible wrongs which may arise to litigants and to the public from failing to formally adjourn a term of the superior court and leaving in doubt the question of whether the court is in session or not. A term of court ought to be formally adjourned, and the adjournment ought to be made a matter of record. If it is desired to adjourn a court to another term or take a recess, this should be placed upon the minutes, so that parties and counsel may know when to return to court and when to anticipate the possibility that their cases may be taken up or disposed of. If the judge simply leaves the courthouse and perhaps the county, with no certainty as to whether the court has been adjourned or remains in session, and with no way for counsel, parties, or witnesses to know whether they must still be on the lookout for those things which may happen in term time, or whether they can safely go until some fixed time in the future, and if the judge may, at any uncertain time, return and transact business suitable only to be done in term time, it will readily be seen that the gravest hardship may happen unintentionally by throwing parties interested in court business off of their guard as to whether court is in session or not in session, and as to whether they are bound to be on the watch for an indefinite time, lest the judge may return to the county and their business be disposed of in their absence or when they are unprepared. Moreover, such a practice leaves in a state of uncertainty the time within which motions for a new trial and writs of error must be presented.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 320)

AMERICAN NAT. BANK OF MACON v.
BROOKS et al. (N6. 279.)

(Supreme Court of Georgia. April 14, 1915.)

(Syllabus by the Court.)

MORTGAGES ⇐ 114—DEED GIVEN AS SECURITY—CONSTRUCTION—DEBT SECURED.

There was no abuse of discretion in the grant of an interlocutory injunction.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 223, 224, 241; Dec. Dig. ⇐ 114.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by J. R. Brooks and another against the American National Bank of Macon. Judg-

ment for plaintiffs, and defendant brings error. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiff in error. L. D. Moore and Sam B. Hunter, both of Macon, for defendants in error.

EVANS, P. J. The firm of Chambers & Young was indebted to the American National Bank of Macon. Chambers & Young ceased to do business as a firm. Chambers desired to personally engage in business and to obtain a line of credit with the American National Bank in the sum of \$5,000. The bank agreed to extend the credit if the contemplated advance of \$5,000 was secured. This was accomplished by the execution of a security deed by J. R. Brooks to the American National Bank, in consideration of \$5,000. This deed was written on a printed form, and contained these printed words:

"This instrument is intended by the parties hereto and is to be construed as a deed passing title, and is made under provisions of section 3306 et seq., and section 6037, of the Code of Georgia of 1910, to secure the payment of a debt evidenced by one certain promissory note executed concurrently with this deed, and payable to the party of the second part or order, and bearing the same date as this deed, and further described as follows [typewritten words]. Note made by J. M. Chambers for five thousand dollars (\$5,000), due on demand, this deed being intended to secure said note and any renewal or extension thereof, and any other notes which may be given by the said J. M. Chambers or any other indebtedness of the said J. M. Chambers to said bank, not to exceed at any one time the sum of \$5,000, this deed being intended to secure the indebtedness of the said J. M. Chambers to the extent of said \$5,000, no matter how the same may be represented"

—followed by this printed clause:

"As well as any notes which may be given in renewal of said notes above described and any notes which may be given as evidence of interest or extension of the time of payment of the debt herein secured."

Upon the delivery of this deed the bank passed \$5,000 to the credit of Chambers. Subsequently the bank undertook to secure a renewal of the old Chambers & Young note. Chambers signed the renewal note, and it was sent to Young for his signature. Young refused to sign it, and the old note of Chambers & Young was never surrendered. Brooks tendered the amount due the bank, exclusive of the Chambers & Young note and the renewal thereof by Chambers; and the bank insisted on the inclusion of this attempted renewal note in the indebtedness secured by the deed from Brooks, and was undertaking to sell the property of Brooks to pay that amount, as well as the balance due on the note given by Chambers at the time of the execution of the deed by Brooks.

It is clear that the indebtedness secured by the deed from Brooks to the bank was limited to a new indebtedness not to exceed \$5,000, which the bank agreed to advance to Chambers on the security of the deed of

Brooks. The deed only secured a new debt and renewals thereof, not to exceed \$5,000. There is nothing in the deed to indicate any purpose or undertaking to secure any pre-existing debt of Chambers or of Chambers & Young. Hence prior indebtedness was excluded, and the deed did not secure the indebtedness evidenced by the old note of Chambers & Young. The note of Chambers, in the attempted renewal of the old note of Chambers & Young, did not change its character and give it the essence and nature of a new indebtedness. The court did not abuse his discretion in granting an injunction to stay the exercise of the power of sale under the facts of the case.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 335)

CITY OF LAWRENCEVILLE v. COOPER.
(No. 289.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

VERDICT SUSTAINED.

No error of law was committed on the trial of the case, and the verdict is supported by the evidence.

Error from Superior Court, Gwinnett County; J. B. Park, Judge.

Proceedings between the City of Lawrenceville and Anna Cooper. From the judgment, the City brings error. Affirmed.

D. M. Byrd and J. A. Perry, both of Lawrenceville, for plaintiff in error. John R. Cooper, of Macon, and O. A. Nix, of Lawrenceville, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 323)

ARMISTEAD v. WHELCHER. (No. 281.)

(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

REFUSAL OF NEW TRIAL.

There being no error of law complained of, and there being sufficient evidence to sustain the verdict, the court did not err in refusing a new trial.

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action between E. C. Armistead and R. B. Whelcher, administrator. From the judgment, Armistead brings error. Affirmed.

E. C. Armistead, of Barnesville, in pro. per. Thos. J. Shackelford, of Athens, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 384)

PEEPLER v. GARRISON & SON. (No. 313.)
(Supreme Court of Georgia. April 20, 1915.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

2. TRIAL. §23—REPORT OF CASE—NECESSITY—DISCRETION.

Under Civil Code 1910, §§ 4984, 4985, on the trial of civil cases, where counsel for plaintiff and defendant fail to agree to have the case reported by the official reporter, the trial judge may direct it to be done, the fee to be paid by the parties on such terms as may be prescribed by the judge; but it is not mandatory that every case should be reported. Where the counsel do not agree, it rests within the sound discretion of the judge whether he will order the case reported.

(a) Under the facts of this case, and the character and quantity of the evidence involved, there was no abuse of discretion in refusing to require the evidence to be taken down by the official stenographer; and while the remarks of the judge in making the ruling may have been subject to some criticism, in view of the circumstances, including the fact that counsel for the plaintiff did not invoke any distinct ruling in regard to the statement of the court in the preliminary motion, but made counter statements as to the facts involved, such statement by the court will not require a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 41; Dec. Dig. §23.]

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

Action by George Peeples against Garrison & Son. Judgment for defendants, and plaintiff brings error. Affirmed.

Wm. Attaway and Chas. H. Griffin, both of Marietta, for plaintiff in error. Mozley & Moss, of Marietta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 312)

BANK OF CUSSETA v. ELLAVILLE GUANO CO. et al. (No. 275.)
(Supreme Court of Georgia. April 14, 1915.)

(Syllabus by the Court.)

CHATTEL MORTGAGES §12—PROPERTY SUBJECT—CROPS.

There can be no mortgage of a crop until it is planted. Redd v. Burrus, 58 Ga. 574; Hall v. State, 2 Ga. App. 739, 59 S. E. 26. And while, under the provisions of section 3349 of the Civil Code of 1910, the lien of a mortgage on crops given to secure the payment of debts for money borrowed to aid in making and gathering such crops is superior to judgments of older date than such mortgage, where the money to secure the payment of which the mortgage is given is furnished in the year in which the crop is grown, the general rule which is first stated is not altered by the Code section referred to; and as the evidence authorized the court, upon the hearing of a rule against the sheriff for the distribution of money in his hands, arising from the sale of certain farm products, the money being claimed by a mortgagee (the plaintiff in error) and by the defendants in error (who were plaintiffs in executions

based upon judgments older than the mortgage), to find that the crops which produced the property sold were not planted at the time of the execution of the mortgage, the court did not err in holding that the money should be awarded to the holders of the judgment liens.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 59, 60; Dec. Dig. §12.]

Error from Superior Court, Chattahoochee County; S. P. Gilbert, Judge.

Action between the Bank of Cusseta and the Ellaville Guano Company and others. From the judgment, the Bank of Cusseta brings error. Affirmed.

C. C. Minter, of Cusseta, and E. J. Wynn, of Columbus, for plaintiff in error. Geo. P. Munro and W. B. Short, both of Buena Vista, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 324)

LAWRENCEVILLE BRANCH R. CO. v. ROGERS. (No. 282.)
(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

VERDICT AND DENIAL OF NEW TRIAL APPROVED.

There being no complaint of any error of law, and the evidence being sufficient to support the verdict, the discretion of the trial judge in refusing to grant a new trial will not be disturbed.

Error from Superior Court, Gwinnett County; O. H. Brand, Judge.

Action between the Lawrenceville Branch Railroad Company and Rubena Rogers, by next friend. From the judgment, the railroad company brings error. Affirmed.

W. E. Simmons, of Lawrenceville, for plaintiff in error. I. L. Oakes, of Lawrenceville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 377)

HITCHCOCK v. HINES. (No. 307.)
(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

ESTOPPEL §24—VENDOR AND PURCHASER §230—EFFECT OF DEED—REVOCATION OF REMAINDER—NOTICE—RECITALS IN DEED.

Where one executes a voluntary conveyance to another, conveying to such other a life estate in land, with remainder to another person, and subsequently to the execution and delivery of that deed makes another deed to the life tenant named in the first deed, and recites in the second deed that the former deed is revoked and annulled, such recital of revocation is not effective to destroy the rights of the remaindermen under the first deed; nor are the rights of the remaindermen affected by any recital of the reasons for the attempted revocation. And the vendees of the grantee in the last deed, which

recites the execution of the former voluntary deed, who rely on such deed as a muniment of title, are charged with notice of the existence of the first deed, and take no larger estate than the grantee of the life estate named therein.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. §24; Vendor and Purchaser, Cent. Dig. §§ 502-512; Dec. Dig. §230.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Ejectment by E. R. Hines, as administrator of the estate of Miranda Parker, against Goodwin Hitchcock. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Hines, as administrator of the estate of Miranda Parker, brought ejectment against Goodwin Hitchcock. When the case was called for trial counsel for both parties consented that the judge presiding should decide the issues involved and render judgment, without the intervention of a jury, on an agreed statement of facts. So far as material, the agreed statement of facts was as follows: For the plaintiff: Deed from Pleas Taylor to Georgia Sanford, Meminger McComb, and Miranda Parker, dated October 11, 1872, and recorded. Death of Pleas Taylor on May 24, 1896. Death of Georgia Sanford on February —, 1912. Death of Meminger McComb prior to that of Georgia Sanford. Administration of E. R. Hines upon the estate of Miranda Parker. Georgia Sanford was occupying the house and land in 1866, and remained upon the same until her death; the nature of her occupancy left to the construction of the court, being unknown to parties, occupancy alone being admitted. Date of death of Miranda Parker unknown. Neither Jack Lee nor Goodwin Hitchcock had seen any deed to Georgia Sanford, conveying the land to her prior to her death. For the defendant: Deed from Pleas Taylor to Georgia Sanford, dated March 4, 1890, and recorded. Deed from Georgia Sanford to Jack Lee, dated February 17, 1908, and recorded. Deed from Jack Lee to Goodwin Hitchcock, dated October 4, 1913, and recorded. No notice, except that which the law might construe the recital in the deed from Pleas Taylor to Georgia Sanford, dated March 4, 1890, of the first deed from Pleas Taylor to Georgia Sanford, Meminger McComb, and Miranda Parker, to either of the grantees, Lee or Hitchcock, in the last-mentioned deeds. It is admitted that the last two deeds were for a valuable consideration, and that Jack Lee went into possession after the death of Georgia Sanford under the deed executed to him by Georgia Sanford. Goodwin Hitchcock took possession immediately upon the execution of the deed to him from Jack Lee, without any notice of the former deeds. The deed from Pleas Taylor to Georgia Sanford, Meminger McComb, and Miranda Parker, dated October 11, 1872, already referred to, was a voluntary conveyance, in which the grantor reserved a life estate to himself for

the term of his own natural life, and conveyed, with that reservation, a life estate to Georgia Sanford, with remainder to her son, Meminger McComb, if he should survive his mother, for the term of his life, with remainder over in fee to Miranda Parker. The deed from Pleas Taylor to Georgia Sanford, dated March 4, 1890, contained the following recitals:

"Whereas on the 11th of Oct., 1872, I, Pleasant T. Taylor, did make to Georgia Ann Sanford and others therein named a deed of gift of the hereinafter described property for her life, with remainder for his life to her son Meminger McComb, with remainder over to Mrs. Robert Parker, of Pitt Co., North Carolina, in fee; and whereas there was no consideration at all for this last remainder; and whereas this whole scheme of settlement was intended only to defeat the contingent claims of certain parties thereto; and whereas the said granted property was really the property of said Georgia Ann Sanford, having been paid for by her out of her own money, to wit, four hundred dollars in gold to me paid. Therefore I, P. T. Taylor, do hereby, with the consent of Georgia Ann Sanford first obtained, revoke and annul said deed of gift and do by these presents give, grant, bargain, sell, and convey to said Georgia Ann Sanford in fee simple all that tract of land," etc. [describing the property in controversy].

The deed from Georgia Sanford to Jack Lee, purported to convey for a valuable consideration the land in controversy. The deed from Jack Lee to Goodwin Hitchcock purported to convey for a valuable consideration the same property. It was adjudged by the court that the plaintiff was entitled to recover, and error is assigned upon this judgment.

W. F. Jenkins, of Eatonton, and D. S. Sanford, of Milledgeville, for plaintiff in error. John A. Sibley, of Milledgeville, for defendant in error.

BECK, J. (after stating the facts as above). We are of the opinion that the judgment complained of was the necessary result of the evidence submitted. The plaintiff in error contends that as he was a purchaser for value he obtained a title superior to that of the remaindermen under the first deed executed by Pleas Taylor, dated October 11, 1872. His contention is not sound. He derives title through the deed of March 4, 1890, from Pleas Taylor to Georgia Sanford, and is chargeable with notice of whatever recitals are contained in that deed affecting his title. The recitals in the deed last mentioned, to the effect that the first deed from Pleas Taylor to Georgia Sanford was a part of a scheme to defeat certain claims, etc., and that the property conveyed was really the property of Georgia Sanford, and that the former deed of Pleas Taylor was revoked, could not affect the rights of the parties under the first deed which the second deed purported to revoke and annul. See Howard v. Snelling, 32 Ga. 195. The second deed from Taylor to Georgia Sanford

did not enlarge the estate of the latter beyond the terms of the first deed between these two parties, and the grantee in the deed from Georgia Sanford took no larger estate than that with which she was vested.

What we have said above rules the controlling issue in this case. A question very similar to the one involved here was recently decided by this court in the case of *Stubbs v. Glass*, 143 Ga. 56, 84 S. E. 126.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 391)

RUTLEDGE & SUMMEROUR et al. v. GWINNETT COUNTY et al.

(No. 316.)

(Supreme Court of Georgia. April 22, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR §501—BILL OF EXCEPTIONS—DISMISSAL—FINAL JUDGMENT.

The county of Gwinnett brought a suit against Rutledge & Summerour and others for the recovery of a certain sum upon a contract of guaranty. The defendants filed a plea, in which they undertook to make one Brown, as administrator of Robertson, a party to the case. The court refused to make Brown, as such administrator, a party, and exception pendente lite was taken to such ruling. The case then proceeded to verdict, upon which judgment was entered. A bill of exceptions, complaining of the ruling to which pendente lite exceptions were filed, but containing no exception to the final judgment rendered in the case, was sued out. Under such circumstances, the bill of exceptions must be dismissed. *Lyndon v. Georgia Railway & Electric Co.*, 129 Ga. 353, 58 S. E. 1047; *Durrence v. Waters*, 140 Ga. 762, 79 S. E. 841.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by Gwinnett County and others against Rutledge & Summerour and others. Judgment for plaintiffs, and defendants bring error. Writ of error dismissed.

O. A. Nix, of Lawrenceville, for plaintiffs in error. N. L. Hutchins and I. L. Oakes, both of Lawrenceville, for defendants in error.

HILL, J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 396)

LUKE v. AVERA, Sheriff, et al.

(No. 322.)

(Supreme Court of Georgia. April 22, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR §80—DECISIONS APPEALABLE — INTERLOCUTORY JUDGMENT — WHAT CONSTITUTES.

Where a judgment plaintiff files a petition against a sheriff and his deputy to show cause why they should not pay the money due on an

execution in their hands, and in response to the rule nisi the respondents file answers, and where on the hearing the court orders the respondents to proceed at once to sell the property upon which the execution has been levied and to make the money, and, upon failure so to do, that the respondents show cause at the next term of court why the rule should not be made absolute, reserving the question of costs for further consideration, such judgment is interlocutory, and a writ of error thereto will not lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by T. J. Luke against L. O. Avera, Sheriff, and another. Interlocutory judgment for defendants, and plaintiff brings error. Writ of error dismissed.

McDonald & Grantham and U. J. Bennett, all of Fitzgerald, for plaintiff in error. Hendricks & Hendricks, of Nashville, for defendants in error.

EVANS, P. J. T. J. Luke applied for a rule against the sheriff and his deputy, alleging that he placed in their hands an execution in his favor against Moses Bemby and Joseph Bemby, that he pointed out certain property of one of the defendants, and that the money had not been made on his *fi. fa.*, and praying that the defendants be attached for contempt upon failure to show cause why they should not pay applicant the amount due on his execution. The court granted a rule nisi, and in response thereto the defendants filed their several answers, averring, that the execution was levied on certain property, which was advertised for sale; that the deputy sheriff took a forthcoming bond for the property, which was not produced on sale day; that the plaintiff was present on the day of sale and knew of the default of the defendant in *fi. fa.*, and stated to the deputy sheriff that he was undecided as to what he would have the deputy sheriff do, viz., whether to bring suit on the bond or retake possession of the property; and that the deputy sheriff was awaiting the plaintiff's further instruction. The case came on to be heard, and the applicant orally moved for a rule absolute, which motion the court denied, and entered the following order:

"After hearing argument on the within application, it is ordered that the sheriff and his deputy, J. B. Griner, proceed at once under said *fi. fa.* to sell said property levied upon and make said money, and, upon failure, that they show cause why the rule should not be made absolute at the next term of this court. Let the question of cost remain open for further order. Judgment and order signed in open court, this March 23, 1914."

Error is assigned on this order.

A motion was made to dismiss the writ of error, on the ground that the order or judgment excepted to is interlocutory. This motion must prevail. The case is still pending in the trial court. The order of the court

is in the nature of a continuance of the case until the next term, upon terms. It is clearly an interlocutory judgment, to which a writ of error will not lie.

Writ of error dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 402)

JONES v. BLACKWELDER. (No. 325.)

(Supreme Court of Georgia. April 23, 1915.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §305—EVICTION OF TENANT—STEPS TO PREVENT—RIGHTS OF TENANT.

Under the statutory proceeding to evict a tenant holding over and beyond his term of rental (Civ. Code 1910, § 5385 et seq.), the tenant may, "by declaring on oath that his lease or term of rent is not expired, and that he is not holding possession of the premises over and beyond his term," and at the same time tendering "a bond with good security, payable to the landlord, for the payment of such sum with costs as may be recovered against him on the trial of the case," arrest the proceedings and prevent the removal of himself and goods from the rented premises. Section 5387.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1310, 1311; Dec. Dig. §305.]

2. LANDLORD AND TENANT §309, 310—EVICTION—VENUE—JUDGMENT ON BOND.

When the counter affidavit is made and bond given as set forth in the foregoing headnote, it then becomes a proceeding on the part of the landlord to recover the premises and the statutory penalty of double the value of the rent that the premises are shown to be worth, or rouble the amount of rent agreed upon, according to the nature of the tenancy; and the issue thus raised is to be submitted to a special jury of the superior court of the county where the land lies, as in cases of appeal. Section 5388; Weaver v. Roberson, 134 Ga. 149, 67 S. E. 662. And if the jury to whom the case is submitted find against the tenant, the landlord shall have, in addition to a writ of possession, judgment against the tenant and the sureties on his bond for the amount of the penalty recovered. Section 5389; Latham v. Perryman, 77 Ga. 579; Bennett v. Farkas, 126 Ga. 228, 54 S. E. 942.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1317-1320; Dec. Dig. §309, 310.]

3. APPEAL AND ERROR §70—LANDLORD AND TENANT §305—DECISIONS APPEALABLE—DISMISSAL—EVICTION.

In the present case the plaintiff, on the 9th day of January, 1913, sued out a dispossessionary warrant, returnable to the July term of the superior court of Floyd county, to evict the defendant from described rented premises, as a tenant holding over and beyond his term. The following entry of service appears on the warrant: "I have this day read the within paper to D. F. Blackwelder in person. January 10, 1913. G. W. Smith, deputy sheriff." The warrant was filed in the clerk's office on January 18th, and on the same day the defendant made and filed with the clerk a counter affidavit, together with bond, in which he denied that he was holding the premises over and beyond his term, and averred that "the term for which he rented the same has not yet expired." On January 25th the defendant's attorney filed with the clerk the following paper: "The defendant having moved from the premises in dispute,

and having surrendered possession thereof to the said O. W. Jones, plaintiff, and the said plaintiff having gone into the actual possession of said premises, the said D. F. Blackwelder comes now and withdraws the counter affidavit heretofore filed by him in said case and the bond given by him therein." On July 16, 1913, at the term to which the warrant was returnable, the court passed the following order: "It appearing from the testimony of M. B. Eubanks, plaintiff's attorney, that on January 25, 1913, the defendant withdrew his counter affidavit and bond, the court holds and adjudges that the entire case went out of court and that there is now no case pending." To this judgment the plaintiff excepted. Held: (a) That the order of the court is in effect a judgment of dismissal of the plaintiff's case, to review which a bill of exceptions will lie. (b) That, under the law enunciated in the first and second headnotes, in dispossessionary proceedings the tenant against whom the proceedings have been instituted cannot, after resisting and arresting the same by making a counter affidavit and giving bond, subsequently withdraw his counter affidavit and bond to the prejudice of the landlord's right to recover the statutory penalty prescribed by section 5389, and to enter up judgment for such penalty against the tenant and the sureties on the bond. Parker v. Beeman, 28 Ga. 475. Having made himself subject to the statutory penalty by arresting the proceedings by counter affidavit and bond, should the issue thus raised be decided against him by the jury, he could not, by his own voluntary act of withdrawal, avoid such consequent penalty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-378, 386, 411; Dec. Dig. §70; Landlord and Tenant, Cent. Dig. §§ 1310, 1311; Dec. Dig. §305.]

4. PROCEEDINGS TO EVICT TENANT.

The court erred in holding that the withdrawal by the defendant of his counter affidavit and bond dismissed the plaintiff's dispossessionary proceedings; but should have submitted to the jury, to the extent of the recovery of the statutory penalty, the issue thus raised.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by C. W. Jones against D. F. Blackwelder. Judgment for defendant, and plaintiff brings error. Reversed.

Maddox & Doyal, of Rome, for plaintiff in error. M. B. Eubanks, of Rome, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 351)

BOWEN et al. v. WHIDDON et al. (No. 298.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

MANDAMUS §154—PETITION—AMENDMENT—PRAYER FOR INJUNCTION.

Where a petition for a writ of mandamus is filed, and mandamus nisi is granted thereon, and the case set down for a hearing at chambers in vacation, the petition is not amendable at the hearing by the addition of a prayer for injunction; and the allowance by the trial judge of a prayer for injunction in the present case, over objection duly urged by the respondents, was error.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. §154.]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Mandamus by A. E. Whiddon and others against I. W. Bowen and others, composing the Board of Commissioners of Roads and Revenues. Judgment for plaintiffs, and defendants bring error. Reversed.

J. S. Ridgill, J. H. Price, and Fulwood & Skeen, all of Tifton, for plaintiffs in error.

BECK, J. A. E. Whiddon and others, as residents and taxpayers of Tift county, made application for a writ of mandamus to compel Bowen and others, composing the board of commissioners of roads and revenues, to do and perform certain acts falling within the sphere of their official duties, according to and in the manner prescribed in the statute which is the basis of the action brought. Upon the presentation of this application to the judge of the superior court, a mandamus nisi was granted, and the respondents were commanded to show cause, at chambers, on a date specified in the order, why a mandamus absolute against them should not be granted as prayed in the petition. When the case came on for a hearing, the petitioners offered to amend the original petition, by adding a prayer, which, in effect, was that the defendants "be restrained and enjoined" from doing and performing certain acts of alleged official misfeasance and misconduct, which were, it is contended, in contravention of the statute referred to. When this amendment was offered, the respondents urged the objection that the petition for mandamus could not be amended by adding thereto a prayer for injunction. This objection was overruled, and the amendment was allowed. To this judgment the respondents excepted.

We are of the opinion that the court erred in overruling the objection and allowing the amendment. The petition for a mandamus and the proceedings thereon are in their nature a common-law action. This action can be begun in vacation, and, after giving the notice required by the statute, a hearing can be had in vacation and final judgment rendered in vacation, if no issue of fact is raised by the answer of the respondent which it is necessary to submit to a jury in term time. Or, if begun in vacation, and issues of fact are raised which it is necessary to submit to a jury, it can be disposed of at the first term of the superior court thereafter convening. It was not proper, therefore, by allowing such an amendment as was made in this case, to convert the action partially into an equitable proceeding, which could not be finally disposed of in vacation, and could not be finally disposed of even at the next term of the court, except by consent of both parties. The remedy sought by the prayer for injunction was not appropriate to the case as it stood when the amendment

containing this prayer was offered. "The double remedy of injunction and mandamus is not appropriate for one and the same case." *Whigham v. Davis*, 92 Ga. 574, 18 S. E. 548; *Gay v. Gilmore*, 76 Ga. 725. Proper and timely objection was urged to the amendment, and the court erred in overruling that objection.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 352)

SOUTHERN RY. CO. v. WRIGHT, Comptroller General. (No. 299.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftarrow 173—SCOPE OF REVIEW—PRESENTATION BELOW—VALIDITY OF JUDGMENT—ILLEGAL DEBT.

The court, who, by consent, heard the case without a jury, did not err in overruling the illegality to the tax execution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1098, 1095-1098, 1101-1120; Dec. Dig. \Leftarrow 173.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. A. Wright, Comptroller General, for use, etc., against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McDaniel & Black and Edgar A. Neely, all of Atlanta, for plaintiff in error. Worley & Nall, of Elberton, for defendant in error.

EVANS, P. J. A fl. fa. was issued by the Comptroller General against the Southern Railway Company for the taxes alleged to be due the city of Elberton for the year 1912. Upon the levy of this fl. fa., the railway company filed an affidavit of illegality, setting out the tax levy of the city of Elberton, and alleging that the item therein contained for outstanding judgments was levied without authority of law, because there was no vote of the people for the levy of an extraordinary tax to pay any outstanding judgment; that it had tendered the full amount of the taxes, exclusive of the alleged illegal item, which the tax collector of the city of Elberton declined to accept. The case was submitted to the court upon an agreed statement of facts, to be decided without the intervention of a jury. The court overruled the illegality, and exception is taken to that judgment.

The substance of the agreed statement of facts is that the railway company had tendered all of the taxes demanded of it, except the item to pay outstanding judgments; that at the time of the levy there were outstanding judgments against the city of Elberton for the sum of \$26,332.21, which were obtained at the September term, 1912, of Elbert superior court, in an equitable petition for money had and received; that the levy was sufficient to pay one-half of the amount of

the judgments, the plaintiffs in *fi. fa.* having agreed with the city to wait until the fall of 1913 for the remainder due on the judgments. It was further agreed that in the year 1910 the city of Elberton borrowed money, without any election of the people authorizing the loan, for the purpose of paving the streets of the city of Elberton, and that it paid for said pavement with the money borrowed during the years 1910 and 1911.

The facts admitted by the parties are much broader in range than the issue made by the affidavit of illegality. The affidavit of illegality asserts that the item of taxes levied is void, because it is to pay an outstanding judgment, and that is not legal to pay an outstanding judgment without a vote of the people. It is neither contended nor argued that it is illegal to pay one-half of a judgment obtained in the year 1912 out of taxes due for that year. The sole argument of the plaintiff in error is that the money was borrowed in 1910 to pave the streets of the city of Elberton in that year, and that the city gave notes for the loan; that, notwithstanding the lenders obtained a judgment in an equitable action for money had and received, their debts are founded in illegality, and the taxpayer has the right to go behind the judgment and show that illegality in resistance of a tax levy. Counsel for the city of Elberton argue, on the other hand, that although the city had no constitutional authority to borrow money, yet if the money so borrowed was used in discharge of a legitimate current expense, it was competent for a court to render judgment in an equitable action for money had and received, which would conclude the city and its taxpayers as to its legality. However this may be, we think that the pleadings are insufficient to raise any such issue. There is no averment in the affidavit of illegality that the judgment was founded on a debt which the city was unable to constitutionally incur, nor is there any suggestion of illegality in the judgment, or the pleadings upon which it is predicated. The taxpayer simply avers that:

"The item levied for outstanding judgments was levied without any authority of law. There was no vote of the people for the levy of any extraordinary tax to pay any outstanding judgment, and the levy of the tax to pay outstanding judgments aggregates \$4.40 on the \$1,000 of taxable property, and the levy of the tax by the city of Elberton was and is excessive to the extent of \$4.40 on the \$1,000 of taxable property."

It is not contended in the brief that the tax levy is beyond the charter power of the city, and excessive for that reason. Nor is it insisted in the brief that a vote of the people is a condition precedent to the levy of a tax to pay a valid judgment. The plaintiff in error's sole contention in his brief is that, on the agreed statement of facts, it has a right to go behind the judgment and show that it rests upon an illegal debt; but he

fails to make that point in his pleadings. There was no error in overruling the illegality.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 322.)

FRASIER v STATE. (No. 280.)

(Supreme Court of Georgia. April 14, 1915.)

(Syllabus by the Court.)

1. WITNESSES ⇐79—COMPETENCY—DETERMINATION.

The competency of a witness to testify must be decided by the court. Civ. Code 1910, § 5856.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 201-204, 216; Dec. Dig. ⇐79.]

2. WITNESSES ⇐40 — COMPETENCY — CHILDREN.

Children who do not understand the nature of an oath are incompetent witnesses. Civ. Code 1910, § 5862.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 97, 98; Dec. Dig. ⇐40.]

3. CRIMINAL LAW ⇐1153—WITNESSES ⇐77 —APPEAL—COMPETENCY OF CHILDREN.

The court must, by examination, decide upon the capacity of one offered as a witness, and objected to as incompetent on account of childhood, so far as to determine whether the witness shall be allowed to testify. His determination of this preliminary question will not be reversed, unless plainly erroneous. Civ. Code 1910, §§ 5865, 5866; Young v. State, 125 Ga. 584, 54 S. E. 82; Richardson v. State, 141 Ga. 782, 82 S. E. 134.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. ⇐1153; Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. ⇐77.]

4. CRIMINAL LAW ⇐1166½—STATEMENT BY COURT—COMPETENCY OF WITNESSES.

Where a female child eight years of age was offered as a witness for the state in a criminal case, and objection was raised on the ground that she was incompetent to testify, if after a preliminary examination by the court she was properly allowed to testify, it was not error injurious to the defendant, and furnishing cause for a new trial on his behalf, that the court remarked: "I think she is *prima facie* competent. I will let the testimony to the jury." When the court allowed the witness to testify, this was a ruling as to her competency to do so, and the expression that he thought her "*prima facie* competent" did not alter the fact that she was held competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. ⇐1166½.]

5. CRIMINAL LAW ⇐1172—WITNESSES ⇐311—CREDIBILITY OF WITNESSES—HARMLESS ERROR—INSTRUCTIONS.

Although, after a preliminary examination, the court may hold a child competent to testify, the credibility of the witness is for the jury; and in determining whether or not they will credit the testimony of such witness, the age of the witness and his understanding or lack of understanding as to the nature of an oath, as developed on the examination before them, are matters for the consideration of the jury. Young v. State, 122 Ga. 725, 50 S. E. 996.

(a) One of the grounds of the motion for new trial complains of the following charge to the jury: "The testimony of the child has come before you. The court thought *prima facie* the child capable of understanding an oath, capable

of giving testimony; but it is for the jury, however, and I submit that question to you, whether this child understood the nature and character of an oath, understood what it meant, understood what she was testifying to. If you believe she did not know or is incompetent as a witness because of her youthfulness, you would leave her testimony out of the case entirely. If you believe she was capable of understanding the nature and character of an oath, understanding what she was talking about, you can consider her testimony, and give it such weight as you think it is entitled to, considering her age at the time." *Held* that, while this charge was not entirely accurate, it was not (under the circumstances) error harmful to the accused, so as to require a new trial on his motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ☞ 1172; Witnesses, Cent. Dig. §§ 1072–1075; Dec. Dig. ☞ 311.]

6. NEWLY DISCOVERED EVIDENCE—NEW TRIAL

The ground of the motion for new trial based on alleged newly discovered evidence fails to show proper diligence in the matter of discovering such evidence, or that if it were admitted on another trial it would likely produce a different result.

7. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial.

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Carl Frasier was convicted of crime, and brings error. Affirmed.

Sims & Von Nunes and Thos. B. Brown, all of Atlanta, for plaintiff in error. H. M. Dorsey, Sol. Gen., of Atlanta, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 379)

FLAGG v. HITCHCOCK. (No. 308.)

(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

1. CONTRACTS ☞ 62—FRAUDS, STATUTE OF ☞ 123—CONTRACT BETWEEN PURCHASERS—CONSIDERATION—STATUTE OF FRAUDS.

The owner of a tract of land orally contracted with A. for the sale of it. B. proposed to A. to be allowed to participate in the purchase. A. and B. orally agreed that the land should be divided in equal areas, and that the improved moiety should be apportioned to B., who obligated himself to pay the owner one-half of the purchase price of the whole tract and to A. one-half of the cost of buildings of the value of those on the improved moiety. The owner of the land, on payment of the entire purchase price (A. and B. each paying one-half), at the request of A. made deeds to A. and B. to their respective moieties, and each entered into possession thereof. *Held*, that the oral contract between A. and B. is not void for want of consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 200–268, 270–272; Dec. Dig. ☞ 62; Frauds, Statute of, Cent. Dig. §§ 83, 278; Dec. Dig. ☞ 128.]

2. FRAUDS, STATUTE OF ☞ 120—PAROL CONTRACT—REAL ESTATE—PERFORMANCE AND ACCEPTANCE.

The contract was not void under the statute of frauds, as being in parol, under the facts of the case. The transaction falls within the exception to the statute that where there has been performance on one side, accepted by the other in accordance with the contract, the statute shall not apply.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. ☞ 129.]

3. JUDGMENT ☞ 17—ATTACHMENT FOR PURCHASE MONEY—APPEARANCE BY DEFENDANT.

It is immaterial whether the ground of the attachment be sufficient, as it is well settled that in a suit by attachment for purchase money, where the defendant has voluntarily appeared and pleaded to the merits of the case, the plaintiff is entitled to proceed for a verdict and general judgment, even though the attachment be subject to dismissal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25–33; Dec. Dig. ☞ 17.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by Joe Flagg against Goodwin Hitchcock. Judgment for defendant, and plaintiff brings error. Reversed.

Hines & Vinson and John A. Sibley, all of Milledgeville, for plaintiff in error. Allen & Pottle, of Milledgeville, for defendant in error.

EVANS, P. J. Joe Flagg sued out an attachment against Goodwin Hitchcock, and filed his petition in attachment pursuant to the statute. In the petition it was alleged that the defendant was indebted to the plaintiff under the following facts: One Jasper Hitchcock was the owner of a described tract of land, and entered into a parol contract with the plaintiff to sell it to him for the sum of \$1,400. Goodwin Hitchcock approached the plaintiff and requested that he be allowed to share in the contract as a copurchaser, for one-half of the land, upon paying one-half of the purchase price agreed on by the plaintiff and Jasper Hitchcock. In the negotiations it developed that Goodwin Hitchcock desired that moiety on which the buildings were located, and it was verbally agreed between the plaintiff and defendant that the latter should participate, to the extent of one-half of the land, and that each was to pay to Jasper Hitchcock \$700. It was further agreed that a survey was to be made of the premises at the joint expense of both, and the land be equally apportioned in area, and that plaintiff was to take the unimproved half and the defendant was to take the improved half, and, in consideration of the plaintiff permitting the defendant to take the improved half, the defendant agreed that he would furnish to the plaintiff one-half of the labor and material for the construction of buildings on the plaintiff's part, of equal value to those on the half apportioned to the defendant. In

pursuance of this agreement, a survey of the land was had, and, at the request of plaintiff, Jasper Hitchcock conveyed the improved half to Goodwin Hitchcock, who paid him therefor \$700, and the unimproved half to one who advanced the purchase money for the plaintiff, and who gave the plaintiff bond for titles. Upon the making of these deeds by Jasper Hitchcock, the plaintiff and defendant entered into possession of their respective moieties. The plaintiff called upon the defendant to comply with his contract for the erection of the improvements on his half of the land, which the defendant refused. The value of the improvements, to equalize the division agreeably to the contract of the parties, is \$600, and the plaintiff asks judgment of the defendant for one-half of this sum, to wit, \$300. The defendant demurred to the petition on the ground that no cause of action was set out, for the reason that the alleged contract was void as being without consideration, and unenforceable because the contract was not in writing. The court sustained the demurrer and dismissed the case.

[1] 1. We do not think that the contract between the plaintiff and defendant was void for want of consideration. It is true that the contract by the owner of the land to sell it to the plaintiff was unenforceable, because the statute of frauds requires contracts for the sale of land to be in writing, signed by the party to be charged therewith. Civil Code 1910, § 3222. The vendor could have repudiated that contract; but, inasmuch as he recognized its binding force and executed deeds to effectuate it, the infirmity of the parol executory contract was cured. It makes no difference that the vendor made two deeds, one to the plaintiff and the other to the defendant, inasmuch as both were made at the instance and request of the plaintiff, in execution of the parol contract of sale. The transaction is equivalent to the vendor making a deed of the whole to the plaintiff. If the vendor had made a deed to the whole land directly to the plaintiff, and he in turn had conveyed the improved half to the defendant in consideration that the latter had paid to the vendor one-half of the purchase money of the whole tract, and his promise to pay to the plaintiff such sum as would equalize the division, it could not be contended that the defendant's promise in this regard would be a nude pact. We cannot differentiate the obligation and effect of the defendant's promise to pay such sum as would make the two tracts of equal value, if the contract had been executed in the manner supposed, from that in which it was actually carried out.

[2] 2. The contract was not void under the statute of frauds, as being in parol, under the facts of the case. The transaction falls within the exception to the statute that where there has been performance on one

side, accepted by the other in accordance with the contract, the statute shall not apply. Civil Code 1910, § 3223.

[3] 3. The remedy pursued was an attachment for the purchase money. It is immaterial whether the ground of the attachment be sufficient, as it is well settled that in a suit by attachment for purchase money, where the defendant has voluntarily appeared and pleaded to the merits of the case, the plaintiff is entitled to proceed for a verdict and general judgment, even though the attachment be subject to dismissal. *McDonald v. Rimes*, 137 Ga. 732, 74 S. E. 266.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 392)

RICHARDSON v. HAMES. (No. 318.)

(Supreme Court of Georgia. April 22, 1915.)

(Syllabus by the Court.)

TRIAL \Leftrightarrow 169—NONSUIT—DIRECTION OF VERDICT.

Where a plaintiff fails to make out a prima facie case, a verdict for the defendant should not be directed, but a judgment of nonsuit should be entered. The judgment of the court is affirmed, with direction that plaintiff have leave to take a judgment vacating the verdict and substituting a judgment of nonsuit when the remittitur is made the judgment of the court below. *Barnes v. Carter*, 120 Ga. 895, 48 S. E. 387; *Equitable Manufacturing Co. v. Davis*, 130 Ga. 67, 60 S. E. 262.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. \Leftrightarrow 169.]

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by Mrs. M. J. Richardson against J. A. J. Hames. Judgment for defendant, and plaintiff brings error. Affirmed, with direction.

P. D. Wright, of La Fayette, and W. M. Henry, of Rome, for plaintiff in error. J. E. Rosser and R. M. W. Glenn, both of La Fayette, for defendant in error.

ATKINSON, J. Judgment affirmed, with direction. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 324)

PARIS et al. v. FARMERS' & MERCHANTS' BANK.

FARMERS' & MERCHANTS' BANK v. PARIS et al.

(No. 283.)

(Supreme Court of Georgia. April 15, 1915.)

(Syllabus by the Court.)

1. EVIDENCE \Leftrightarrow 423—GUARANTY \Leftrightarrow 4—PRINCIPAL AND SURETY \Leftrightarrow 6—CONTRACT.

A contract, "For value received I hereby guarantee payment of the within note and any renewal of the same in force and effect as against the maker previously liable thereon, and hereby waive protest, demand, and all notice of nonpayment thereof," signed by third persons

and entered on the back of a promissory note executed by an individual and payable to a named bank, was prima facie a contract of guaranty, in contradistinction to one of surety; and parol evidence was admissible to show that the persons signing as guarantors did so without independent consideration to them, and that the contract was one of suretyship. *Baggs v. Funderburke*, 11 Ga. App. 793, 74 S. E. 937; *Maril v. Boswell*, 12 Ga. App. 41, 45, 76 S. E. 773; *Buck v. Bank*, 104 Ga. 660, 30 S. E. 872; *Watters v. Hertz*, 135 Ga. 814, 70 S. E. 343; *Park's Code*, §§ 3538, 3541, 3556.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1957-1965; Dec. Dig. ¶423; *Guaranty*, Cent. Dig. §§ 3-6; Dec. Dig. ¶4; *Principal and Surety*, Cent. Dig. § 6; Dec. Dig. ¶6.]

2. REFUSAL OF NEW TRIAL.

The issues made by the pleadings were fairly submitted under appropriate instructions. Some of the grounds of the motion for new trial are not approved by the court. The evidence was conflicting, but authorized the verdict for the plaintiff; and none of the assignments of error are sufficient to require the grant of a new trial.

Error from Superior Court, Milton County; H. L. Patterson, Judge.

Action by the Farmers' & Merchants' Bank against C. N. Paris and others. Judgment for plaintiff, and defendants bring error, and plaintiff files a cross-bill of exception. Affirmed on main bill, and cross-bill dismissed.

J. Z. Foster, of Marietta, and J. P. Brooke, of Alpharetta, for Paris and others. Geo. F. Gober, of Atlanta, and C. L. Harris, of Cumming, for Farmers' & Merchants' Bank.

ATKINSON, J. Judgment affirmed on the main bill of exceptions. Cross-bill dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 403)

CRAWFORD v. CATHEY. (No. 826.)

(Supreme Court of Georgia. April 23, 1915.)

(*Syllabus by the Court.*)

LANDLORD AND TENANT ¶5, 265—LEASE—OPTION TO PURCHASE—LIABILITY FOR RENT.

The contract examined, and construed to be a lease, with an option to the lessee to buy at a stipulated price, exercisable at the end of the lease, upon the lessee's full performance of the lease contract. The stipulated annual rent was enforceable by distress warrant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 3, 5, 9, 1062-1074; Dec. Dig. ¶5, 265.]

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Action by Albert Cathey against R. M. Crawford. Judgment for plaintiff, and defendant brings error. Reversed.

R. M. Crawford and Albert Cathey, on November 1, 1913, entered into a written contract, executed in duplicate, containing, in substance, the following covenants and stipulations: Crawford hereby leases to Cathey for the period of five years, beginning November 1, 1913, and ending November 1, 1918,

certain described land in consideration of five annual payments to be made by Cathey to Crawford, as follows: November 1, 1914, \$342; November 1, 1915, \$326.80; November 1, 1916, \$311.60; November 1, 1917, \$296.40; November 1, 1918, \$281.20. Cathey agrees to accept and hold the premises under the terms of the lease, and covenants to pay all taxes, insurance, assessments, and all other charges of every kind which may arise by operation of law or otherwise against the property, and to make all repairs and improvements thereon at his own expense, and to keep the same in a safe condition and well cultivated, and, in the event of injury to or destruction of any of the buildings on the property, to repair and restore the same at his own expense. Cathey covenants that he shall be charged with the custody, control, and management of the premises, and that Crawford shall in no wise be charged with any duty to him or his tenants or agents, or to the general public, but as to all such persons Cathey shall be solely responsible. Cathey covenants, in the event of default in the payment of any note, to pay interest thereon at the rate of 8 per cent., and to pay reasonable attorney's fees to Crawford in case any action to enforce his rights under the lease should be brought. In the event of default in the payment of taxes or assessments against the property by Cathey, or the filing of any lien against the property, Crawford has the right to take up the same, though he is not bound to do so; and such sum, together with interest thereon at 8 per cent. per annum until paid, shall be immediately added to any sums due or to become due under the contract, and Crawford shall be entitled to recover the same as he would any other sum due under the contract. In the event of default in any of the terms of the lease, either in the payments stipulated or any other obligation thereunder by Cathey, Crawford shall thereupon have and be entitled to exercise all the rights and remedies provided for landlords under the laws of Georgia. On the 1st day of November, 1918, Cathey, his heirs, representatives, or assigns, shall have the right and privilege, in the event that he has fully paid all sums due under the contract of lease and complied with all the other stipulations, to pay to Crawford the additional sum of \$950, and Crawford binds himself, his heirs and assigns, to execute to Cathey, his heirs and assigns, a full quitclaim deed to the land described in the contract. Cathey paid to Crawford \$100, entered into immediate possession of the land, and cultivated it for the year 1914. He failed to pay the note due November 1, 1914, and Crawford sued out a distress warrant to collect the same. Thereupon Cathey filed his petition against Crawford, alleging that the contract was one of purchase, and that the relation of

landlord and tenant did not exist by virtue thereof; that on the faith of his contract he had erected valuable improvements to the extent of \$100; that he had never attorned to Crawford as landlord, and Crawford had no right, under the contract or otherwise, to sue out a distress warrant; and that the levy of the distress warrant upon his crop constituted irreparable injury. He prayed for injunction against the further progress of the distress warrant. Crawford filed an answer, alleging that Cathey had defaulted in the payment of the rent stipulated in the contract; that as landlord he had made to Cathey certain advances; that his right to enforce payment of the sums due him as landlord exists, both under the contract and under the law. The court granted an interlocutory injunction against Crawford, and this is the judgment to which exception is taken.

J. M. Bellah, of Summerville, for plaintiff in error. Graham Wright and Denny & Wright, all of Rome, for defendant in error.

EVANS, P. J. (after stating the facts as above). Courts do not make contracts for parties. Where a written contract is plain and unambiguous, it is the only evidence of what the parties intended and understood by it. No issue is raised in the pleadings that the written contract did not express the intention and purpose of the parties to it. The rights of the parties primarily depend upon a construction of their contract as creating the relation of vendor and vendee or that of landlord and tenant. It seems to be a rule of all but universal application that a provision in an instrument of lease, giving the lessee an option to purchase the reversion in the premises, should he so desire, in no way affects the relation of landlord and tenant, or the latter's liability for rent. 2 Tiffany, Landlord and Tenant, § 256. The parties designated their contract as one of lease. They expressly stipulated that the lessor should have all the rights and remedies provided for landlords under the laws of this state. The consideration of the five annual payments was the right to occupy and use the land. The parties seem to have been careful that the relation of landlord and tenant should not be converted into that of vendor and vendee, pending the continuance of the lease contract. An option to purchase was given to the lessee at the end of his tenancy, upon condition that he had made his annual payments and performed his obliga-

tions in terms of the contract. A contract very similar to this was before the court in *Clifford v. Gressinger*, 96 Ga. 789, 22 S. E. 399. In that case it was held that, upon the tenant's failure to pay the stipulated rent for any year when it became due, it was the right of the landlord to sue out a warrant under the Code for his summary ejection, and also to distrain for the rent. We think the ruling in that case compels a construction that the contract between the parties in this case was a lease with an option to buy, and that the landlord was entitled to enforce the collection of his rent by distress warrant.

Counsel for the defendant in error, in their brief, place great reliance on the case of *Lytle v. Scottish-American Mortgage Company*, 122 Ga. 458, 50 S. E. 402, as demanding a construction that the contract in this case created the relation of vendor and vendee. In the *Lytle* Case the parties thereto characterized their contract as a "land contract." That contract called for 10 payments, aggregating \$1,260, designated as purchase money, and 10 payments, aggregating \$2,750, designated as rental, and provided that upon the payment of these sums conveyances in fee should be executed; and it was held that such contract created the relation of vendor and vendee, and not that of lessor and lessee. The distinction between the contract in that case and the one under consideration is obvious. In the former the person contracting for the land contracted to pay a certain amount as purchase money and a certain amount as rent, and, after obtaining possession, made payments of both purchase money and rent installments. The landowner claimed a forfeiture on account of a failure to make these payments under the terms of the contract, and the issues in that case revolved around the effort to declare a forfeiture. In the instant case, according to the contract, no money was contracted to be paid to the landlord as purchase money. The tenant was given an option to buy at the expiration of the lease contract. On the interlocutory hearing no evidence was introduced except the written contract between the parties, and the case was heard upon this evidence and the pleadings. The plaintiff in error, having the right to enforce his claim of rent against the tenant by distress warrant, it was error, in the absence of any other equitable consideration, to enjoin its enforcement.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(169 N. C. 375)

STATE v. ALLISON. (No. 465.)

(Supreme Court of North Carolina. May 12, 1915.)

1. CRIMINAL LAW ⇨741—TRIAL—JURY QUESTIONS.

The weight and sufficiency of the testimony is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. ⇨741.]

2. BURGLARY ⇨41—PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for burglary in the first degree, evidence held sufficient to warrant conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. ⇨41.]

Appeal from Superior Court, Iredell County.

Abe Allison was convicted of burglary in the first degree, and he appeals. Affirmed.

The prisoner was convicted of burglary in the first degree, and sentenced to be electrocuted, and from the judgment pronounced against him appeals. The prisoner requested his honor to instruct the jury that the evidence was not sufficient to justify a conviction, and that the jury must return a verdict of not guilty, which was refused, and the prisoner excepted, and this is the only exception presented by the appeal.

W. D. Turner, of Statesville, for appellant.
T. W. Bickett, Atty. Gen., and T. H. Calvert, Asst. Atty. Gen., for the State.

ALLEN, J. The evidence establishes the fact that the crime charged in the bill of indictment was committed, that is, that some one broke and entered the dwelling house of the prosecutrix, then actually occupied as a sleeping apartment, in the nighttime, with intent to commit a felony; and the only debatable question raised by the prayer for instruction is whether there is evidence which ought to have been submitted to the jury that the prisoner is the perpetrator of the crime.

[1, 2] The evidence is not satisfactory, and several of the circumstances relied upon to prove guilt are consistent with innocence, but we cannot say that there was no evidence for the consideration of the jury. As was said in *State v. Hawkins*, 155 N. C. 470, 71 S. E. 328, quoting from *State v. White*, 89 N. C. 464:

"It is well-settled law that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury pertinent to an issue submitted to them. It is as well settled that, if there is evidence to be submitted, the jury must determine its weight and effect."

And again, when speaking of circumstances relied on by the state:

"The court cannot, however, decide that they are true or false; this is for the jury; but it must decide that, altogether, they make some evidence to be submitted to the jury."

The prisoner is a negro man, and the evidence introduced by the state tends to prove

that the crime was committed by a negro, because the prosecutrix testified that when she was awakened by feeling the hand of some one upon her person she threw up her hand, and it fell on the head of a negro; that the prisoner lived within 260 steps of the home of the prosecutrix, and no other negro lived nearer than 2 miles; that the prosecutrix is a married woman; that her husband had been away from home for several days, and she was alone, except she had with her three small children, the oldest five years of age; that the prisoner knew these facts; that on Saturday before the crime was committed the prisoner was at the home of the prosecutrix and spoke of the fact that her husband was away, saying that he ought not to go away and leave the prosecutrix there, and that it was real dangerous and too lonesome; that he said this three or four times; that on the afternoon before the crime was committed the prisoner went to the home of the prosecutrix three times, once at 2 o'clock to get apples, again at 4 o'clock to carry the mail, and at 5 o'clock to get water from the well; that he had never gotten water from the well before, and used water from a spring near his house; that when the prosecutrix was awakened on the night the crime was committed, by finding some one in her room, she ran from the house screaming, going in the direction of the house of the prisoner, and when about halfway between the two houses she stepped in a ditch and screamed again; that the prisoner, dressed in his night clothes and barefooted, then came to her, coming from the bushes and from the south, his home being towards the north; that the prosecutrix asked him why he waited so long before coming to her and he said he waited to load his gun; that he had no gun with him; that the wife of the prisoner then joined them, and he and she went with the prosecutrix to her home for the purpose of getting her children; that when they reached the home they looked for tracks under the window, and found one which was a barefoot track; that the defendant said there are tracks, and the one who made them had on shoes; that there was also a barefoot track on a shirtwaist which had been left on the floor in the room where the prosecutrix was sleeping; that the prisoner and his wife went with the prosecutrix to the home of a neighbor; that the prisoner said to this neighbor on that night that he was glad that he was at his home, or the crime would have been laid on him; that there was a barefoot track under the window through which the person who committed the crime entered the house; that the foot of the prisoner was placed in this track, and it fitted exactly; that there was a path leading from the direction of the home of the prosecutrix to the back door of the defendant's house; that there were tracks of bare feet along this path which indicated that

they were made by some one running; that the foot of the prisoner was placed in one of these tracks, and it fitted exactly, and these tracks were followed to the prisoner's house; that the prisoner told a witness the course he went when he found the prosecutrix at the ditch, and no tracks could be found along this course; that the prisoner appeared to be excited and nervous. There are other circumstances which are favorable to the prisoner, and which indicate that he was endeavoring to assist and protect the prosecutrix, but it is not necessary to consider these, as the sole inquiry for us is whether there was any evidence which ought to have been submitted to the jury.

We have considered the record with the care which the importance of the issue demands, and, being of opinion that there is evidence of the guilt of the prisoner, the judgment is affirmed.

No error.

(169 N. C. 39)

ATLANTIC FRUIT DISTRIBUTORS, Inc.,
v. FOSTER et al. (No. 366.)

(Supreme Court of North Carolina. May 5, 1915.)

1. SALES \Leftrightarrow 358—ACTION FOR PRICE—SHIPMENT OF BANANAS—EVIDENCE.

Where, in a seller's action for the price of a car load of bananas, the defense was that the bananas were damaged en route through plaintiff's failure to properly load and ventilate the car, and plaintiff's witness testified that the car had been given a certain amount of heat, defendant's evidence that it was not the custom of the trade in shipping bananas to give a car heat before it was moved was properly admitted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1055; Dec. Dig. \Leftrightarrow 358.]

2. APPEAL AND ERROR \Leftrightarrow 1050 — HARMLESS ERROR—ADMISSION OF EVIDENCE.

In such case the admission of evidence as to what the duties of a messenger would have been had one accompanied the car, if error, was harmless, where the evidence showed that no messenger accompanied the car.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. \Leftrightarrow 1050.]

3. SALES \Leftrightarrow 150 — SHIPMENT OF BANANAS — LIABILITY FOR PRICE.

Where the seller of a car load of bananas selects the car and packs the bananas for shipment, but fails to exercise the precautions usual to the trade, and by reason thereof the bananas arrive in a damaged and unmerchantable condition, the buyer is not liable for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 350, 351, 354-356; Dec. Dig. \Leftrightarrow 150.]

4. TRIAL \Leftrightarrow 295—INSTRUCTIONS—CONSTRUING TOGETHER.

Where, in an action for the price of a shipment of bananas, the defense was that the bananas were damaged en route, and the entire charge was a clear expression of the law as to the rights of the buyer and seller and the seller's duty in preparing the bananas for shipment, error in adding language, the meaning of which was not clear, to an instruction that, if the seller performed the contract as agreed, he could recover, but that, if he failed to comply with

the contract, he could not recover, was harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. \Leftrightarrow 295.]

Appeal from Superior Court, Guilford County; Devin, Judge.

Action by the Atlantic Fruit Distributors, Incorporated, against John R. Foster and others, trading as Foster & Caveness. From a judgment for defendants, plaintiff appeals. No error.

The action was brought to recover \$259.32, the price of a car load of bananas which the plaintiff alleges it had sold to the defendants. The following was the issue:

"Are the defendants indebted to the plaintiff, and, if so, in what amount? Answer: Nothing."

C. L. Shuping, of Greensboro, for appellant. Chas. A. Hines, of Greensboro, for appellees.

BROWN, J. The evidence tends to prove that on the 21st of February, 1914, the plaintiff and defendants entered into a contract for the sale of a car load of bananas for the sum of \$259.32. The defendants admitted the purchase, but alleged that under the terms of the contract the bananas were to have been shipped from Baltimore properly loaded and packed, and that the plaintiff agreed to protect the shipment through to Greensboro, either by messenger, or by having the car properly ventilated. The defendants alleged that the car was improperly loaded and not ventilated; that all the vents were closed, in consequence of which the bananas became overheated en route, and when they arrived in Greensboro they were overripe, decaying, and not in a merchantable condition.

[1, 2] We will notice only such assignments of error as are commented on in the plaintiff's brief. The plaintiff excepted because his honor permitted the witness Foster to testify that in shipping bananas it is not the custom of the trade to give a car heat before it is moved, and also in permitting the same witness to testify what the duties of a messenger were, had one accompanied this car.

The plaintiff's witness De Giorgio had testified that the car had been given a certain amount of heat. It was, therefore, competent for the defendants, in order to controvert this testimony, to show if they could by one familiar with the trade and the packing and shipping of bananas, that it was not customary to give bananas heat. 17 Cyc. p. 75; Wigmore on Evidence, § 2053.

As to the other exception, we regard that as utterly immaterial, as to what a messenger's duties were; since the evidence shows that no messenger accompanied the car.

[3] The plaintiff excepts to the following part of his honor's charge:

"Or, if you find that the plaintiff undertook to, and did, select the car, and packed the bananas for shipment, and you further find that the plaintiff failed to exercise the precautions usual to the trade in the shipment of bananas, and you find that by reason of such failure the bananas arrived in damaged condition, and the fruit was unmerchantable, if you find those to be the facts, the defendant would not be liable for this shipment of bananas, and you would answer the issue 'No' or 'Nothing.'"

The charge seems to be in accordance with the recognized principles of law regulating the duty of the seller in preparing goods for shipment.

In 25 A. & E. Ency. (2d Ed.) at page 1072, it is said:

"It is the seller's duty to prepare the goods for shipment and to deliver them to the carrier in a merchantable condition, and in delivering to a carrier he must take the usual precautions for insuring a safe delivery to the buyer, and for holding the carrier liable in case of loss or damage." Benj. on Sales (16 Am. Ed.) § 693; Bull v. Robinson, 10 Exch. 342; Finn v. Clark, 12 Allen (Mass.) 522.

[4] The plaintiff excepts to the following instructions:

"If you find they performed the contract, as agreed upon, and that they delivered the amount that was called for in the order, they would be entitled to recover the contract price thereof. If they failed to comply with their contract, the plaintiff would not be entitled to recover anything. There is one view of it—I don't know; there is no evidence to support that—but whether a partial compliance of it, that is, as to quantity of goods on the car; but I do not recall any evidence as to the quantity thereon, except the testimony in behalf of the plaintiff that it was \$259.32."

As there can be no complaint to the general instruction in the first part of this charge, the error complained of must be in the language used in the last five lines of it. The language is not very explicit, but it is evidently harmless. The entire charge is a clear expression of the law as bearing upon the rights of the vendor and vendee, and the duty resting upon the former in regard to the preparation of the bananas for shipment.

The case was made to depend upon the question as to whether the plaintiff performed the contract on its part. If the plaintiff failed to do so, then, if the bananas arrived at Greensboro in the condition described by some of the witnesses for the defendant, and such condition arose from a failure of the plaintiff to perform the contract upon its part, then it is plain that the defendants were not required to accept the fruit, and could not be held liable for the contract price.

No error.

(169 N. C. 250)

ANTHONY v. POAG. (No. 441.)

(Supreme Court of North Carolina. May 5, 1915.)

APPEAL AND ERROR ⇨1067—HARMLESS ERROR—FAILURE TO INSTRUCT.

Where, in an action for injuries in a collision with an automobile, the facts that short-

ly after the accident defendant showed concern for plaintiff's condition, left money at a drug store for him, and took steps to have him presently conveyed to his home, were brought out on cross-examination of plaintiff, failure to charge that defendant's conduct could not be considered on the issue of his negligence was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⇨1067.]

Appeal from Superior Court, Gaston County; Shaw, Judge.

Action by Frank Anthony against J. Edgar Poag. From a judgment for plaintiff, defendant appeals. Affirmed.

There were facts in evidence tending to show that in May, 1911, plaintiff, driving a one-horse wagon in the town of Cherryville, was injured by reason of negligence on the part of defendant, operating an automobile on the streets of the town. There was evidence on part of defendant that he was not negligent, and further that plaintiff's injury was properly attributable to his own negligence in the way he endeavored to alight from his wagon at the time of the occurrence. On the three ordinary issues, in actions of this character, there was verdict for plaintiff. Judgment, and defendant excepted and appealed.

Mangum & Woltz, of Gastonia, for appellant.

PER CURIAM. The issue as to defendant's liability for plaintiff's injury was largely one of fact; and, the jury having accepted plaintiff's version of the occurrence, an actionable wrong is established, and we find no sufficient reason for disturbing the result. There were facts in evidence tending to show that, shortly after the occurrence, defendant had shown concern for plaintiff's condition, had left \$5 at a drug store for him, and taken steps to have him presently removed to his (plaintiff's) home, and it was chiefly urged for error that the court failed to charge, as requested by defendant, that this conduct should not be considered on the issue of negligence. While the prayer may, as a general rule and on this record, embody a correct general proposition, we do not think the action of the court concerning it should be held for reversible error, for the reason that we are utterly unable to see that the evidence was used to defendant's prejudice, or that it in any way affected the result. As a matter of fact, the kindness of the defendant, in procuring a physician for plaintiff, was brought out on the cross-examination of plaintiff by defendant's counsel, and the considerate conduct of his client was no doubt used to full advantage in the discussion of the issue. It was for this reason, probably, the court ignored the prayer for instructions, and, in doing so, we are unable to see that prejudicial error was committed.

After giving the matter very careful consideration, we are of opinion that the judgment should be affirmed; and it is so ordered.

No error.

(189 N. C. 74)

MOORE v. CURTIS. (No. 489.)

(Supreme Court of North Carolina. May 5, 1915.)

1. JUDGMENT ⇐681—RES JUDICATA—TITLE TO LAND.

Where ejectment between the predecessors in title of plaintiff and defendant had resulted in judgment adverse to defendant's predecessors, he was estopped to claim under any chain of title originating previous to the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. ⇐681.]

2. ADVERSE POSSESSION ⇐41—DURATION—TACKLING OF INTERESTS—STATUTE.

Where defendant in ejectment held uninterrupted adverse possession of land through himself and his grantor for 40 years, exercising dominion over the tract as owner, claiming without protest or interruption from the plaintiff or those under whom the plaintiff claimed, defendant acquired title under Revisal 1905, § 383, providing that no action for the recovery of real property shall be maintained unless the plaintiff had possession within 20 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 184-206; Dec. Dig. ⇐41.]

3. ADVERSE POSSESSION ⇐16—UNTILLABLE LAND—EVIDENCE.

Where defendant in ejectment and his grantor fenced a tract of untillable land, used it as a pasture, and took timber, barn lumber, and firewood, such use was evidence of adverse possession to go to the jury on the question of whether defendant had title thereby.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. ⇐16.]

4. JUDGMENT ⇐617—RES JUDICATA—DEFENSES BARRED.

Judgment in ejectment against defendant's predecessor in title did not estop such defendant from setting up title by adverse possession, secured through the continued possession of himself and grantor, since the rendition of such judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1130, 1134; Dec. Dig. ⇐617.]

Appeal from Superior Court, Caldwell County; Harding, Judge.

Action by D. P. Moore against E. P. Curtis. Judgment for plaintiff, and defendant appeals. Reversed.

W. C. Newland and Edmund Jones, both of Lenoir, for appellant. Squires & Whisnant and M. N. Harshaw, all of Lenoir, for appellee.

CLARK, C. J. The land in controversy contains about an acre, and it seems is broken and too rough for cultivation, and valuable only for what timber grows upon it and as a woods pasture for stock on adjoining land. Both the plaintiff and defendant claim under grants from the state and mesne conveyances. The plaintiff claims under a grant to his father, Richmond Moore, issued April

16, 1873, and conveyance to plaintiff by deed April 24, 1912. The defendant claims under a grant to Thomas Henderson issued October 11, 1783, upon an entry taken out by Gov. Alexander Martin, and mesne conveyances down to defendant. The question at issue in this action is: Which has the better title?

There is testimony that the defendant and those under whom he claims have been in possession of the small tract in dispute for more than 20 years before the beginning of this action, and the plaintiff has not had seisin of the land in dispute within 20 years, unless the possession of the defendant was the possession of the plaintiff, by estoppel, as was held by the court.

There was an action in 1873 by Jesse Moore, under whom the defendant claims, against Richmond Moore, the grantor of the plaintiff, putting in controversy the title to the land now in dispute, and at September term, 1873, the cause was referred to an arbitrator, whose award was to be a rule of court. Such award was filed at spring term, 1874, of Caldwell, and by this award the line in controversy was determined as now claimed by the plaintiff.

[1, 2] We need not consider the objections raised by the defendant to the regularity of that proceeding, for, conceding that it was regular in all respects, it was an estoppel of that date, and the defendant cannot claim under any chain of title reaching beyond the judgment entered in 1874. To that extent it is an estoppel. But there is evidence here of uninterrupted adverse possession of the land by the defendant and his grantor, exercising dominion of an owner over the locus in quo, claiming it as his own without protest or interruption from the plaintiff in this action, or those under whom he claims. Taking this evidence as true, the defendant has acquired a new estate by disselsin acquiesced in for 40 years by the plaintiff. Such new estate can thus be acquired. Call v. Dancy, 144 N. C. 497, 57 S. E. 220.

[3] There was evidence that the defendant and his grantor fenced up the locus in quo, used it as a pasture, and got timber from it, barn lumber, and firewood. The land being unfit for cultivation, such use of it was evidence of adverse possession which should have been submitted to the jury, for it was evidence of an appropriation of the land for the purposes for which it was best, if not solely, adapted. If the jury had passed upon the question and found that such possession was adverse and continuous for more than 20 years prior to the beginning of this action, the plaintiff could not recover. Rev. § 383.

[4] The court below, however, instructed the jury that, in view of the finding of the jury to the third issue (i. e., that the line had been established by the proceeding and judgment in 1874), the court held, as a matter of

law, that the jury should respond to issues 6 and 7 (which the jury had left unanswered) that the defendant had not been in possession of the land under colorable title for 7 years next preceding the commencement of this action, nor had held it adversely for more than 20 years prior to the commencement of this action.

The court evidently was of opinion that the proceeding in 1874 having adjudicated and settled the line, as between the parties under whom the plaintiff and defendant respectively claim, such adjudication was an estoppel, and that the defendant could not set up possession since contrary thereto, however long continued. The evidence of such possession should have been submitted to the jury.

Error.

(169 N. C. 363)

STATE v. TRULL. (No. 425.)

(Supreme Court of North Carolina. May 5, 1915.)

1. HOMICIDE \Leftrightarrow 289—TRIAL—INSTRUCTIONS.

In a prosecution for murder, where the alleged motive was robbery, and the court had correctly charged that the state, which relied on circumstantial evidence, was bound to establish each essential fact beyond a reasonable doubt, the refusal of a requested charge, that the state must satisfy the jury that deceased had the amount of money found on the person of accused, and that such money was the identical money that deceased had, was proper, for the prosecution was not for robbery, and, if it had been, the exact identity of the money need not have been established.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 594; Dec. Dig. \Leftrightarrow 289.]

2. CRIMINAL LAW \Leftrightarrow 784—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where the state relied on circumstantial evidence to show that accused murdered deceased and took his money, but there was no series of interrelated circumstances, the refusal of a request that, where circumstantial evidence is relied upon, each circumstance depends upon the truth of the preceding one and the chain is no stronger than its weakest link, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. \Leftrightarrow 784.]

3. CRIMINAL LAW \Leftrightarrow 829—TRIAL—INSTRUCTIONS ALREADY GIVEN.

Where it was charged that the circumstances relied upon should exclude every conclusion except that of guilt, the refusal of a request that, where circumstantial evidence is wholly relied on, the circumstances must be so clear and convincing as to point unerringly to the guilt of accused and exclude every possibility of innocence, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. \Leftrightarrow 829.]

4. CRIMINAL LAW \Leftrightarrow 855—CUSTODY OF JURY—SEPARATION.

In a capital case, it is not improper to allow the jurors to sleep in several adjoining rooms, all being on the same floor and separated from the rest of the hotel; nor will it

work a reversal that jurors asked bell boys for water.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2043-2053; Dec. Dig. \Leftrightarrow 855.]

5. CRIMINAL LAW \Leftrightarrow 925—NEW TRIAL—CONDUCT OF JURY.

Where accused was in no way harmed by the jurors sleeping in adjoining rooms and requesting the bell boy to bring them ice water, he was not entitled to a new trial on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2238-2247, 2250; Dec. Dig. \Leftrightarrow 925.]

6. CRIMINAL LAW \Leftrightarrow 911—NEW TRIAL—VERDICT.

Where the circumstances merely put suspicion on a verdict, the granting of a new trial rests in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2134; Dec. Dig. \Leftrightarrow 911.]

7. CRIMINAL LAW \Leftrightarrow 636—TRIAL—PRESENCE OF ACCUSED.

Where accused was present during all proceedings, though at times he seemed sleepy, and the court had his condition investigated, the fact that he might have been using opiates smuggled to him was no ground for disturbing a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. \Leftrightarrow 636.]

8. CRIMINAL LAW \Leftrightarrow 938, 1156—APPEAL—NEW TRIAL.

The granting of a new trial for newly discovered evidence rests in the lower court's discretion and is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317, 3067-3071; Dec. Dig. \Leftrightarrow 938, 1156.]

9. CRIMINAL LAW \Leftrightarrow 950—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A motion for a new trial for newly discovered evidence cannot be made in the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2345-2348; Dec. Dig. \Leftrightarrow 950.]

10. CRIMINAL LAW \Leftrightarrow 1082—APPEAL—DOCKETING.

The state's solicitor cannot extend the time for docketing an appeal from a conviction by consenting to a delay, that time being fixed by statute and rules of court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2727; Dec. Dig. \Leftrightarrow 1082.]

Appeal from Superior Court, Mecklenburg County; Thomas J. Shaw, Judge.

Charles E. Trull was convicted of murder in the first degree, and he appeals. Affirmed.

The prisoner was convicted before Shaw, J., at June term, 1914, of murder, in the first degree, of Sidney Swain, who was killed by a blow on the head with an iron pipe, after midnight on Saturday April 16, 1914, while going home from his store. It was in evidence that the deceased before leaving his store about 12:20 at night took from the money drawer all the cash therein, about \$225, having been taken in that day, besides there was in the drawer the cash taken in for three or four days previously, and that

when his body was found there was only \$3 in his hip pocket; that on Tuesday before the homicide the prisoner left his boarding house because he could not pay his board bill and was in the habit of borrowing small sums of money and pawning his effects; that on that Saturday afternoon he went to his boarding house and, being asked to pay his bill, said that he would pay on Monday morning; that at 10:30 that night he went to a barber shop and asked to be shaved on credit; that at 3:30 that afternoon he borrowed 75 cents to buy a pair of shoes; that about 12:30 that night the prisoner asked the witness Barton to exchange suits with him, and Barton let him have his coat, and about 2 o'clock that night he was awakened by the prisoner, who took off his pants and put on another pair, and at the prisoner's invitation the witness went with him to several places "to have a big time"; that on objection by Barton that he had no money the prisoner then replied that he had plenty of money and would pay all expenses, they visited several places, and the prisoner spent considerable money, besides giving the witness \$10. On his return the prisoner seemed much excited and nervous, and during the night repeatedly insisted on the witness leaving town with him. The witness and the prisoner were arrested early the next morning, and just before the arrest the prisoner said to the witness that if anything got out, and the witness said anything about it, he (the prisoner) would shoot him.

It appears from the testimony of the officers that, when the witness Barton and the prisoner were arrested, \$10.55 was taken from Barton and \$407.50 from the prisoner; that the prisoner said when arrested that he did not know how much money he had, and the prisoner's pants, which Barton testified he had taken off and put in a drawer on his return, had fresh blood on them; the shoes taken from the prisoner were the same which he had bought with the 75 cents borrowed from Barton, and fitted the tracks found near the body, the tracks showing the five bars which were on the shoes; one of the shoes had blood spots on it. There were other circumstances in evidence, several witnesses testifying that they saw the prisoner about 12 o'clock that night, or shortly thereafter, in the vicinity of the place where the deceased was murdered, some of them noticing the change in his clothing, and that between 11 and 12 o'clock the prisoner had tried to borrow a pistol. Barton further testified that, when they were arrested and taken to the police station, the prisoner beckoned him into the toilet room and suggested how he should obtain testimony as to how the prisoner had obtained money. The driver of the patrol wagon testified that the prisoner beckoned to Barton, and they went together into the toilet room. The chief of police testified that Barton in the prisoner's presence gave substantially the same recital

of the circumstances which he testified to on the stand. The prisoner in his own behalf gave his account of his movements that evening, which it is not necessary to recite, and accounted for his money by saying that he had been saving it up for some time to go to Hot Springs, Ark., for treatment of a disease, and that he had put his money around in different places from time to time, that he hid some money in a mattress at his boarding house, that he pulled a plank off a store and had concealed some money there, and that he had hidden money between Riles' Store and the alley, and that that evening he had gone around and collected up the money thus hidden. It is unnecessary to state the evidence more in detail.

D. B. Paul, of Charlotte, and Newell & Newell, for appellant. The Attorney General and T. H. Calvert, Asst. Atty. Gen., for the State.

CLARK, C. J. There are no exceptions to the evidence. Exceptions 1, 2, and 3 are to the refusal of the court to give three special instructions requested as to circumstantial evidence.

[1] The first request was to charge that:

"Where the state relies wholly upon circumstantial evidence for conviction, it is incumbent upon the state to establish each circumstance beyond a reasonable doubt. In this case, the state alleges that the deceased was murdered by the defendant, the motive being robbery; and it alleges that the money taken from the defendant's person and also off the witness Barton was the identical money that was taken from the deceased at the time of his murder. Therefore the state must satisfy you beyond a reasonable doubt, first that the deceased had at least \$417.50 on his person at the time of the murder, and that the money taken from the defendant and also from the witness Barton is the identical money that the deceased had. If the state has not so satisfied you, you will return a verdict of not guilty."

The court could not give this charge as asked. This is not an indictment for robbery, and if it were it would not be necessary to prove the identical amount charged. The court in the charge correctly instructed as to circumstantial evidence all that the prisoner could have asked, as follows:

"Each essential and material fact relied upon by the state must be established beyond a reasonable doubt."

The court also charged as to circumstantial evidence:

"When such evidence is relied upon to convict, it should be clear, convincing, and conclusive in all its combinations, and should exclude all reasonable doubt as to guilt."

And further:

"In passing upon such evidence, it is the duty of the jury to consider all the circumstances and determine whether they have been established beyond a reasonable doubt."

This was a sufficient compliance with the prayer. *State v. Brackville*, 106 N. C. 701, 11 S. E. 284.

[2] The second exception is to the refusal of the court to charge that, "where circum-

stantial evidence connected the prisoner with the crime, each circumstance depends upon the truth of the preceding one, and the chain is no stronger than its weakest link, and when once broken becomes a rope of sand," and further asks the court to charge as an application of the principle that unless the state satisfied the jury that the defendant did not have the money hid out as he said, and that the money which he had when arrested was the identical money which the deceased had on his person when he was murdered, and that the prisoner and no one else murdered him and took his money, the jury should return a verdict of not guilty. But this was not a case calling for the application of the principle stated. In *State v. Neville*, 157 N. C. 596, 72 S. E. 800, Mr. Justice Walker said:

"There was no chain of circumstances in this case which required the court to tell the jury that each circumstance which constituted a link * * * should be established to their full satisfaction. A chain is no stronger than its weakest link, it is true; but there is no series of facts in this case necessary to be considered by the jury in order to convict the defendant."

In *State v. Flemming*, 130 N. C. 689, 41 S. E. 550, the refusal of the court to charge "every link in the chain of evidence must be proved beyond a reasonable doubt" was sustained, when in lieu thereof the court instructed the jury, as in this case, that the state must establish every circumstantial fact upon which it relies beyond a reasonable doubt.

In *State v. Shines*, 125 N. C. 730, 34 S. E. 552, the court said:

"There are cases of circumstantial evidence in which each circumstance depends upon the truth of the preceding one, in which case the evidence may be likened to a chain which is no stronger than its weakest link; but usually that simile is inapplicable. Ordinarily, the circumstances accumulate, each one by itself being of no great weight, but like the bundle of twigs in the fable, or the several strands twisted into a rope or cable, becoming, when united, of great strength"—citing several cases.

Even when a charge giving the simile of a chain may be properly used, it refers only to the necessary links in the chain of evidence. *State v. Carson*, 115 N. C. 743, 20 S. E. 384; *State v. Crane*, 110 N. C. 530, 15 S. E. 231.

[3] The third exception is to the refusal of the court to charge, in the identical words of the prayer:

"Where circumstantial evidence is wholly relied upon by the state for conviction, as in this case, the circumstances so relied upon must be so clear and convincing as to point unerringly to the guilt of the defendant and must exclude every possibility of his innocence."

The court in its charge substantially complied with this request, saying:

"Do these circumstances exclude from your conclusion everything except that of guilt?" "Such facts (essential or material facts) so established must not only be consistent with the defendant's guilt, but these facts must be inconsistent with the defendant's innocence and

exclude every reasonable hypothesis of his innocence."

The whole charge is carefully expressed and fully conveys the idea set out in the prisoner's prayer, often repeated.

[4, 5] Exception 4 was for the refusal of the court to grant a new trial on account of alleged improper conduct of the jurors. The matters alleged were that the jurors were permitted to sleep in separate rooms and to read newspapers containing accounts of the trial, and that the hotel bell boy was admitted to the rooms while the jurors were occupying them. The court found as facts that:

"The jurors were properly kept together and in the custody of an officer during the day, but that at night they occupied five adjoining rooms on the same floor. The jurors were allowed to occupy the five rooms on account of oppressive heat. No persons had access to such rooms except the maid at the hotel and the bell boy, and the jurors communicated with no one, except to order water from the bell boy. No juror read any newspaper during the trial. The court further found that, while the conduct of the officer in keeping the jury in five different rooms was improper, yet that no harm came to the prisoner on this account."

The requirement that the jury should be held together is not statutory, but the practice of the courts in order to prevent the jury being tampered with. It must receive a reasonable construction. There must be necessarily some separation, for the jurors do not all sleep in one bed, and in the dining room where there are small tables they cannot sit at the same table, but it is sufficient if they are segregated from mingling with the crowd, and there are other occasions which necessarily require the temporary retirement of a juror from the body of his fellows. On this occasion, owing to the heat, and possibly from the difficulty of procuring a sufficiently large room, the jurors occupied 5 adjoining rooms, and from the testimony those 5 rooms were on the same floor and segregated from the rest of the rooms on that floor by a bathroom and toilet "setting off this lot of rooms from any of the other rooms in the buildings," and all five rooms opened on the same hall. The judge finds as a fact that the jurors did nothing improper during the trial and communicated with no one, except to order ice water from the bell boy. There was no impropriety in this any more than in speaking to the waiter at the table to bring water or dishes.

Even if the judge were correct in finding that it was improper for the jurors, under the circumstances, to occupy five adjoining rooms opening upon the same hall, still he finds that there was no communication with outsiders (except with the bell boy, as stated), and that no harm accrued to the prisoner.

[6] It has been uniformly held that when the circumstances are such as merely to put suspicion on a verdict (which was not the case here) by showing, not that there was any

undue influence, but merely opportunity, the granting of a new trial rests in the discretion of the trial judge. This was fully discussed and decided in *State v. Tilghman*, 33 N. C. 553, and very numerous cases in the citations thereto in the *Anno. Ed.* Among many in point are *State v. Brittain*, 89 N. C. 504, and *State v. Crane*, 110 N. C. 537, 15 S. E. 231, and cases there cited, and *State v. Morris*, 84 N. C. 765, and citations in the *Anno. Ed.* At this term the court has reiterated in *Lewis v. Fountain* and in *Cook v. Highland Hospital* that, where the circumstances are such as merely to put suspicion on the verdict because there was opportunity and a chance for misconduct, this is not sufficient to set aside the verdict unless there was in fact misconduct. When there is merely matter of suspicion, it is purely in the discretion of the presiding judge, citing *Moore v. Edmiston*, 70 N. C. 481; *State v. Brittain*, supra; *Baker v. Brown*, 151 N. C. 17, 65 S. E. 520, and *State v. Tilghman*, supra. In *Baker v. Brown*, this proposition is fully discussed and sustained by Walker, J. In *State v. Harper*, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46, where 11 of the jurors went to dinner under charge of an officer and the other remained in his room under the charge of a sworn deputy, but the court found there was no effect on the verdict caused thereby, this court sustained the judge below in refusing to set aside the verdict. That case was a conviction of a felony, though not capital.

Under the ancient common law, after the jury were charged they were kept together, both in civil and criminal cases, "as if they were prisoners, until they are discharged." *Bannister, J., in Bishop of N. v. the Earl of Kent*, 14 Henry VII, c. 29, quoted by Thompson & Merriam on Juries, § 310. In those times, trials of causes lasted but a single day, and the power of the court to adjourn from day to day to give jurors opportunity for rest and refreshment was doubted or denied. Indeed, the jurors were denied "meat and drink" until they had agreed. In modern times, there has been a great amelioration, owing to the greater intelligence of the jurors, the greater respect for their intelligence, and the changed conditions of modern times. Indeed, in civil cases, the separation of a jury after being charged, though without leave of the court, before they have agreed upon their verdict, is not now, as a mere matter of law, ground for a new trial. Thompson & Merriam on Juries, § 315. In some of the states this has been extended to prosecutions for felony, and even in capital cases. Thompson & Merriam, § 318. In this state the jury in felony cases, after the charge, are required to be kept together, though there are many cases in which the jurors have been, and must be, permitted to separate during the progress even of a capital trial under the charge of sworn officers. One or more of the jury in a capital case have been permitted, in some states, to

visit their homes under the charge of a sworn officer. See Thompson & Merriam, § 321, and cases there cited. We would not be understood as approving or encouraging such practice. We merely hold, in this case, that on the facts found there was no legal separation, and that even if there was the judge having found that there was no communication with outsiders, and that no harm accrued to the prisoner, he properly refused to grant a new trial. It will be noted that there is a distinction between the discharge of a jury before verdict, and a temporary separation, for purposes of necessity, or a quasi separation, as in this case, where the jury is really still kept separate from outsiders and the judge finds that no prejudice accrued to the prisoner.

[7] The prisoner also excepted to the refusal of the court to grant a new trial on the allegation that the prisoner was under the influence of an opiate during a part of the trial. The court finds as facts that while the court was charging the jury the defendant was asleep a part of the time, but that the court did not know of the fact, and that the counsel of the prisoner did and failed to call the attention of the court thereto; that late one afternoon during the trial the court discovered that the prisoner did not seem to be right and at once adjourned court for the afternoon and had the prisoner examined by the county physician, who the next morning reported him in good condition; that then the trial proceeded, and the judge with the aid of the county physician observed the condition of the defendant thereafter during the trial; and that he was in full possession of all his faculties and entirely capable of conducting his defense; that, if he was under the influence of an opiate at any time, it was smuggled to him without the knowledge of the officers and was taken by him voluntarily. Though the court finds that the prisoner appeared drowsy at times, it also found that he was throughout the trial in full possession of all his faculties and capable of conducting his defense. The court could not have taken more precautions than the careful judge appears to have taken in behalf of the prisoner in this case.

[8, 9] The refusal of the court to grant a new trial for newly discovered testimony rested in his discretion and is not reviewable. *State v. Jimmerson*, 118 N. C. 1173, 24 S. E. 494; *State v. De Graff*, 113 N. C. 690, 18 S. E. 507; *State v. Morris*, 109 N. C. 820, 13 S. E. 877. The findings of fact by the court on such motion are not reviewable. *State v. De Graff*, 113 N. C. 690, 18 S. E. 507; *State v. Morgan*, 120 N. C. 563, 26 S. E. 634; *State v. Lance*, 109 N. C. 789, 14 S. E. 110; and *State v. Dunn*, 95 N. C. 897.

This court has uniformly held that:

"A petition to rehear, or to grant a new trial for newly discovered testimony, cannot be entertained in this court in criminal actions." *State v. Ice Co.*, 166 N. C. 404, 81 S. E. 953,

52 L. R. A. (N. S.) 219, citing numerous and uniform decisions.

After careful consideration of all the assignments of error and scrutiny of the entire record, we find no error.

[10] We note that this trial was had in June, 1914. Under the statute and rules of the court, this appeal was required to be docketed at the fall term of this court before the call of the docket of the district to which it belongs under penalty of dismissal. Rules 5 and 7 (140 N. C. 654, 656, 53 S. E. v. 11); Rev. 591; Pittman v. Kimberly, 92 N. C. 562, and numerous cases thereto cited in the Anno. Ed., and Burrell v. Hughes, 120 N. C. 277, 26 S. E. 782, citing numerous cases and with numerous annotations in the Anno. Ed. It appears in the record that the solicitor agreed with the prisoner's counsel that the case might be postponed and docketed at this term. This was an irregularity and was beyond his authority. The statute must be complied with, and the cause docketed at the next term here after the trial below. If in any case there is any reason why this cannot be done, the appellant must docket the record proper and apply for a certiorari, which this court may allow, unless it dismisses the appeal, and may then set the case for trial at a later day at that term or continue it as it finds proper. It is not permitted for counsel in a civil case, nor to the solicitor in a state case, to assume the functions of this court and allow a cause to be docketed at a later term than that to which the appeal is required to be brought by the statute and the rules of this court.

No error.

(100 N. C. 72)

FINGER v. GOODE. (No. 485.)

(Supreme Court of North Carolina. May 5, 1915.)

1. CONTRACTS \S 147—CONSTRUCTION—INTENT OF PARTIES.

In construing a written contract, the intent of the parties as expressed in the entire instrument, giving effect, if possible, to every part, must prevail; and, where the language expresses clearly the meaning of the parties, other means of interpretation are not permissible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 730, 743; Dec. Dig. \S 147.]

2. LOGS AND LOGGING \S 3—CONTRACT FOR CUTTING—SALE OF LAND.

Where a contract between a landowner and a sawmill owner for the cutting of timber on the land provided that if the owner should sell any or all of the land, the contract should at once become null and void as to the part sold and conveyed, and contained nothing to indicate that there was to be any period of time between the execution of the contract and the commencement of operations thereunder, the landowner could sell part of the land without liability to the sawmill owner, even if the latter had begun the cutting.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. \S 6-12; Dec. Dig. \S 3.]

Appeal from Superior Court, Lincoln County; Adams, Judge.

Action by C. B. Finger against J. A. Goode. Judgment for defendant, and plaintiff appeals. Affirmed.

On the hearing it was properly made to appear: That plaintiff owned and operated a sawmill, and defendant owned a body of land lying in Lincoln county, known as the "Derr lands," composed of different and co-terminous tracts and amounting to about 700 acres, and, in December, 1909, the two entered into a contract, in terms as follows:

"This agreement made this 11th day of December, 1909, between J. A. Goode, of the county of Lincoln, state of North Carolina, of the first part, and Calvin Finger, of said county and state, of the second part, witnesseth: That the said J. A. Goode does this day contract and agree to let the said C. B. Finger saw with a sawmill and convert into lumber, all the timber now standing on the said J. A. Goode lands known as the 'Derr lands,' containing about 700 acres, adjoining the lands of M. A. Ewing, J. P. Mullen and others. And it is further agreed that each of said parties shall pay one-half of all expense in chopping and hauling all logs to sawmill and delivering all lumber to market, and expense of collecting pay for same. And it is further agreed that the sawing of said timber into lumber shall be a rebuttal in full against the timber, as it now stands. And it is further stipulated and agreed that each of the parties herein named shall receive one-half of all the proceeds derived from the sale of all said lumber. It is further agreed if the price of lumber should decline below one dollar per hundred f. o. b. railroad, the sawing shall cease until the price shall again advance to one dollar per hundred f. o. b. railroad: Provided, the said J. A. Goode shall sell and convey any or all of the land herein mentioned and described, this contract shall at once become null and void, as to the part sold and conveyed. It is further agreed that in case the said J. A. Goode shall sell the timber in a body, then and in that case the said C. B. Finger is to cut and saw said timber at customary prices."

Signed and sealed by the parties.

That plaintiff placed his mill on the said lands of defendant and began cutting the timber, and while there defendant sold 377 acres of the land to one J. Smith Campbell, and plaintiff was thereby prevented from cutting the timber on the 377 acres. The case on appeal further states that it was agreed by the parties that if, upon a proper construction of the contract, defendant had a legal right to sell said 377 acres, after plaintiff began to cut the timber, plaintiff had no cause of action, and, the court having intimated an opinion in favor of defendant on the proposition as submitted, in deference to such intimation plaintiff submitted to a nonsuit and appealed.

C. E. Childs and C. A. Jonas, both of Lincoln, and S. B. Sparrow, of Dallas, for appellant. Ryburn & Hoey and D. Z. Newton, all of Shelby, and K. B. Nixon, of Lincoln, for appellee.

HOKE, J. [1] In the recent case of Gilbert v. Shingle Co., 167 N. C. 286-288, 83 S.

E. 337, it is said to be the accepted rule of constructions of written contracts:

"That the intent of the parties as embodied in the entire instrument should prevail, and that each and every part shall be given effect if it can be done by fair and reasonable intent, and that in ascertaining this intent resort should be had primarily to the language they have employed, and where this language expresses plainly, clearly, and distinctly the meaning of the parties, it must be given effect by the courts, and other means of interpretation are not permissible" (citing *McCallum v. McCallum*, 167 N. C. 310, 83 S. E. 250; *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747, Ann. Cas. 1912A, 1189; *Hendricks v. Furniture Co.*, 156 N. C. 569, 72 S. E. 592; *Bridgers v. Ormond*, 153 N. C. 114, 68 S. E. 973; *Davis v. Frazier*, 150 N. C. 447, 64 S. E. 200; *Walker v. Venter*, 148 N. C. 388, 62 S. E. 510).

[2] In the present case, the contract contains express stipulation that:

"If the said J. A. Goode shall sell and convey any or all of the land herein mentioned and described, the contract shall at once become null and void"

—and there is nothing anywhere in the instrument to indicate that the force and effect of this provision shall be restricted to the period of time that might elapse before operations were commenced; indeed there is nothing to indicate that there was to be any such period. The plain and natural meaning of the language is that the stipulation is to prevail through the life of the contract and, applying the principle of interpretation above referred to, we concur in his honor's view that, on sale of the land or any part of it, the contract obligations of the parties, concerning the portion sold, should cease.

There is no error, and the judgment of the court below is affirmed.

Affirmed.

(169 N. C. 196)

BOARD OF SCHOOL COM'RS OF CITY OF CHARLOTTE v. BOARD OF EDUCATION OF MECKLENBURG COUNTY.
(No. 440.)

(Supreme Court of North Carolina. May 5, 1915.)

1. SCHOOLS AND SCHOOL DISTRICTS — §91—FUNDS—APPORTIONMENT—STATUTE.

Revisal 1905, § 4029, of the general school law, providing that the chapter shall not apply to any city levying a special tax for schools and operating under a special charter, and Charter of City of Charlotte (Priv. Laws 1907, c. 342) § 207, providing that the county board of education shall apportion the school fund of the county payable each year for the public graded schools of the city on a per capita basis in the proportion of the number of school children in the city to that in the county, were not repealed by Pub. Acts 1913, c. 149, entitled "An act to amend certain sections * * * of the public school law" (Revisal 1905, c. 89), and not specifying section 4029, in view of Pub. Acts 1915, § 1, expressly declaring section 207 of the charter not to have been repealed by the act of 1913.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 210; Dec. Dig. § 91.]

2. SCHOOLS AND SCHOOL DISTRICTS — §91—FUNDS—APPORTIONMENT — CONSTITUTIONALITY.

Revisal 1905, § 4029, excepting a city under a special charter from the provisions of the school law, and Charter of City of Charlotte (Priv. Laws 1907, c. 342) § 207, providing for the apportionment of county school funds to the city on a per capita basis, held not to violate Const. art. 9, § 2, providing for a general, uniform system of public schools.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 210; Dec. Dig. § 91.]

Appeal from Superior Court, Mecklenburg County; Lane, Judge.

Action for injunction by Board of School Commissioners of the City of Charlotte against the County Board of Education of Mecklenburg County. From the judgment, plaintiff appeals. Reversed and remanded, with directions.

A mandatory injunction was issued, directing the defendant to apportion the school fund in accordance with chapter 149, Acts of 1913, and not in accordance with the charter of the city of Charlotte (section 207, c. 342, Priv. Laws 1907).

Tillett & Guthrie, of Charlotte, for appellant. E. R. Preston and J. W. Keerans, both of Charlotte, for appellee.

BROWN, J. This is an injunction proceeding, brought to compel the defendant to apportion the public school funds of the county of Mecklenburg to the city of Charlotte, "per capita," as provided by the city charter (section 207, c. 342, Priv. Laws 1907, p. 857), and not according to "length of term," as provided by Pub. Acts 1913, c. 149. This latter act prescribes:

"It shall be the duty of the county board of education to distribute and apportion the school money so as to give to each school in the county for each race the *same length of school term, as nearly as may be each year.*"

Section 207 of the revised charter of the city of Charlotte is in these words:

"That the county board of education of Mecklenburg county, in apportioning the school fund of said county, shall ascertain and determine the amount of said funds to be used each year for the public graded schools of the city of Charlotte by dividing the whole amount of school funds received by the county treasurer of Mecklenburg county less his commissions or the part of his salary which is to be paid out of said funds, and less the amount reserved by said county board of education for the office expenses and salary of the county superintendent of education and for the per diem and mileage of the said county board of education by the total number of children of school age in said county, as determined by the last census preceding such apportionment, and by multiplying the quotient so obtained by the total number of school children in the city of Charlotte, as determined by last school census preceding such apportionment, and the amount so ascertained and determined is to be paid by the treasurer of said Mecklenburg county to the treasurer of the public schools of the city of Charlotte, or such other official as may be legally designated to receive the same, to be used for

the said public schools of said city, under the control and direction of the board of school commissioners of said city of Charlotte."

Chapter 89, Revisal 1905, which contains the general school law of the state, provides (section 4029) that:

"The provisions of this chapter shall not apply to any township, city or town now levying a special tax for schools and operating under special laws or charters."

The city of Charlotte is now levying a special tax for its schools, and is conducting its school system under its special charter above cited.

[1] The defendant contends:

"That the act of 1913 (chapter 149) was intended to embrace the general school policy in the apportionment of school funds throughout the state, and necessarily repealed by implication section 4029, and any prior, local, or general statute inconsistent therewith."

We do not think this position can be maintained, in view of the language of the act of 1913. This act is on its face an amendatory law, amending certain sections of chapter 89 of the Revisal, specifying them. It does not, in any way, repeal or amend section 4029 above quoted. Its title is that of an amendatory act, and is as follows:

"An act to amend certain sections of chapters 81 and 89 of the Revisal of 1905 of North Carolina, and certain chapters of the Public Laws of 1907, 1909, and 1911 of North Carolina, being parts of the public school law."

For the purpose of relieving the matter of any doubt, the General Assembly of 1915 enacted:

"Whereas, a doubt has arisen as to whether section two hundred and seven of chapter three hundred and forty-two of the Private Laws of one thousand nine hundred and seven is still in force or whether the same has been repealed by chapter one hundred and forty-nine of the Public Laws of one thousand nine hundred and thirteen; now, therefore, the General Assembly of North Carolina, do enact:

"Section 1. That in apportioning the school fund of the county of Mecklenburg, the county board of education shall be governed in all respects by the provisions of section two hundred and seven of chapter three hundred and forty-two of the Private Laws of one thousand nine hundred and seven."

[2] No sufficient reason has been advanced which would justify us in holding that section 4029 of the Revisal, or section 207 of the revised charter of the city is violative of the state Constitution, article 9, § 2, providing for—

"a general uniform system of public schools wherein tuition shall be free of charge to all children in the state between the ages of six and twenty-one years."

The various Legislatures that have passed laws since the Constitution was adopted seem to have considered that a fair and just method of distributing the school fund is per capita, and numerous acts have been passed looking to this end. Section 4029, Revisal, has been on the statute book many years, and its constitutionality has never been questioned. In pursuance of it, a great many cities

and towns in this state are conducting their school systems, under special legislation providing for a per capita apportionment of the school fund. We are not prepared to say that all this legislation, which has been in force so many years, is contrary to our fundamental law. In the Greensboro school case, the per capita method of apportionment is recognized, the court holding that:

"The public school fund in any county, from whatever source arising, must be distributed pro rata among the several school districts respectively, according to the number of children in each."

The court says:

"A very material part of the fund thus devoted to the support of public schools is taken from the ordinary revenue of the state, raised by taxation, but this does not imply, nor does it follow, that the fund thus raised is to be distributed to the support of schools located in the neighborhood of those taxpayers who paid the taxes, or most thereof, but it is to be distributed as nearly as may be per capita for the education of all the children in the state."

The judgment of the superior court is reversed, and the cause is remanded, with direction to issue a mandatory injunction, commanding the defendant to apportion and distribute the school fund in accordance with the provisions of the charter of the city of Charlotte.

Reversed.

(109 N. C. 243)

MONTGOMERY v. CAROLINA & N. W. RY. CO. (No. 492.)

(Supreme Court of North Carolina. May 5, 1915.)

1. TRIAL \S 205 — INSTRUCTIONS — CONSTRUCTION.

The instructions must be considered in their entirety, to determine their correctness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. \S 295.]

2. NEW TRIAL \S 75 — INADEQUACY OF VERDICT — MOTION TO SET ASIDE.

The remedy for the correction of error, in a verdict awarding inadequate damages for a personal injury, is by motion in the trial court to set aside the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 151, 152; Dec. Dig. \S 75.]

Appeal from Superior Court, Caldwell County; Harding, Judge.

Action by Ella G. Montgomery, administratrix of J. Roby Montgomery, deceased, against the Carolina & Northwestern Railway Company. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Squires & Whisnant, Thos. Newland, and M. N. Harshaw, all of Lenoir, and Murray Allen, of Raleigh, for appellant. J. H. Marion and W. C. Newland, of Lenoir, for appellee.

PER CURIAM. We have examined the record carefully, and considered the able argument and learned brief of plaintiff's counsel submitted to us, and find no error in the trial of the case.

[1] The jury answered the issue, as to negligence, in favor of the plaintiff, and the exceptions relate, therefore, to the issue as to damages, which were assessed at \$1,000; the plaintiff contending that the amount is too small, and that the verdict in this respect was influenced by an erroneous charge of the court. If considered in detached portions, there may be some ground for the exception, but it should be taken and construed in its entirety, as we have so often held. *Aman v. Lumber Co.*, 160 N. C. 374, 75 S. E. 931; *State v. Exum*, 138 N. C. 599, 50 S. E. 283; *Kornegay v. Railroad Co.*, 154 N. C. 389, 70 S. E. 731; *McNeill v. Railroad Co.*, 167 N. C. 390, 83 S. E. 704.

[2] His honor distinctly told the jury that, if the injury and death of intestate were caused by a violation of the Safety Appliance Act of Congress, they should not consider the intestate's contributory negligence, if there was any, in diminution of the damages. We are induced to believe, after a careful review of the charge and the evidence, that the jury found that the intestate's death was caused by a violation of the Safety Appliance Act, and, for some reason satisfactory to themselves, they agreed upon this verdict, though small it may be, or not as full as plaintiff thinks it should have been. If it was so, the remedy for the correction of the alleged error was by motion, in the court below, to set aside the verdict.

The charge as to the measure of damages, we think, was at least substantially correct and a sufficient compliance with the law. It would seem that in one or two respects the charge was liberal to the plaintiff.

No error.

(169 N. C. 64)

WOOTEN v. S. R. BIGGS DRUG CO.
(No. 437.)

(Supreme Court of North Carolina. May 5, 1915.)

1. DISMISSAL AND NONSUIT §70—NOTICE OF MOTION.

A party is not entitled to notice of a motion to dismiss, made at a regular term of court, as parties are presumed to have notice of all motions, orders, and decrees made in the cause.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 164; Dec. Dig. §70.]

2. COURTS §121 — JURISDICTION — "GOOD FAITH."

For the amount demanded by plaintiff to confer jurisdiction, it must be made in "good faith," which means, not only an honest purpose, but that the demand shall be related to the facts alleged, and shall follow as a reasonable and natural conclusion.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 410, 413-426, 428, 437, 450, 452, 458, 459, 466; Dec. Dig. §121.]

For other definitions, see *Words and Phrases*, First and Second Series, *Good Faith*.]

3. CONTRACTS §85—CONSIDERATION.

Where a drug company agreed to pay a stipulated sum in consideration of plaintiff preparing plans for the arrangement of its fixtures, and it did not appear that in fixing the amounts

the parties were influenced by defendant's promise to notify plaintiff when it was ready to let out bid, the contract to make plans cannot be considered as furnishing consideration of the agreement to give notice.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 234, 267, 292, 293; Dec. Dig. §85.]

4. CONTRACTS §47 — CONSIDERATION — UNILATERAL CONTRACTS.

No recovery can be had for breach of an agreement to notify plaintiff when it would be ready to let bids for the sale of fixtures, for as plaintiff did not agree to bids, there was no consideration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 220, 221, 256-258; Dec. Dig. §47.]

5. CONTRACTS §9 — VALIDITY — INDEFINITENESS.

Where a drug company agreed to notify plaintiff when it would be ready to let bids for fixtures, the agreement, if supported by consideration, is too vague to afford a right of action for its breach, on the theory that plaintiff was thereby deprived of commission, for plaintiff's bids might have been rejected, or the concern for which he was bidding might have rejected the contract when tendered, and in either case plaintiff would have been entitled to no commissions.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20; Dec. Dig. §9.]

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by M. F. Wooten against the S. R. Biggs Drug Company. From a judgment dismissing the action, plaintiff appeals. Affirmed.

This is an action to recover damages, in which the plaintiff filed the following complaint:

"The plaintiff, complaining of the defendant, alleges: (1) That he is and was, at the times hereinafter mentioned, a resident and citizen of said county and state, and that the defendant is and was, at said times, a corporation under and by virtue of the laws of North Carolina, engaged in the business of handling drugs, fountain beverages, etc., with its principal place of business in the city of Williamston, in Martin county in said state. (2) That on or about the 25th day of September, 1913, the plaintiff and defendant entered into the following agreement, to wit: 'It is understood and agreed by M. F. Wooten and S. R. Biggs Drug Company that the said M. F. Wooten is to make blue print plans, elevation and perspective sketches and detailed specifications for one set of drug fixtures to be purchased by the Biggs Drug Company. It is further agreed that upon receipt of said sketch, plans and specifications, the S. R. Biggs Drug Company will pay the sum of one hundred (\$100.00) dollars to M. F. Wooten for said services and then if S. R. Biggs Drug Company should accept the proposition from M. F. Wooten on the fixtures and buy same from him, the money paid (one hundred dollars) will be credited on the face of the contract and credit for this amount will be given on the purchase price. In case S. R. Biggs Drug Company buys from another man or firm then M. F. Wooten will keep said money, and be fully paid for his services. [Signed] S. R. Biggs Drug Company, S. R. B. [Signed] M. F. Wooten.' (3) That agreeable to the foregoing the said plaintiff prepared and delivered to the defendant the plans and specifications above referred to, and the same were duly accepted by

the defendant, whereby the defendant became indebted to the plaintiff in the sum of \$100, as above set forth. (4) That said plans were for the purpose of enabling the defendant to purchase and install certain drug store fixtures which it proposed to purchase. That plaintiff was a representative of a concern furnishing such fixtures. That by the terms of said contract and a contemporaneous agreement the defendant contracted and agreed with plaintiff to notify plaintiff when it would be ready to let bids for said proposed purchase of certain drug store fixtures, and assured the plaintiff that it would favor him in the purchase of said fixtures. (5) That plaintiff is informed and believes, and so alleges, that the defendant has already purchased said fixtures without notifying plaintiff or giving him an opportunity to be present and bid upon said fixtures. That plaintiff is informed and believes, and so alleges, that the defendant has purchased fixtures conformable to said plans from the other parties in the sum of about \$3,500, and that if plaintiff had been notified of said purchase by defendants and been permitted to bid on said fixtures, he could and would have met said price and thereby obtained said order, which would have netted plaintiff 20 per cent. or \$750. (6) That by reason of the failure of the defendant to comply with its contract and permit plaintiff to participate in said bidding, the plaintiff lost said sale and the commission thereon, and that thereby the defendant is justly indebted to the plaintiff in the sum of \$750. Wherefore the plaintiff prays judgment against the defendant for \$750, with interest thereon from the day of —, 1914, and the costs of the action to be taxed by the clerk."

At the return term of the summons and after the complaint was filed, the defendant moved to dismiss the action for want of jurisdiction in the superior court, upon the ground that the only cause of action alleged in the complaint was for the recovery of \$100, which was in the jurisdiction of a justice of the peace, and that the allegations as to the agreement to notify the plaintiff when it would be ready to let bids were not sufficient to constitute a contract which could be enforced. The motion was continued and was heard at the next succeeding term of court, when the motion was allowed and judgment was entered dismissing the action, and the plaintiff appealed, assigning the following errors: (1) The refusal of the court to compel the defendant to give notice, under the special appearance, for the hearing of his motion to dismiss said action for a lack of jurisdiction, and in hearing said motion without notice being given as required by law, over plaintiff's objection. (2) To the judgment as set out in the record, and especially as the court did not find that the demand in the complaint was not made in good faith, but held, either *ex mero motu*, or upon a demurrer *ore tenus* by defendant under a special appearance, that the plaintiff could not maintain said action.

Thos. W. Alexander, of Charlotte, for appellant. Pharr & Bell, of Charlotte, for appellee.

ALLEN, J. [1] The plaintiff was not entitled to notice of the motion to dismiss the action because the motion was made at a

regular term of court. *Hemphill v. Moore*, 104 N. C. 379, 10 S. E. 313; *Coor v. Smith*, 107 N. C. 430, 11 S. E. 1089; *Stith v. Jones*, 119 N. C. 430, 25 S. E. 1022. The rule as to motions made in term is stated in *Coor v. Smith* to be that:

"While the action is pending no actual notice is required, as all parties are presumed to have notice of all motions, orders, and decrees made in the cause."

[2] Nor was it the duty of his honor to find as a fact that the demand for judgment by the plaintiff was not made in good faith. The term "good faith" may be found in many of the opinions of this court dealing with the question of jurisdiction, but it means more than an honest purpose. It implies that the demand shall be related to the facts alleged, and shall follow as a natural and reasonable conclusion from them, and in cases like the one before us, to recover damages for breach of contract, the allegations of fact in the complaint must show an enforceable contract. In *Realty Company v. Corpening*, 147 N. C. 613, 61 S. E. 523, the demand was for \$500, when on the facts alleged the plaintiff could only recover \$200. The action was dismissed in this court upon the ground that the superior court did not have jurisdiction, the court saying:

"It is too well settled to admit of controversy that the jurisdiction is fixed by the amount for which, in the aspect most favorable for the plaintiff, judgment could be rendered upon the facts set out."

There are many other cases in our reports of like import. *Froelich v. Express Company*, 67 N. C. 1; *Wiseman v. Witherow*, 90 N. C. 140; *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724. In the last case cited, the jurisdiction of the superior court was sustained because, upon the facts alleged in the complaint, the plaintiff was entitled to recover more than \$200, but it was pointed out that the court would not be deprived of jurisdiction by reason of the failure of the plaintiff to sustain his entire demand upon the trial, or because a part of his claim might be based upon a misconception of a legal principle. If, therefore, the "good faith" of the demand made by the plaintiff and the jurisdiction of the court are determined by the facts alleged, we must examine the allegations of the complaint to see what cause of action the plaintiff relies upon. The first, second, and third allegations are sufficient to establish a cause of action to recover \$100, but as this amount is not within the jurisdiction of the superior court, the plaintiff must rely on his cause of action, based on the allegation that the plaintiff promised to notify him when it would be ready to let bids for its proposed purchase of drug fixtures.

[3] Does this allegation and those succeeding it, accepting them as true, establish an enforceable contract between the plaintiff and the defendant? We think not. The written contract contains no such promise as

is alleged, and the plaintiff must rely upon a verbal promise, and no consideration is alleged to support this promise. The sum of \$100 which the defendant agreed to pay under the written contract was for the plans and specifications, and there is no allegation that in fixing this amount the parties were influenced one way or the other by the promise of the defendant to notify the plaintiff when it was ready to let out bids, and therefore this sum cannot be relied upon as a consideration.

[4] The promise of the defendant cannot be supported upon the ground that mutual promises constitute a consideration, because there is no allegation in the complaint that the plaintiff promised to bid, and if the defendant had notified him, he could have refused to bid without incurring the breach of any moral or legal obligation. The promise, as alleged, amounted to no more than an offer, which has never been accepted by the plaintiff, and which could not constitute a contract until acceptance. It is lacking in the one thing without which a contract cannot be made, and that is the assent of the parties to the agreement, the meeting of the minds upon a definite proposition. *Elks v. Insurance Company*, 159 N. C. 624, 75 S. E. 808.

[5] Again, the promise is too vague and indefinite. In *Elks v. Insurance Company*, supra, the court quoting from *Page on Contracts*, says:

"The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned which could be measured by any test of damages from the contract, it has been said to be too indefinite."

If the defendant had notified the plaintiff he could have refused to bid without incurring any liability, or if he had bid, the defendant was not obliged to accept, or if the bid had been made and accepted, the company represented by the plaintiff could have refused to accept the order for the fixtures. The right of the plaintiff to recover damages, assuming that there was a consideration to support the promise, is altogether conjectural and speculative.

We are therefore of opinion that no cause of action is stated in the complaint, except for the recovery of \$100; and, as this is not within the jurisdiction of the superior court, the action was properly dismissed.

Affirmed.

(169 N. C. 52)

SHUFORD v. COOK et ux. (No. 491.)

(Supreme Court of North Carolina, May 5, 1915. Dissenting Opinion, May 12, 1915.)

1. EVIDENCE §248—DECLARATIONS OF HUSBAND—ADMISSIBILITY.

In an action to set aside a fraudulent conveyance by a husband to a wife, declarations of

the husband, though admissible against him, may be excluded as against the wife.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 953-964; Dec. Dig. §248.]

2. APPEAL AND ERROR §1056 — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action to set aside a fraudulent conveyance, the exclusion of evidence of fraud as against the grantee is harmless, where the jury found no fraudulent intent by the grantor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. §1056.]

3. WITNESSES §330—CROSS-EXAMINATION—SCOPE—FRAUD.

In cases involving fraudulent intent, much latitude is allowed on cross-examination as to questions affecting the credibility of witnesses or tending to assist the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. §330.]

4. WITNESSES §387—CROSS-EXAMINATION—TESTIMONY AT FORMER TRIAL.

Plaintiff can be cross-examined fully as to the testimony given by him at a former trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232; Dec. Dig. §387.]

5. FRAUDULENT CONVEYANCES §289 — ADMISSIBILITY OF EVIDENCE—INTENT.

In an action to set aside a conveyance by a husband to a wife, testimony of the husband as to why he made the conveyance is competent on the issue of fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 838, 840-845, 847, 848; Dec. Dig. §289.]

6. FRAUDULENT CONVEYANCES §289 — ADMISSIBILITY OF EVIDENCE—GOOD FAITH.

In an action by a creditor, who had obtained a judgment for contribution against one who had been cosurety on a note with him, to set aside a conveyance by the cosurety to his wife, testimony by defendant that at the time of the conveyance he knew that the maker of the note had property was admissible to show good faith in the amount of property retained by him to meet his debts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 838, 840-845, 847, 848; Dec. Dig. §289.]

7. FRAUDULENT CONVEYANCES §277—VOLUNTARY CONVEYANCE—PRESUMPTION.

Under Revisal 1905, § 962, providing that, where there is any evidence tending to show that at the time of an alleged fraudulent conveyance the grantor retained property sufficient to satisfy his then creditors, and that the existence of indebtedness shall be evidence only from which a fraudulent intent may be inferred, the presumption of fraud arising from a voluntary conveyance by a party indebted is removed, and it is proper to refuse a prayer to instruct the jury to find against the good faith of the grantor unless the preponderance of the evidence shows that he retained after the conveyance available property sufficient to satisfy a contingent obligation to plaintiff.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. §277.]

8. FRAUDULENT CONVEYANCES §58—VOLUNTARY CONVEYANCE—PROPERTY RETAINED—AMOUNT.

A surety on a note need retain, as far as his cosurety is concerned, from a voluntary conveyance to his wife, only enough property to pay one-half of the amount of the note; since

that is all that the cosurety is entitled to recover from him.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 138, 140, 144-147, 158; Dec. Dig. ¶58.]

8. FRAUDULENT CONVEYANCES ¶58—VOLUNTARY CONVEYANCE—INDEBTEDNESS—SURETY OBLIGATION.

While surety debts are to be considered as other debts in reserving property from a voluntary conveyance to a wife, the fact that the principal was entirely solvent at the time of the conveyance ought to be considered in determining the amount of property to be retained after the conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 138, 140, 144-147, 158; Dec. Dig. ¶58.]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Burke County; Harding, Judge.

Action by A. A. Shuford, Jr., against F. P. Cook and wife to set aside a conveyance to the wife in alleged fraud of creditors. Judgment for defendants, and plaintiff appeals. Affirmed.

B. B. Blackwelder and Self & Bagby, all of Hickory, and S. J. Ervin, of Morganton, for appellant. Spainhour & Mull and Avery & Ervin, all of Morganton, for appellees.

CLARK, C. J. This is an action to set aside a conveyance by the defendant F. P. Cook to his wife, the codefendant, March 14, 1908, on the ground that it was voluntary and made in fraud of creditors. The defendant F. P. Cook and plaintiff were indorsers of the note of one J. E. Wheeler, who has since become insolvent, and the note was paid by the plaintiff, who at June term, 1913, of Burke obtained judgment against F. P. Cook for \$1,200, and interest from September, 1909, being the pro rata due by him to the plaintiff.

The defendants denied that the conveyance was voluntary or fraudulent, alleging that F. P. Cook at the time of said conveyance to his wife retained property amply sufficient to pay his then creditors, and further alleged that the property conveyed was purchased for the wife by her father and mother. The plaintiff insisted that neither of these allegations was true, but that the conveyance was executed with the fraudulent intent to hinder, delay, and defeat the creditors of F. P. Cook.

The jury found, in response to the issues submitted, that the defendant F. P. Cook, at the time of the conveyance of the said property to his wife, retained property fully sufficient and available for the satisfaction of his then creditors, and, that, while there was no consideration paid F. P. Cook by his wife, the said tract had cost \$1,200, of which \$1,100 had been paid by her father and mother; that the deed for the same had been executed by the vendor to F. P. Cook, with an agreement that he should hold the title for the benefit of his wife, and that in afterwards making the conveyance to her J. P.

Cook had no intent to delay, hinder, or defeat his creditors.

[1, 2] The exceptions of the plaintiff are numerous, but, many of them being of the same character, they may be grouped under a few heads. Exceptions 1, 2, 3, 4, 5, and 6 are to the exclusion of certain acts and declarations of F. P. Cook, as evidence against Victoria Cook, though admitted as to him. This was competent. *Eddleman v. Lentz*, 158 N. C. 71, 72 S. E. 1011. Besides, as the jury find that there was no fraudulent intent on the part of F. P. Cook, it is immaterial that this evidence was excluded as to his wife.

[3] Exceptions 7, 8, 9, 10, 11, 13, and 20 were taken on the cross-examination of the plaintiff, A. A. Shuford, Jr. These questions bore more or less on the matters in issue, and in cases involving fraudulent intent much latitude is allowed on cross-examination as to inquiries that affect the credibility of witnesses or tend to assist the jurors.

[4] Exceptions 14, 15, 16, 17, 18, and 19 were as to the testimony of the plaintiff on a former trial, and it was competent to inquire fully into such testimony. Neither can exceptions 21, 22, and 23 be sustained: for the scope of the inquiry in cases involving questions of fraud is broadened to take in all the circumstances and conditions surrounding the parties.

[5] Exception 24 is to the testimony of F. P. Cook as to why he made the deed to his wife, but it was clearly competent on the question of intent.

[6] Exceptions 25 and 26 are to the testimony of the defendant F. P. Cook that at the time he made the deed to his wife he knew that Wheeler had certain property, and that the cashier of the bank holding the note, which he signed, informed him of the possession of said property by Wheeler. This was competent as showing good faith and intent as to the amount of property which should have been retained by him when making the deed to his wife. *Black v. Sanders*, 46 N. C. 67.

[7, 8] Exception 27 was for the refusal to give the following prayer for instruction:

"Though you should find from the evidence that F. P. Cook, at the time of the execution of the deed in question, honestly believed that J. A. Wheeler was solvent, financially responsible, and would pay the note given to the bank when it became due, and though you should further find that F. P. Cook retained property fully sufficient and available for the satisfaction of his obligations other than the \$2,400 note to said bank, then it would be your duty to answer the first issue 'No,' unless defendants satisfy you by the greater weight of the evidence that F. P. Cook retained property fully sufficient and available to pay the \$2,400 note to the bank, as well as his other obligations."

The plaintiff earnestly pressed this exception, but the act of 1840, now *Revisal*, § 962, provides that the court, where there is any evidence tending to show that at the time of

the alleged fraudulent conveyance the grantor retained property fully sufficient and available for the satisfaction of his then creditors, shall submit the question to a jury "with such observations as may be right and proper." The presumption formerly arising from a voluntary conveyance made by a party indebted is thus removed, and the indebtedness in such case is to be taken and held, in the language of Revisal, § 962, "to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred." *Hobbs v. Cashwell*, 152 N. C. 183, 67 S. E. 495. As against this plaintiff, it was not necessary to retain \$2,400, but as to him the liability to be covered was only \$1,200.

[9] As to exceptions 28, 32, and 33, the requests of plaintiff's counsel which were refused were, in substance, that the defendant must show that he retained property "fully sufficient and available" to pay all his obligations of every kind without regard to his true and ultimate liability thereon by reason of the solvency or insolvency of his co-obligors or principals in an indebtedness to which he is surety. While holding that surety debts are to be taken as other debts in reserving property to pay them, *Pearson, J.*, says, in *Black v. Sanders*, supra: "On the other hand, if the principal be entirely solvent, it would seem that it ought to be considered."

So far as the plaintiff is concerned, it was not necessary as against him, as already stated, that the defendants should have retained and set apart \$2,400 of property; since his liability to the plaintiff could not exceed his pro rata part, i. e., \$1,200.

It having been found on the other issues that the deed to his wife was executed by Cook without any fraudulent intent, and that, if he had such intent, it was unknown to his wife, and that \$1,100 of the \$1,200 originally paid for the land had been furnished by her mother and father, and that the deed to F. P. Cook had been executed by the vendor with an agreement that he would hold the title for the benefit of his wife, much of this discussion is immaterial. But we have considered all the points raised.

No error.

BROWN, J. (dissenting). The following is the first issue:

"(1) Did the defendant F. P. Cook, at the time of the execution of the deed in controversy to his wife, the feme defendant, M. V. Cook, retain property fully sufficient and available for the satisfaction of his then creditors?"

The plaintiff in apt time requested the court to instruct the jury that:

"There is not sufficient evidence in this cause to show that F. P. Cook, at the time of the execution of the deed to his wife, M. V. Cook, retained property fully sufficient and available for the satisfaction of his then creditors, and you will answer the first issue 'No.'"

The court refused to give the instruction, and the plaintiff excepted.

I am of opinion, upon all the evidence, the prayer should have been given. Actual insolvency is not necessary in order to render a voluntary conveyance void; for if a person, largely indebted, makes a voluntary conveyance, and shortly afterwards becomes insolvent, that is enough to set aside the conveyance as fraudulent. Wherever the amount of the property so closely approximates the amount of the liabilities that the conveyance would have a direct tendency to impair the rights of creditors, if they should attempt to force collection by judicial process, the debtor is adjudged insolvent. *Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342. The act of 1840, now section 962 of the Revisal of 1905, provides that no voluntary conveyance or gift by one indebted shall be deemed to be void—

"if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler."

The property must be available to the creditors owning the debts existing at the time of the gift or settlement. The property must be available when such debts become due and payable, and, if payment is refused, the property must be available at the time when the creditor, by the exercise of all due diligence, should reduce debt to a judgment. *Howse v. Judson*, 1 Fla. 133; *Edmunds v. Mister*, 58 Miss. 765; *Cock v. Oakley*, 50 Miss. 628; *State v. Koontz*, 83 Mo. 323; *Pomeroy v. Bailey*, 43 N. H. 118; *Williams v. Hughes*, 136 N. C. 58, 48 S. E. 518; *Black v. Sanders*, 46 N. C. 67. In the last-named case it is held as a matter of law that 20 negroes and two tracts of land valued at \$7,250 are not property fully sufficient and available to pay debts amounting to \$6,848. In the opinion Chief Justice Pearson says:

"No man would lend money upon such security; he would require property of this description to exceed the debt at least one-third, if not one-half."

Accepting defendant's own valuation upon his property, which should be taken cum grano salis, at time he conveyed the property in controversy to his wife, his remaining assets exceeded his liabilities (after deducting homestead and personal exemption) only \$610. The bulk of property retained is of a very fleeting and unsubstantial character. Among the assets are mules, cattle, stock of goods, store accounts, binder, buggy, drill, and wagon; total value, \$2,260. The store accounts alone amount to \$400, and there is no evidence that they can be collected.

To my mind, it is perfectly evident that the defendant was practically insolvent when he executed the deed to his wife, and that he did not retain property fully sufficient and available within the meaning of the statute.

WALKER, J., concurs in this opinion.

(109 N. C. 73)

KIVETT v. GARDNER et al. (No. 150.)

(Supreme Court of North Carolina. May 5, 1915.)

1. ADVERSE POSSESSION ¶79 — "COLOR OF TITLE"—VOID TAX DEED.

A sheriff's deed for taxes, which was not under seal, and was void because the property was sold to the county, which, under the existing law, acquired only a right to foreclose, but which conveyed the property without attempting to foreclose, was "color of title" to support a claim by adverse possession for seven years; since "color of title" is a writing, usually a deed, which professes to pass the title, but fails to do so.

[Ed. Note.—For other cases, see Adverse Possession; Cent. Dig. §§ 459-462; Dec. Dig. ¶ 79.]

For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

2. TAXATION ¶730—TAX DEEDS—SALE TO COUNTY.

Under Revisal 1905, § 2905, authorizing the issuance of a tax deed on production of a certificate of purchase, a county purchasing land at a tax sale can acquire a deed therefor without resorting to foreclosure.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1463; Dec. Dig. ¶ 730.]

B. TAXATION ¶805—LIMITATIONS—LAND SOLD FOR TAXES—POSSESSION OF OWNER.

The ordinary statutes of limitations run against an owner of land sold for taxes unless he has remained in possession of the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. ¶ 805.]

Appeal from Superior Court, Harnett County; Connor, Judge.

Action by Mrs. Lillian L. Kivett against S. J. Gardner and others. Judgment for defendants, and plaintiff appeals. Affirmed.

There was evidence tending to show: That in 1824 Alex. McKay, sheriff, conveyed the land in question to Nell McNeill, Sr.; that he died, leaving two children, Archibald McNeill and Caroline Turner; that plaintiff is daughter of Archibald, and that she has acquired the interests of the other children and grandchildren, descendants, and heirs at law of Nell McNeill; that the land was listed for taxation as the property of these heirs, or some of them, in 1895 or 1896; that the land was sold for taxes in 1897, and a paper writing was executed, purporting to be in pursuance of such sale, in terms as follows:

"* * * Whereas at a sale of real estate for the nonpayment of taxes made in the county aforesaid on the 3d day of May, A. D. 1897, the following described real estate, to wit: One hundred acres of land in Black River township adjoining the lands of S. J. Gardner, H. A. Williams, and C. C. Barbee estate, it being bid off to the county of Harnett, it being the last and highest bidder, for the sum of ten dollars and sixty-six cents tax, and three dollars and sixty-nine cents, cost and interest, making fourteen dollars and thirty-five cents:

"And whereas, the same not having been redeemed from sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of North Carolina necessary to entitle him to a deed of said real estate:

"Now, therefore, know ye, that I, J. H. Pope,

sheriff of said county of Harnett, in consideration of the premises and by virtue of the statutes of North Carolina in such cases provided, do hereby grant and convey unto Alex. Stewart, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

"Given under my hand and seal the 6th day of June, Anno Domini.

"J. H. Pope, Sheriff."

That defendant had acquired, by proper conveyances, the interest of Alex. Stewart, the purchaser.

His honor, having held that this paper was inefficient to convey the title, admitted the same as color of title, and thereupon defendant offered evidence tending to show that, not long after the execution of the paper, Alex. Stewart had taken possession of the property, claiming to own the same under the above instrument, and that he and his grantees had held it under this and the conveyances since made for more than seven consecutive years next before action brought, and apparently more than ten years; that none of the deeds made by Stewart and his successors in interest bore date more than seven years before suit, only the paper writing above set out bearing such date.

On issues submitted, there was verdict for defendant. Judgment, and plaintiff excepted and appealed, assigning for error chiefly that the paper writing in question was not good as color.

J. R. Baggett, of Lillington, and Winston & Biggs, of Raleigh, for appellant. J. C. Clifford, of Dunn, and Chas. Ross, of Lillington, for appellees.

HOKE, J. [1] Color of title has been defined with us as "a paper writing, usually a deed, which professes to pass the title, but fails to do so." Knight v. Roper Lumber Co., 84 S. E. 705, at the present term, and we are of opinion that the instrument under which defendant claims comes clearly within the words and meaning of the definition.

It is urged for plaintiff: (1) That a tax deed void for noncompliance with the statute may not constitute color; (2) that, in any event, the present instrument is not properly color, for lack of a seal.

But the first position has been resolved against the plaintiff in Greenleaf v. Bartlett, 146 N. C. 495, 60 S. E. 419, 14 L. R. A. (N. S.) 660, and the second, in Avent v. Arrington, 105 N. C. 377-392, 10 S. E. 991, cited with approval at the present term, in Knight's Case, supra, and in Gann v. Spencer, 167 N. C. 429, 83 S. E. 620. True, we have held in several cases coming under the former law that, when a county bid in land, it acquired only the right to foreclose. (Wilcox v. Leach, 123 N. C. 74, 31 S. E. 374), and that, when it attempted to convey the title without foreclosure, the conveyance was void (Smith v. Smith, 150 N. C. 81, 63 S. E. 177); but none of these decisions affect the doctrine of

adverse possession under color of title where, as in this case, it is made to appear that the sheriff has executed a written instrument purporting to convey the land in fee, and the grantee, claiming as owner under it, has taken and held possession adversely for more than seven, and even more than ten years, according to the testimony.

Regarding defendant as a purchaser, under an irregular sale for taxes, it would seem that three years' adverse occupation, under a sheriff's deed, is all that would be required. Revisal, §§ 2909, 395. *Lyman v. Hunter*, 123 N. C. 508, 31 S. E. 827.

[2, 3] It may be well to note that, under the present law (Revisal, § 2905), a county purchasing land for taxes may take a deed therefor without resorting to foreclosure. *McNair v. Boyd*, 163 N. C. 478, 79 S. E. 966, and this case holds, too, that it is only when the owner has been in possession that the ordinary statutes of limitations do not operate against him.

We find no error to plaintiff's prejudice in the proceedings below, and the judgment in plaintiff's favor is affirmed.

No error.

(169 N. C. 48)

MITCHEM v. MITCHEM. (No. 445.)

(Supreme Court of North Carolina. May 5, 1915.)

1. FRAUD — § 65 — ACTIONS — INSTRUCTION — CONTENTION OF PARTIES.

In an action for fraud in the sale of a livery business, where plaintiff claimed that defendant falsely represented that the profits of the business were \$300 a month, while defendant contended that he stated that the income from the business was that amount, and that the statement was true, an instruction that, unless the jury found by greater weight of evidence that defendant said he was making a profit of \$300 per month, they should find for him on that issue was correct.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 72-74; Dec. Dig. § 65.]

2. APPEAL AND ERROR — § 1079 — QUESTIONS PRESENTED FOR REVIEW — ASSIGNMENT OF ERROR — BRIEF.

A question discussed on oral argument, but not embraced in the assignments of error nor referred to in the brief, will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4262; Dec. Dig. § 1079.]

3. APPEAL AND ERROR — § 1033 — HARMLESS ERROR — INSTRUCTION — ERROR FAVORABLE TO DEFENDANT.

Plaintiff, in an action for fraudulent representations, cannot complain of errors in the charge, submitting to the jury the issue as to representations, alleged to have been made by defendant, that the business sold to her produced a profit of \$300 per month, where the only representation shown by her testimony was that the business would pay for itself in six months.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.]

4. APPEAL AND ERROR — § 1068 — HARMLESS ERROR — INSTRUCTION — PARTY NOT ENTITLED TO RECOVER.

Error in a charge that plaintiff was not entitled to a rescission of a contract on the ground of fraud because she had not returned the property received was harmless, where the jury found there was no fraud.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.]

Appeal from Superior Court, Gaston County; Thos. J. Shaw, Judge.

Action by Mrs. G. B. Mitchem against D. W. Mitchem. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action brought for the purpose of rescinding a contract of sale and to recover damages, the plaintiff alleging that she was induced to purchase a one-half interest in a livery business upon the false and fraudulent representation of the defendant, that the net income from the business at the time of the sale was \$300 per month, and that the property sold was worth \$1,400. His honor charged the jury that the plaintiff could not sustain her action upon the representation as to the value of the property, to which there was no exception, and the case was tried upon the allegation that the defendant made the representation alleged as to the profits per month. The plaintiff testified as follows:

"My name is Gabrilla Mitchem; the defendant is my brother-in-law, my husband's brother. He advised me on buying some land; told me how much to give, and he had Mr. Mason there to tell me how far to go, and I stopped when he told me to stop. I did not go to him any time prior to the transaction about the livery stable for advice about business affairs, only that time. In reference to this time, I will say he sent up there. Joe came up there and said papa sent after me to come down there; that he wanted me to buy a half interest in the livery stable. I went down there, and I wasn't there but a few minutes until he got to talking to me about the stable; said he wanted to sell, and wanted me and Joe to buy it; said the whole thing was worth \$1,400 and wanted me to buy half and wanted Joe to take the other, and I said, 'Dave, I don't know anything about the livery business,' and he said I knew enough, and advised me to take it and to take his advice, and told me my half would be \$700, and told me to take it, and Joe would take the other half, and in six months it would pay for itself, and I said, 'Have a living out of it, too?' and he said, 'Yes; it does that now, and will do it on,' and I said, 'I will be making right smart money for me out of the little bit I have got.' I had a little bit, and I wanted to put it in something that would make me a little more. He said for me to take that and I could make a living, and it would pay for itself in six months, and Joe said: 'Papa, say 12 months; I think that we can make it in 12 months,' and he said, 'You can make it in six months,' and he named over the horses and buggies and one surrey, I believe; said six horses and seven buggies or seven buggies and six horses, I won't be sure. I did not see the property myself; I told him I would not know if I would go look at them, just took it that they would be what he said. I really never saw them until I moved down there; he said everything was in good condition and would make that money. I paid him \$500 at the

time, I believe it was. After I got down there I found out I wasn't getting anything, and I asked them where the money was, and they said they wasn't hardly making expenses; and about six weeks after I was down there, between 4 and 6, Dave came through the yard, and I said: 'Stop a little bit; I want to talk to you. I am just ruined in this thing.' And he said, 'Why?' and I said, 'Because what money I got is in this,' and I said, 'Take it back off my hands for \$600 and let me go home,' and he just laughed at me and said, 'I don't want it,' and I said, 'Dave, take it back; you can get it off and I can't; take it for \$600 and let me go back home. I can live there and I can't live here.' And he laughed and said he would see if he could not help me get shut of it, and he walked off and left me, and I left it there; left Harvey there, my son, and I come home. I had it to do. Was getting in debt for house rents and not making anything. The horses were just worn-out shacks; there was about six. I did not call them valuable; the best horse there only had one eye, the best buggy horse; one was a little faster. I never examined the buggies. Defendant gave his reason for selling out that he wanted to sell it; wanted to send his little boys to school; was going to send Ed off to school, and could not do it and keep the stable. He did not send him to school while I stayed there. Joe and Dave were there every night or every day when Joe run up the pay roll to find out what they had made. I don't know who got the money. I did not get it; did not receive anything from it."

The jury returned the following verdict:

"1. Was the plaintiff induced to purchase a half interest in the livery business from the defendant by means of false and fraudulent representation by the defendant, as alleged in the complaint? Answer: No.

"2. If so, what damage is plaintiff entitled to recover? Answer: Nothing."

Judgment was rendered in favor of the defendant, and the plaintiff appealed, assigning the following errors: (1) The court erred in charging the jury that there was no evidence of confidential relationship existing between the parties. (2) The court erred in charging the jury that unless they found by greater weight of evidence that D. W. Mitchem told Mrs. G. B. Mitchem that he was making a profit of \$300 a month, they would answer the first issue, "No;" that if they found that what he told Mrs. Mitchem was that he was taking in \$300 a month, then there would be no false representation, and they would answer the first issue, "No." (3) The court erred in charging the jury that plaintiff was not entitled to rescission of contract, for that no offer to return the property had been made; that the property had passed out of possession of plaintiff, and she was therefore in no position to restore it and could not have rescission of contract. (4) The court erred in not allowing the motion of plaintiff's counsel to set aside the verdict and for new trial.

J. F. Flowers and Geo. W. Wilson, both of Gastonia, for appellant. Mason & Mason and Mangum & Woltz, all of Gastonia, for appellee.

ALLEN, J. 1. The first assignment of error is not sustained by the record. His honor did not charge the jury that there was no

evidence of confidential relationship existing between the parties. He did, however, say:

"Ordinarily, gentlemen, where this confidential relationship exists as to a transaction passing between the parties, the presumption is that it is fraudulent, but the court instructs you, gentlemen, that there is no evidence of this confidential relation existing between the plaintiff and the defendant that would create a presumption in the case at all"

—and counsel for the plaintiff admits that upon the evidence introduced upon the trial, this was a correct statement of the law.

[1] 2. We find no error in that part of the charge to the jury embraced in the second assignment of error. His honor stated clearly the respective contentions of the plaintiff and the defendant, and it appears that the fact in dispute was whether the defendant made a representation as to the net profits of the business or as to the gross profits, the plaintiff contending that she was induced to enter into the contract by reason of the statement by the defendant that the net profit of the business per month was \$300, and the defendant contending that his statement was that the gross profit was \$300 per month. This being true, his honor could not do otherwise than charge the jury that if the representation made was as contended for by the defendant, they should answer the issue, "No," and this is the effect of the part of the charge excepted to. His honor charged the jury, in reference to the contention of the plaintiff, that:

"The false representation relied upon in this case is that the defendant represented to the plaintiff that this livery business he then and there proposed to sell to plaintiff was paying to him at the time of the sale, and had been prior to that time, the sum of \$250 or \$300 profit. That is the false representation which is relied upon by this plaintiff—that the defendant made that representation to her. The burden is on the plaintiff to show that he did"

—and with reference to the contention of the defendant that:

"The defendant contends, gentlemen, that you ought to answer the first issue, 'No.' He contends in the first place that he made no false representation, he did not tell her, told her nothing from which she could infer he was making a profit of \$200 or over, but he testified what he told her was that the income from the business, the gross income, was \$300, and he says that is true, and he had been having an income of \$300, and that he had been having that on an average for the last two years prior to that time. So he contends, in the first place, that it was not any false representation made by him; that he stated the truth, the facts as they were, and that the plaintiff misconstrued what he said; thinks that he meant that the profits were as she contends, when he was saying that it was the gross income."

No exception was taken to this part of the charge, and the case was tried upon the theory that this correctly presented the position of the plaintiff and the defendant.

[2] The question discussed upon the oral argument as to the correctness of the statement that "there is no evidence that his gross income was not as stated by him" is not em-

braced in the assignments of error, nor is it referred to in the brief of the appellant.

[3] The charge of his honor impresses us as being more favorable to the plaintiff than she was entitled to, because upon a careful reading of her evidence it does not appear that she testified that the defendant made any representation as to the profits which the defendant had made or was making out of the business, except that, after the statement by the defendant that the business would pay for itself in six months, she asked if she could also have a living out of it, and the defendant replied that it was doing as well as that. She does not say in her testimony that the defendant stated that he had made and was making \$300 per month, and the only representation she says the defendant made was that the business would pay for itself in six months, which is not the representation alleged in the complaint.

[4] It is not necessary to consider the correctness of that part of the charge referred to in the third assignment of error, as the plaintiff cannot, in any event, have rescission of the contract as long as the finding of the jury upon the first issue stands.

The other assignment of error is merely formal.

No error.

(169 N. C. 259)

HUFFMAN et al. v. GAITHER LUMBER CO. et al. (No. 486.)

(Supreme Court of North Carolina. May 11, 1915.)

1. EVIDENCE — 450 — PAROL EVIDENCE — INDORSEMENT.

An indorsement on one of three notes for \$400 each, which recites, "Received on the above \$370.30 * * * less open account \$214.12, being credit of \$156.18 on the note," is ambiguous, and parol evidence in explanation thereof is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. — 450.]

2. TRIAL — 90 — EVIDENCE — OBJECTIONS — MOTION TO STRIKE OUT.

A party, complaining of the answer of a witness as beyond the question asked, must move to strike out the nonresponsive answer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 235, 236, 238–240, 252; Dec. Dig. — 90.]

Appeal from Superior Court, Burke County; Harding, Judge.

Action by F. O. Huffman and another, attorneys in fact of the Wells Lumber Company, against the Gaither Lumber Company and another. From a judgment for plaintiffs, defendant Eugene Morrison appeals. Affirmed.

This is an action to recover a balance alleged to be due on three notes of \$400 each, executed by the Gaither Lumber Company, the payment of which was assumed by the defendant Morrison, president of said company.

The questions in controversy between the parties were:

1. Whether the Gaither Lumber Company was indebted to the plaintiff in the sum of \$214.12 in addition to the three notes.

2. Whether the payment of \$370.30 on October 25, 1909, should be credited on one of said notes, or whether a part thereof should be applied in satisfaction of the amount due on the open account and the balance upon the note.

The jury returned the following verdict:

1. Was the entry on the four-month note for \$400, dated October 20, 1909, as follows: "Received on the above three hundred seventy dollars and thirty cents (\$370.30), October 25, 1909"—made at the same time and as the same transaction as the words appearing thereon, "less open account \$214.12, being credit of \$156.18 on the note?" Answer: Yes.

2. Were the words, "less open account \$214.12, being credit of \$156.18," placed on the note after the words, "Received on the above \$370.30, October 25, 1909," as a different transaction? Answer: No.

3. In what amount was the defendant Gaither Lumber Company indebted to plaintiff by open account at the time the entry of \$370.30 was made on the note? Answer: \$214.12.

4. Is plaintiff's cause of action barred by the three-year statute of limitations? Answer: No.

5. Is the defendant Eugene Morrison indebted to the plaintiff, and, if so, in what amount? Answer: \$250, with interest from October 10, 1912.

6. Is the defendant the Gaither Lumber Company indebted to the plaintiff, and, if so, in what amount? Answer: \$250.

There was a judgment in favor of the plaintiff, and the defendant Morrison appealed, assigning the following errors: (1) To the ruling of the court permitting the witness F. O. Huffman to testify that an entry of credit on the back of a \$400 note in the following words: "Received on the above \$370.30"—meant it was received on the entire account of the Gaither Lumber Company; (2) to the ruling of the court in permitting the witness F. O. Huffman to testify to the declaration of Mr. Gaither that there was no dispute about the amount of lumber shipped by the Wells Lumber Company on the order of the Gaither Lumber Company and that the amount for the same was honest and just; (3) to the ruling of the court denying defendant's motion for judgment of nonsuit at the close of the evidence.

S. J. Ervin, of Morganton, for appellant.
John T. Perkins, of Morganton, for appellees.

PER CURIAM. We have carefully examined the record and find no sufficient reason for disturbing the verdict and judgment of the superior court.

[1] The words in the indorsement of the credit on the note, "the above," are ambiguous, and it was competent for the witness to testify, in explanation thereof, that the whole account against the Gaither Lumber Company, amounting to \$1,414.12, was attached to the note.

[2] The objection to the declarations of Gaither, manager of the Gaither Lumber Company, apparently made in 1910, would be objectionable, but it appears that the witness was only asked as to statements made by him with reference to the items in the account of March 26, April 3, and April 5, 1909, and that these items were not in dispute because they were embraced in two notes of May 18, 1909, in the amounts of \$387.09 and \$370.30. If the answer of the witness went beyond the question it was the duty of the defendant to move to strike it out. As the execution of the notes was not denied and the real dispute was as to the application of a payment, the motion to nonsuit was properly denied.

No error.

(169 N. C. 57)

COCHRAN v. YOUNG-HARTSELL MILLS CO. (No. 477.)

(Supreme Court of North Carolina. May 5, 1915.)

1. APPEAL AND ERROR ⇐997 — QUESTIONS REVIEWABLE—REFUSAL OF NONSUIT—EVIDENCE.

The court, on appeal in construing the evidence on motion to nonsuit, must view it most favorably to plaintiff, and if, when so considered, there is any evidence to support a recovery, a nonsuit is properly denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. ⇐997.]

2. MASTER AND SERVANT ⇐278—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé by contact with an iron pipe charged with electricity, evidence held to support a finding of the employer's negligent failure to maintain a ground wire, so as to prevent the pipe from being used as a ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇐278.]

3. MASTER AND SERVANT ⇐122—INJURY TO SERVANT—SAFE PLACE TO WORK.

An employer, who permits an iron pipe to become and remain charged with electricity while employes must work near it, and who fails to warn them of the danger, negligently fails to furnish a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 232; Dec. Dig. ⇐122.]

4. MASTER AND SERVANT ⇐150—INJURY TO SERVANT—FAILURE TO WARN.

Where an iron pipe was located so as to be near the place where employes were at work, and became heavily charged with electricity by reason of a defect in machinery, failure of the employer to warn employes of the danger was actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. ⇐150.]

5. MASTER AND SERVANT ⇐205—INJURY TO SERVANT—NEGLIGENCE.

An employé may assume that his employer will not negligently expose him to danger, and where the dangerous occupation can be prosecuted by proper precautions, without harmful

results, such precautions must be taken, or liability for injuries will follow.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. ⇐205.]

6. MASTER AND SERVANT ⇐150—OBLIGATION TO SERVANT—WARNING OF DANGER.

An employer must warn and instruct an employé of dangers known to him, or which he should know in the exercise of reasonable care, and which are unknown to the employé or are undiscoverable by him by ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. ⇐150.]

7. MASTER AND SERVANT ⇐265—INJURY TO SERVANT—RES IPSA LOQUITUR.

The rule that where a thing which causes injury is shown to be under the management of defendant, and the accident is such as ordinarily does not happen if those in control use proper care, there is evidence, in the absence of explanation, that the accident resulted from want of proper care, applies to cases involving negligence of the employer in the management of electrical machines and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 956; Dec. Dig. ⇐265.]

8. ELECTRICITY ⇐14—INJURIES INCIDENT TO PRODUCTION OR USE—LIABILITY—CARE REQUIRED.

A high degree of care is required of one using electricity.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⇐14.]

9. MASTER AND SERVANT ⇐289—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an employé injured by contact with an iron pipe charged with electricity, while at work in the customary manner, was guilty of contributory negligence in not shutting off the electric current, held under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. ⇐289.]

10. APPEAL AND ERROR ⇐1033—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

Error in allowing questions to experts is not prejudicial to a party, where the advantage of all the questions and answers was in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. ⇐1033.]

Appeal from Superior Court, Cabarrus County.

Action by Zeb Cochran against the Young-Hartsell Mills Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover damages for injuries alleged to have been caused by the defendant's negligence. Plaintiff was second hand in defendant's mill, and his duty was to keep the machinery running. An electric motor furnished the power, but he had nothing to do with it or the electric apparatus of any kind. The machines were run by shafts, belts, and pulleys. One of the belts broke about 12 o'clock at night on September 19, 1913, and plaintiff mended it, and then, by means of crosspieces nailed to a post, he got upon a sill, underneath which was the

motor. In order to steady himself for the purpose of replacing the belt on the pulley, he caught hold of an iron pipe, and was severely shocked and injured by the current of electricity. One of his legs had to be amputated, and his body was severely burned. There was a ground wire which belonged to the motor, but it had been removed without plaintiff's knowledge. He knew nothing about electricity, and did his work that night in the usual way, as he had done it many times before, and several times in the presence of the superintendent and overseer of the mill, one of them telling him to "keep the frames running and get off all the pounds you can. Keep the belts on the pulleys and make the hands work. Don't let them go to sleep." He received no instructions to do the work, otherwise than he had been doing it, and doing it, too, with safety all the time for several years. He could have stopped the machinery, but it was not customary to do so, nor had he done so, or been told to do so.

Julius Yates testified:

"I had been working with the Young-Hartsell Mill, but left there something like a week before September 19, 1913. I worked at night with Mr. Cochran. My duties were oiling the spinning frame. I worked in the same room with Mr. Cochran. The motor was not stopped at any time to my knowledge only when it was lightning. I don't know of any notices around the mill or in that room at the time, informing people that the ground wire had been taken out. I had seen them put this belt on the pulley—I had done it myself."

He then described the method of replacing a broken belt, and further testified:

"This is the way that Mr. Cochran and I did it; the belt could not have been put on if the machinery was stopped. I don't think you could have moved the belt; I never tried it."

Clarence Price testified that:

"The pulley has to be operating while you are putting the belt on. It is impossible to put a belt on the pulley unless it is connected with the motor."

He also stated that he had seen others put the belt on the pulley just like plaintiff had.

W. A. Honeycutt, after stating that he was an electrical engineer and had worked, as such, in several mills, further testified:

"My duty in all those mills was to see that all motors were repaired and running safely. I had charge of the motors and electricity in the mills. I worked for the Young-Hartsell Company six years. I quit this mill some seven or eight months before September, 1913. I helped to install the motor in the Young-Hartsell Mill. The motor is 100 horse-power motor; one also at the end of the spinning room which I rebuilt. It was never very good from the start. There is a ground wire to all motors. The object of the ground wire is to lead the electricity to the earth. These ground wires are for the purpose of making the motors perfectly safe, and for protection. (Witness is here shown a plat and says it represents about the way the motor was attached to the sill.) This plat is a very good sketch of the motor."

The plaintiff testified:

"I knew how to stop and start up that electric motor. When I wanted to stop the motor, I knocked up a switch. I don't know why that stopped the motor. It is all boxed up. I don't

know how it works. I guess the power is cut off. I didn't know the motor was out of fix. Bill Rainey claimed to be the electrician. I do not know anything about his attempting to fix the motor. I was there at night every minute. I do not know that the machinery stopped for about three hours that night. The motor never would stop. I didn't know where the ground wire was. One morning when I was lying in bed, I heard them talking about it. They said, if the ground wire hadn't been off, I could not have been hurt. That's how I learned the ground wire was off. I had been in the mill four years and could not swear which was the ground wire, if the wire was open to view. I didn't see it. There was a whole bunch of wires there. I didn't know where it was. I do not know anything about it. I didn't see the wire. I know I didn't see any wire. I didn't know there was anything at all the matter with the motor. Rainey had gone there to fix it. I do not know anything about him fixing the motor. He never worked on the motor for me. There may have been things done in the daylight I didn't know about."

Defendant, at the close of the evidence, moved for judgment of nonsuit. The motion was refused, and he excepted. The jury found that the plaintiff's injuries were caused by defendant's negligence; that he was not guilty of contributory negligence, and assessed his damages at \$5,000. Judgment was entered upon the verdict, and defendant appealed.

Wilson & Ferguson, of Greensboro, and L. T. Hartsell, of Concord, for appellant. M. H. Caldwell, of Concord, and J. W. Keerans, of Charlotte, for appellee.

WALKER, J. (after stating the facts as above). [1] It is our duty, in construing evidence on a motion to nonsuit, to view it most favorably for the plaintiff, and when thus considered, if there is any evidence to sustain the charge of negligence in this case, the motion necessarily fails.

[2] We not only think there is some evidence of such negligence, but that, taken as an entirety, the evidence strongly supports the verdict. A simple narrative of the facts will make this clear. The plaintiff had been engaged in running the machinery at this mill for several years. When a belt dropped from the pulley, he had always replaced it in the same way that he did on this occasion, when he was injured; that is, by climbing the improvised ladder described by him as being made of crosspieces nailed to a post, and getting upon the sill, which was just above the motor and rested upon it. Then he stood and steadied himself by grasping an iron pipe overhead with the left hand, and with the other hand replacing the belt on the pulley. He had done this repeatedly without injury to himself, and it was the method he was directed to use by his superiors, and often was done in their immediate presence and in full view of them. The jury have acquitted him of contributory negligence, and we think properly, as we can see no evidence of carelessness on his part, though the court submitted the question to the jury

under fair and correct instructions, at least to the defendant. The only question then is whether there was evidence of defendant's negligence. It appeared, and was in fact admitted, that the electric motor had a ground wire, which is always used with such motors "for protection and safety" and for the purpose of conducting the current to the ground. It was intended, it seems, or the jury might have so found, to prevent just such horrible accidents as this one, and, if it be conceded that there was no evidence that the motor itself was defective, it still remains that an accident has occurred, which was unusual, and which did not occur when the ground wire was there, and when care was used by the defendant. The jury had the right to infer that it was due to the absence of the ground wire. We do not mean to say that this was the only conclusion to be drawn from the evidence, but it surely was one of the legitimate inferences, and, if so, it defeats the motion for a nonsuit.

[3, 4] The only contention that suggests the opposite conclusion is one based upon the answer of an expert witness on cross-examination, when he said that the pipe might have become "alive," that is, as we understand it, charged with electricity, even if the ground wire was attached to the motor and the latter was in good condition, it depending upon the condition of the ground, for if it was damp there would be no shock, but, if dry and the pipe was a better "ground," there would be a shock, and the person handling it might get as much as 550, 600, 700, or 800 volts, regardless of the presence of the ground wire or the condition of the motor. But, if this be so, defendant is then confronted with the principle that it would be evidence of negligence to permit such a condition of danger to exist, when its duty was to furnish a reasonably safe place for its employé to do his work, and especially without giving him some warning of the danger, so that he could avoid it, if possible.

We have defined the master's duty, in this respect, to his servant in numerous cases. *Marks v. Cotton Mills*, 135 N. C. 290, 47 S. E. 432; *Patterson v. Nichols*, 157 N. C. 407, 73 S. E. 202; *Pigford v. Railroad Co.*, 160 N. C. 93, 75 S. E. 860, 44 L. R. A. (N. S.) 865; *West v. Tanning Co.*, 154 N. C. 48, 69 S. E. 687; *Tate v. Mirror Co.*, 165 N. C. 273, 81 S. E. 328. We have held in a number of cases what is the measure of the master's duty towards his servant. Thus we said in *Steele v. Grant*, 166 N. C. 635, 82 S. E. 1033, that:

"The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guaranty of safety to the employé, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in

and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. *R. R. v. Herbert*, 116 U. S. 642 [6 Sup. Ct. 590, 29 L. Ed. 755]; *Gardner v. R. R.*, 150 U. S. 349 [14 Sup. Ct. 140, 37 L. Ed. 1107]; *R. R. v. Baugh*, 149 U. S. 368 [13 Sup. Ct. 914, 37 L. Ed. 772]; *Steamship Co. v. Merchant*, 133 U. S. 375 [10 Sup. Ct. 397, 33 L. Ed. 656]. This undertaking on the part of the master is implied from the contract of hiring. *Hough v. R. R.*, 100 U. S. 213 [25 L. Ed. 612]. The rule was stated and applied in *Mincey v. R. R.*, 161 N. C. 467 [77 S. E. 673], citing the above authorities, and it has been frequently recognized in many other cases. The difficulty is not in the expression of the principle, but in the application of it to any given statement of facts. But this case does not present any such difficulty, as the facts are simple and practically uncontroverted."

And so we say here that this case is free from any difficulty in applying this elementary rule. The facts are simple and practically undisputed. There must have been a defect in the apparatus somewhere, either in the absence of a ground wire or in the electric motor itself, or in the general plan of construction of the complete machine, else the current would not have surcharged the pipe with electricity, making it a dangerous and deadly piece of the machinery for plaintiff, while performing, in the usual manner, the work assigned to him, and, even if this was unavoidable, then it was plainly defendant's duty to warn him of this danger, so as to put him on his guard.

[5, 6] The servant has the right to assume that his master will not needlessly or negligently expose him to danger. *Mercer v. Railway Co.*, 154 N. C. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002; *Britt v. Railway Co.*, 141 N. C. 253, 56 S. E. 910.

"If an occupation, attended with danger, can be prosecuted by proper precaution without harmful results, such precaution must be taken, or liability for injuries will follow if injuries ensue; and if laborers, engaged in such occupation, are left by their employers in ignorance of the dangers incurred, and suffer in consequence, the employers are chargeable for their injuries." *Wood v. McCabe*, 151 N. C. 457, 66 S. E. 433.

"Generally speaking, an employer is bound to warn and instruct his employés concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are undiscoverable by them in the exercise of such ordinary and reasonable care as in their situation they may be expected and required to take for their own safety, or concerning such dangers as are not probably appreciated by them, by reason of their lack of experience, their youth, or through general incompetency, or ignorance; and, unless the servant is so warned or instructed, he does not assume the risk of such dangers; but if he receives an injury without fault on his part, in consequence of not having received a suitable warning or instruction, the master is bound to indemnify him therefor." *Thompson on Negligence*, § 4055; *Norris v. Mills*, 154 N. C. 474, 70 S. E. 912.

There was evidence of a neglect of duty by the defendant in both respects, especially when it is considered favorably for the plaintiff, as it should be, and it was for the jury to say what were the facts. But, as plain-

tiff's evidence made out at least a prima facie case, the nonsuit was properly disallowed.

[7] We have recently so fully discussed the doctrine of *res ipsa loquitur*, as applicable to cases of this kind, that it would seem to be unnecessary to add anything to what has already been said upon the subject. At this term, in *Shaw v. N. C. Public Service Corporation* (this defendant), 84 S. E. 1010, we reviewed the authorities, and thus stated the principle:

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from want of such care"—citing several cases, and among them *Ridge v. Railroad Co.*, 167 N. C. 510, 83 S. E. 762.

This rule of the law has been frequently applied to cases involving negligence in the management of electrical machines and appliances, as will appear by reference to *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Mitchell v. Electric Co.*, 129 N. C. 169, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735; *Turner v. Power Co.*, 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848; *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399; *Houston v. Traction Co.*, 155 N. C. 4, 71 S. E. 21; *Starr v. Telephone Co.*, 156 N. C. 435, 72 S. E. 484; *Hicks v. Telegraph Co.*, 157 N. C. 519, 73 S. E. 139; *Ferrell v. Cotton Mills*, 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N. S.) 64; *Benton v. Public Service Corporation* (this defendant) 165 N. C. 354, 81 S. E. 448. And in some of these cases the defendants were held to be liable where the negligence was not as pronounced, or as clear, as it is in this case.

[8] It is not suggested that the fault was due to the electric company in supplying too strong a current or more voltage than the defendant's contract called for, even if this would tend to exonerate defendant. The fault was on the inside. The plaintiff knew nothing about the motor or its accessories, whether they were in order or not, but the defendant did know, or should have known by the exercise of proper care. We require a high degree of care in the use of such a deadly agency as electricity. The court said, in *Mitchell's Case*, *supra*, and approved in *Ferrell's Case* and *Shaw's Case*, *supra*:

"In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition."

[9] Whether it was negligence on the part of the plaintiff, that is, contributory negligence, not to have shut off the current at the switch before going upon the sill and grabbing the pipe, was plainly a question for the

jury, and it was submitted to them with proper instructions. In substance and in principle, the case is not unlike *Shaw v. N. C. Public Service Corporation* (this same defendant), which was decided at this term.

[10] The questions to the expert were properly framed and were supported by evidence. *Summerlin v. Railroad Co.*, 133 N. C. 554, 45 S. E. 898; *Parrish v. Railroad Co.*, 146 N. C. 125, 59 S. E. 348; *Shaw v. N. C. Public Service Corporation*, *supra*. Besides, it appears that, upon striking a general balance, the advantage of all the questions and answers was largely in favor of defendant. If there had been error, no harm would have resulted to defendant.

A careful review of the facts constrains us to sustain the judgment.

No error.

(169 N. C. 143)

MACE v. CAROLINA MINERAL CO. et al.
(No. 517.)

(Supreme Court of North Carolina. May 12, 1915.)

MASTER AND SERVANT §241—PLACE OF WORK—CONTRIBUTORY NEGLIGENCE.

An experienced miner was killed by the fall of an overhanging ledge of rock and dirt in defendant's felspar and mica mine, due to the removal by him of the supports thereof. He was the foreman and had authority to carry on the work as he saw fit. Held, that as the danger was obvious and fully appreciated by deceased, he was guilty of contributory negligence, and a nonsuit was properly granted.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 757; Dec. Dig. §241.]

Appeal from Superior Court, Mitchell County; Long, Judge.

Action by W. L. Mace, administrator, against the Carolina Mineral Company and Sebe Pitman. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was brought to recover damages for the alleged negligent killing of plaintiff's intestate, Charles Buchanan. He was employed as foreman in defendant's felspar and mica mine, and was killed by the falling of a bank of overhanging dirt and rock in the mine, which defendant avers was caused by his own negligent act, and not by its fault at all. The following testimony of plaintiff's witness, Coleman Pittman, who worked with deceased in the mine, will sufficiently explain the character of the evidence in the case:

"I was there when the dirt fell in. It was kinder undermined, and there was a block of mica sticking back in there, and we were taking that out, and it just fell over. By undermining I mean digging back under the bank. That had been done all along the tunnel, and then we went after the block of mica as big as your double fist. I was the one that got the dirt from around the mica that evening. The fall occurred about 2 o'clock. * * * Charley Buchanan ordered us to get the spar out of there, and we dug in on the under side of the wall, under his orders, to get out the felspar. We did that that morning and also after dinner.

* * * He was digging with us, and getting out the felspar and telling the hands to do that. We dug in under there getting felspar along until he got to the black of mica. We dug 2½ feet and over back in there. He did not give any order to dig any certain length of feet. He was helping us dig under there and saw and knew how far under we dug, and that we were undermining the wall; he was helping to do it. We dug all along under the wall from the mouth of the cut up to the head of the cut. It was under the wall on the right-hand side we were digging. We discovered the mica along after dinner. We went back to work about 12:30 or 1 o'clock. I discovered the block of mica on the right-hand side of the cut in the wall under which we had all been digging to get felspar. The block of mica was about two feet above the floor of the cut, or perhaps 18 inches; it was straight back into the wall; perhaps 18 inches from the head of the cut. When I discovered it, I told Charley Buchanan that I had struck a block of mica, and he laughed and said to get it out, and I set to work with my pick and dug after it on both sides. There was a hard substance around this mica. It was about the size of two hands, just in a kind of vein. I worked at it about 10 minutes. I do not think I dug in a foot. It is pretty hard stuff. I stripped the mica and dug on all sides of it. I dug half a foot before I stripped the mica. I was working under the order of Charley Buchanan, the foreman. Then Charley Buchanan told Clifton Buchanan to go for the drill and I went to help Charley Duncan sort and Clifton. Then Charley Buchanan took his pick and went to work. He did not say anything about my not knowing how to dig mica. As quick as I stopped he dug into the wall, and while he was digging, the earth fell down on him and killed him. Digging on the under side of that cut removed the support for the dirt that was above it in the cut. Mr. Sebe Pitman came to me after it happened, and asked me the cause of the trouble. I told him Charley Buchanan was digging in there when it fell. He certainly dug in there and was removing the support for the dirt, and the dirt above there did fall on him. I did not notice how deep he dug in before it fell. I do not remember what position he was in when the dirt fell. I did not see the dirt fall; I looked around after it fell. I was six feet from him. It fell out of the place in the wall, starting about six feet above, and fell down to where he was digging. No hole left in the wall much for it, just broke off and left a kind of smooth place. I do not know that it was deeper in the center. The hole that was left in the wall was about as deep one place as another, I should think; I really do not know about that. That cut was 15 to 20 feet deep. That morning Charles Buchanan had helped to dig out the felspar along under the wall and told the boys to dig it out. He was digging for mica about where he had been digging for felspar. The digging in the morning had weakened the wall on the right-hand side, and it was the same wall he had undermined that he was digging the mica out of. The tunnel where it had run in had undermined partly and kept on going up with it. After I quit digging for mica, Charles Buchanan dug for it between two and five minutes. The digging I did was under his orders. It was my duty to obey his orders. We had worked in that cut all morning. I do not remember where we dug first."

A paper was handed by defendant's counsel to plaintiff's witness M. C. Duncan, it being a written statement by him as to the transaction, and he testified that it was true, as he understood it. It is as follows:

"I was employed by the Carolina Mineral Company on 24th of April, 1914, and was work-

ing under orders of Charlie Buchanan, foreman of Deer Park mine No. 3, from whom I receive all orders as to what duties to perform. On the morning of April 24th, the open cut in which we were working had straight firm sides with no overhang. At about 9 o'clock the superintendent visited the mines, and no change of condition had occurred. About 11:30 o'clock Fule Pitman said to Buchanan that he had struck a block of mica in the side of the cut, and Buchanan told him to go after it. This Pitman did, and afterward Buchanan joined him and commenced undermining the side, and about 2:10 o'clock the overhang fell, and buried Buchanan and Clarence Stewart."

There was much evidence introduced by both parties, but the foregoing is the substance of its essential parts. At the close of the evidence, the court ordered a nonsuit, and plaintiff appealed.

Chas. E. Greene, John C. McBee, and J. W. Pless, all of Bakersville, for appellant. Black & Wilson, of Bakersville, W. C. Newland, of Lenoir, and S. J. Ervin, of Morganton, for appellees.

WALKER, J. (after stating the facts as above). It appears in this case that the intestate of plaintiff had been employed to work as foreman in the defendant's service, and as overseer of the work performed by others placed under his authority. He was an experienced miner, having been engaged in the business of mining for many years. Because of his expertness thus acquired, the defendant was induced to take him into its service. The work he was to do, on the day of the accident, was left, in respect to the method and manner of doing it, to his own judgment, and he was perfectly free to exercise his own common sense and skill in doing it. According to the evidence and the description of the conditions in the mine just before he was killed, he did not need any one to tell him that by digging under the projecting or overhanging bank of dirt and rock he was placing himself in a very dangerous position, as the unsupported bank would necessarily cave in when he removed the last prop that kept it in place. Any man of ordinary sense and common prudence would know of this danger and appreciate the risk of cutting out the foundation, upon which a bank of dirt rests, and leaving it overhanging, without any support, brace, or prop to prevent its falling in and crushing him, as he was in the way, and must needs be hurt. The danger of such a place was so imminent that any ordinarily prudent man would not have so cut underneath the bank as to weaken its support and cause it to fall, or if this was necessary to be done, would have taken measures to brace it in some way as the work progressed. This court has often held that:

"An employer's duty to provide for his employes a reasonably safe place to work does not extend to ordinary conditions arising during the progress of the work when the employe doing his work in his own way can see and understand the dangers and avoid them by the exercise of

reasonable care." *Simpson v. Railroad Co.*, 154 N. C. 51, 69 S. E. 683.

The rule was well stated in *Covington v. Furniture Co.*, 138 N. C. 374, 50 S. E. 761, as follows:

"The general rule of law is that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care." *Warwick v. Ginning Co.*, 153 N. C. 262, 69 S. E. 129; *House v. Railroad Co.*, 152 N. C. 397, 67 S. E. 981; *Hicks v. Manufacturing Co.*, 138 N. C. 319, 50 S. E. 703.

In *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440, it was held that the obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty towards them of keeping a building which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of the work by them and their fellows. The case of *Cons. Coal & Mining Co. v. Floyd*, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848, has many facts in common with this one, and they are sufficiently similar in that respect to make it a good authority. There it appeared that the intestate was killed by the fall of slate from the roof of a mine, due to the failure to install props while the work was in progress. The claim for damages was sought to be sustained by a class of cases which hold that the duty of the master to provide a safe working place and machinery for his employes cannot be delegated, so as to absolve the master from liability in case of failure of the vice principal to perform that duty. It does not seem necessary to review these cases. They are, as a rule, based upon the proposition that where the appliance or place is one which has been furnished for the work in which the servants are to be engaged, there the duty above stated attaches to the master. The court said:

"We need not discuss this proposition for we have not that case. Here the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employes within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself a part of the work which they were employed to perform. The distinction is shown in a number of cases, among which may be cited *Fraser v. Lumber Company*, 45 Minn. 235 [47 N. W. 785]; *McGinty v. Reservoir Company*, 155 Mass. 183 [29 N. E. 510]; *Coal Co. v. Scheller*, 42 Ill. App. 619."

And so in *Petaja v. A. I. Mining Co.*, 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505, the facts were

that the plaintiff was injured by the fall of ore while working in the room of a mine used by the hands while excavating for ore and getting it out. It was decided, and affirmed on a rehearing, that the place where the injury occurred must have been furnished by the master, or be one which his duty to the servant required him to furnish and keep in a safe condition, before the ordinary rule of liability can be applied, and that the place then in question was not of that description. The court said:

"Now, if this room can properly be said to be a place furnished to the servants in which to carry on the master's business, and which he must, at his peril, keep in reasonably safe condition, as a factory or warehouse, then the case should have gone to the jury; but, if it is not such a place, then it falls within that other rule that the duty of the master is performed by using reasonable care or furnishing suitable material, and employing capable and efficient men to do the work. In view of the cases of *Schrolder v. Flint & P. M. R. Co.*, 103 Mich. 213 [61 N. W. 663, 29 L. R. A. 321, 50 Am. St. Rep. 354], and *Beasley v. F. W. Wheeler & Co.*, 103 Mich. 196 [61 N. W. 658, 27 L. R. A. 266], cited in the former opinion, there is no doubt that a master must furnish a reasonably safe place for a servant to work, if a structure is required for the carrying on of his business; and the briefs furnished in this case upon the part of the plaintiff would render us more assistance, had they called our attention to cases establishing the claim that a master is obliged to make safe the place which the servant makes and occupies as a means of doing his work, or which results as an accident of the work, although it necessitates his presence in a place, to a greater or less degree, unsafe. In such cases, must the master stay with, or follow up, the servants, to be certain that they make the place safe, so that they or some of them be not injured? There are many cases which draw the distinction pointed out. Such a case is *Beasley v. F. W. Wheeler*, supra."

The same was held to be law in *Fraser v. R. R. Lumber Co.*, 45 Minn. 237, 47 N. W. 785, where it was said:

"An important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform."

It was held in *St. L. & M. R. R. Co. v. Baker*, 110 Ark. 241, 163 S. W. 152, that where a servant was employed to wreck a structure, such as an unsafe building, or to do blasting and excavating, the duty of keeping the place of work safe, if it was originally so, devolves upon the servant and not on the master. The rule that an employer must exercise ordinary care to provide a safe place of work for his employe was held in *Riley v. Neptune*, 181 Ind. 228, 103 N. E. 406, not to apply, where from the nature thereof, the conditions are ever changing, so as to increase or diminish the danger in the course of the particular work, the same being passing risks arising out of the nature of the work and of which the servant is as well informed as the master. *L. P. Cement Co. v. Bass*, 180 Ind. 538, 103 N. E. 483. It was held in *Andrews v. T. Mining Co.*, 180 Mich.

72, 146 N. W. 394, that the doctrine of furnishing a safe place to the servant to do his work does not apply where a miner was killed while engaged in making "hitches" in which to place timbers to hold up the roof, "since he is required to make the piece of work safe as he went." Nor, it has been said, does the rule of a safe place apply to building operations where conditions are continually changing, due to the acts of the servants themselves. *Roshalt v. Worden-Allen Co.*, 155 Wis. 168, 144 N. W. 650. It was not necessary that intestate should have had any warning from the superintendent. He was an expert himself in mining, and it did not even require that one should be so thoroughly experienced in such work as he was to know or understand that the work was dangerous, for a man of ordinary intelligence would know that to withdraw a prop or foundation from an object resting upon it would necessarily cause it to fall. "(1) An employer may ordinarily assume that an adult employé has that knowledge which is acquired by common experience, and hence understands those dangers which may readily be known by common observation. (2) All adult employés are presumed to have some knowledge of the properties of nature, and the operation of natural laws, such as the law of gravitation. (3) An employé assumes the risk of injury from obvious dangers, unless because of his immaturity, inexperience, etc., he is incapable of appreciating the danger therefrom." *Riley v. Neptune*, 181 Ind. 228, 103 N. E. 406. No one should be allowed to justify or excuse his own improper conduct by alleging that he expected that another would prevent such conduct on his part. *Houston, etc., Railroad Co. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 790. Intestate was the author of his own misfortune, and no one was to blame but himself. This is shown with as near an approach to a demonstration as anything short of mathematics will permit, as was said of a plain act of negligence in *B. & P. Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506. The same court, in *Bunt v. S. B. Mining Co.*, 138 U. S. 483, 11 Sup. Ct. 464, 34 L. Ed. 1031, where an employé had been killed by removing a post which supported the roof of a mine, thus causing the roof to fall upon him, said:

"Bunt participated in taking out the post, with full knowledge of the danger, and, after the post had been removed, * * * sat down under the shattered roof. Recklessness could hardly go further. The evidence would warrant no other conclusion than that he took the risks of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death."

The two cases are parallel with each other; the fact that there a post was taken out, and here some dirt was dug out, can make no difference. In this case the danger of the place where intestate was working and the cause of the accident, were due to

his own careless act in undermining the upper wall of dirt, so that it lost its natural support and fell upon him. The recent case of *Neville v. Bonsal*, 166 N. C. 218, 81 S. E. 448, in which a servant was killed by an act of the foreman similar to the one that caused the intestate's death, is applicable. We held the master liable because the foreman had been negligent in digging at the bottom of an embankment, which caused the upper layer of dirt to fall and kill the intestate of the plaintiff in that case. The court there said:

"The work was being done under the management of one Stowe, who, about three hours before the cave-in, ordered the plaintiff's intestate to work at that place. The evidence shows that Stowe was in and out of the pit all the time, and knew of the conditions. It is a fair inference from the evidence that Stowe took no precautions to prevent a cave-in before the supporting bank of dirt was removed. It was the duty of Stowe to take such precautions as the situation permitted, so as to prevent injury to his subordinates when the bank of dirt at the base of the pit was removed; ordinary prudence dictated it."

If the company was held liable because of its foreman's culpable negligence in causing the death of the intestate by improperly excavating the bank of earth, so that its support was weakened and it fell, it follows that the company would not have been liable if the foreman himself had been killed by the same act of negligence, which would, in that case, have been the efficient and proximate cause of the fatal injury. It was even held in *Alteriac v. Coal Co.*, 161 Ala. 435, 49 South. 867, that:

"Where a miner of many years' experience saw a pot or bell-shaped rock in the roof of a mine, and knew that it was more or less disconnected and liable to fall without warning at any moment, and after telling his superior of it, and that he would not work without timbers, but who returned to the work under the pot or bell-shaped rock on being told to do so, and on the promise that timber would be sent at once, he assumed the risk incident to his return and work thereunder."

It must be borne in mind that this foreman of hands was himself a very experienced miner, and knew, as the evidence shows, what was the safe method of doing the work. It appears that those of even less experience in mining knew of the danger. If he had been inexperienced and was put to do work of a dangerous character without proper warning or instruction, the case might be different. He knew of the danger and was fully able to take care of himself, and the fault was all his own. No man, by his own voluntary and negligent act, will be permitted to impose liability on another for its injurious consequences, for he will not be allowed to reap an advantage from his own wrong. *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17. The peril was obvious, and he should not have caused it or exposed himself to it.

It follows that there was no wrong com-

mitted by defendant which would make it liable for the intestate's death, and the non-suit was properly granted.

Affirmed.

(169 N. C. 70)

WATAUGA & Y. R. CO. v. FERGUSON.
(No. 474.)

(Supreme Court of North Carolina. May 5, 1915.)

1. EMINENT DOMAIN ⚡254—PROCEEDINGS—APPEAL.

Revisal 1905, § 2587, declares that if the railroad company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, it may take and hold possession of the land sought to be condemned until final judgment on appeal. Section 2567 (4) declares that a railroad company may lay out its right of way upon making compensation. Priv. Laws 1905, c. 411, contains a similar provision authorizing the condemnor to take lands. The chapter was amended by Priv. Laws 1913, c. 11, by adding that, after the amount of the compensation shall have been determined, the railroad company shall not be required to institute proceedings for the condemnation of lands prior to entering thereon for the purpose of constructing its line of railroad. Section 2566 declares that the chapter which relates to condemnation shall govern and control, anything in any special act creating a railroad corporation to the contrary notwithstanding, unless in such act the sections intended to be repealed shall be specifically referred to. No such reference appeared in Priv. Laws 1913, c. 11. *Held* that, as the Legislature may authorize the actual taking of lands before compensation is made, section 2566 cannot prevent subsequent antagonistic legislation, and so the railroad company, which has entered on the land, may appeal from an assessment of damages without depositing the amount in court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 665; Dec. Dig. ⚡254.]

2. EMINENT DOMAIN ⚡74—CONDEMNATION PROCEEDINGS.

The Legislature may authorize the taking of property under the right of eminent domain, without requiring a precedent payment therefor, although it must provide some course whereby the owner may obtain payment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 188-197; Dec. Dig. ⚡74.]

Appeal from Superior Court, Caldwell County; Harding, Judge.

Proceeding by the Watauga & Yadkin Railroad Company to acquire the land of Blanche Ferguson. From an order approving the assessment of damages by the condemnation commissioners, condemnor appeals. Reversed.

Squires & Whisnant, of Lenoir, for plaintiff. W. C. Newland, of Lenoir, and Hackett & Gilreath, of Wilkesboro, for defendant.

CLARK, C. J. This is an appeal from an order of the clerk approving the assessment of damages by the commissioners condemning the right of way for the plaintiff, under its charter (Private Laws 1905, c. 411).

[1, 2] Rev. § 2587, provides:

"If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that

event the said company may enter, take possession, * * * and hold said lands, notwithstanding the pendency of the appeal and until the final judgment rendered on said appeal."

The charter of the plaintiff (Pr. Laws 1905, c. 411) is practically to the same effect as the provision in Rev. § 2567(4), which provides that the railroad company may lay out its road not exceeding 100 feet in width and construct the road, making compensation therefor, as provided by that chapter, for lands taken for the use of the company. Chapter 11, Private Laws 1913, amends this provision of the charter (section 4, c. 411, Pr. Laws 1905) by adding at the end thereof:

"After the amount of such compensation shall have been determined by a proceeding instituted either by the said railroad company or by the owner of the lands through which the line of said railroad may run; and said railroad company shall not be required to institute proceedings for the condemnation of lands prior to the time of entering upon the lands of any person for the purpose of constructing its line of railroad."

The plaintiff entered upon the right of way constructed its road and is now operating traffic over the same. The defendant relies upon Rev. § 2566, which provides that that chapter (chapter 61) "shall govern and control, anything in any special act of assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the General Assembly * * * the section or sections of this chapter intended to be repealed shall be especially referred to by number and, as such," shall be repealed. This reference was not made in chapter 11, Private Laws 1913, and on motion of the defendant the court dismissed the plaintiff's appeal upon the ground that, not having paid into court the \$800 assessed for damages, the plaintiff could not prosecute its appeal.

It is true that Rev. § 2566, was held valid in *Railroad v. Railroad*, 106 N. C. 16, 10 S. E. 1041, and *Liverman v. Railroad*, 109 N. C. 52, 13 S. E. 734, but said section 2566 of the Revisal is like any other act of the Legislature, and is subject to any subsequent legislation, and is only useful in construing the meaning of subsequent legislation when it is doubtful. But it cannot have the effect to prevent antagonistic legislation at a subsequent date.

The amendatory act (chapter 11, Pr. Laws 1913) authorizes the plaintiff company to enter "upon the lands of any person for the purpose of constructing its line of railroad" without prior thereto instituting proceedings for condemnation. The power of the Legislature to authorize the taking of property under the right of eminent domain, without requiring the precedent payment therefor, is discussed and decided in *State v. Lyle*, 100 N. C. 497, 6 S. E. 379, and has been approved since. See citations in *Anno*, Ed. It is there held that compensation must be provided for to warrant the taking, but that it

need not precede the taking, and that "the owner is confined to the special remedy given him by the statute under which his property is seized."

In *State v. Wells*, 142 N. C. 593, 55 S. E. 210, *Street R. R. v. Railroad*, 142 N. C. 438, 55 S. E. 345, 9 Ann. Cas. 683, and *State v. Mallard*, 143 N. C. 666, 57 S. E. 351, the court held that, under the general statute, a railroad company had no right to begin the construction of its road until the payment into court of the damages assessed, and that its only right prior to payment thereof into court was to enter on the right of way merely for the purpose of surveying and laying it off, so that the commissioners might assess damages. But as we have seen under the amendment to the charter of the plaintiff company, by chapter 11, Laws 1913, the plaintiff could construct its railroad before complying with this requirement. This does not deprive the defendant of proceedings to collect the compensation assessed on the final trial, for until payment therefor the title to the easement in her lands does not pass to the plaintiff company.

Reversed.

(101 S. C. 29)

ALTMAN v. CHARLESTON & W. C. RY.
CO. (No. 9083.)

(Supreme Court of South Carolina. April 29, 1915.)

1. TRIAL \Leftrightarrow 251—INSTRUCTIONS—COMPLAINT—ISSUES NOT RAISED.

In an action in which the petition alleged that plaintiff owned land adjoining a railroad right of way, that on the opposite side of the railroad there was an accumulation of surface water, that defendant built a culvert and caused the water to overflow plaintiff's land, with intent to injure plaintiff and willfully and wantonly and without regard for plaintiff's rights, it was error to submit the issue of ordinary negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. \Leftrightarrow 251.]

2. PLEADING \Leftrightarrow 237—AMENDMENT—TIME FOR AMENDMENT—AMENDMENT AFTER SUBMISSION.

It was error to allow a complaint alleging a willful and wanton wrong to be amended to allege negligence after the pleadings and testimony had closed and the jury had retired.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 603-619; Dec. Dig. \Leftrightarrow 237.]

Appeal from Common Pleas Circuit Court of Hampton County; Geo. W. Gage, Judge.

Action by Adele Altman against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

F. Barron Grier, of Greenwood, and J. W. Manuel, of Hampton, for appellant. J. W. Vincent and T. H. Gooding, both of Hampton, for respondent.

FRASER, J. This case raises but two questions, and may be stated briefly.

[1, 2] The plaintiff alleges: That she is

the owner of a tract of land lying on the defendant's right of way. That across the railroad, on the opposite side, there is an accumulation of surface water. That the defendant put in a culvert under its roadbed, and thereby caused the water to pass upon and overflow defendant's land. "That the placing of said culvert under the said track of said defendant by said defendant, causing the damages as aforesaid to plaintiff's land, was totally unnecessary, and was done with intent to injure this plaintiff in the possession of her said land and in the enjoyment thereof, and was done willfully and wantonly and without regard for the rights of this plaintiff."

The defendant set up a general denial. At the conclusion of the testimony, the defendant moved for a direction of a verdict in its favor, on the ground that there was no testimony to sustain a verdict, based on willfulness and wantonness, and the plaintiff was not entitled to a verdict based on negligence. This motion was refused. His honor allowed the issue of negligence to go to the jury. After the jury retired, his honor allowed the amendment of the complaint, alleging negligence. The appeal raises two questions (there are many exceptions): (1) Was it error to allow the amendment? (2) Can a verdict for negligence be allowed on a complaint that charges only a willful wrong? These two questions present really one issue. If the complaint will sustain a verdict for negligence, then the amendment was harmless.

The main question is no longer an open one in this state. See *Proctor v. Southern Railway*, 61 S. C. 185, 186, 39 S. E. 357:

"Now, in this case, there is no allegation whatever that the plaintiff was injured by the ordinary negligence (as the circuit judge terms it in his charge) of the defendant, and no fact is alleged which would tend to show such negligence. On the contrary, the allegation is that the defendant did the acts complained of 'with intent to frighten and scare the plaintiff's team and injure the plaintiff willfully, wantonly, and recklessly, and not regarding the rights of the plaintiff in that regard.' This, so far from being an allegation of the want of due care on the part of the defendant, which would constitute 'ordinary negligence,' is, on the contrary, an allegation that the defendant purposely, not negligently, did the acts complained of with intent to injure the plaintiff. So that the practical question presented is whether there was error on the part of the circuit judge in instructing the jury that, even if they were not satisfied that the defendant did the acts complained of in the manner and with the intent alleged in the complaint, they still might find for the plaintiff, if they were satisfied that the injuries complained of were due 'to the negligence, want of due care, of the railroad company.' It seems to us clear that such an instruction would be erroneous, for it would be in effect saying that, where a defendant is charged with one wrong, the jury may hold him liable if a wholly different wrong from that charged is proved against him; that if a person is charged with willful and intentional wrong, and such charge is not sustained by the testimony, still he may be held liable if the jury are satisfied that he has committed an en-

tirely different and distinct wrong with which he is not charged. In other words, that a person who is brought into court to answer to one charge may be held liable under another and different charge for which he has not been called upon to answer."

The court goes on to say:

"In case where the wrong charged in the complaint is willful and done with intent to injure the plaintiff (as it is here), contributory negligence on the part of the plaintiff cannot be pleaded as a defense."

It was error to allow the jury to pass upon the question of "ordinary negligence," under this complaint, and also to allow an amendment that changed the cause of action after the pleadings and testimony had closed.

The judgment is reversed.

GARY, C. J., and WATTS and HYDRICK, JJ., concur.

GAGE, J., having heard this case on circuit, did not participate in the consideration of this case.

(100 S. C. 489)

HARRIS v. SOUTHERN RY. CO.
(No. 9071.)

(Supreme Court of South Carolina. April 19, 1915.)

1. CARRIERS \S 389—INTERSTATE TRANSPORTATION—SCHEDULE OF RATES.

An interstate passenger is bound to take notice of the rules and regulations as to the transportation of baggage filed with and approved by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. \S 389.]

2. CARRIERS \S 397½—LOSS OF BAGGAGE.

Where a passenger's trunk was put off the train at destination in the evening and was not claimed by the passenger until next morning, a reasonable time had not elapsed for its removal so as to change defendant's liability for its destruction by fire while in the depot from that of carrier to that of warehouseman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1519-1528; Dec. Dig. \S 397½.]

3. CARRIERS \S 405—LOSS OF BAGGAGE—LIMITATION OF LIABILITY.

Where the carrier's rate schedules, approved by the Interstate Commerce Commission, provided for a limitation of liability for the loss of baggage, unless its value should be declared and excess rates paid, an interstate passenger checking a trunk without specifying its value can recover no more than the amount limited in case of its destruction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1544-1549; Dec. Dig. \S 405.]

Appeal from Common Pleas Circuit Court of Edgefield County; John S. Wilson, Judge.

Action by Nannie E. Harris against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. New trial conditionally granted.

N. George Evans, of Edgefield, and B. L. Abney, of Columbia, for appellant. B. E. Nicholson, of Edgefield, for respondent.

GAGE, J. Action to recover \$341.65 the value of a trunk and contents burned in the railroad baggage room at Edgefield, and \$50 statutory penalty for deferred payment of

the claim. The jury returned a verdict for the aggregate sum of \$491.65. The defendant has appealed.

The plaintiff is a young lady. On July 3, 1913, at Augusta, Ga., she bought a ticket over the defendant's line of road to procure for herself transportation therefrom to Edgefield, S. C., and thereon she had checked her trunk for the same destination. She took the cars at Augusta, and she arrived at Edgefield about 5 o'clock p. m. of the same day. She went the same evening five miles into the country, which was the ultimate destination she set out to make. She returned to Edgefield the next morning for her trunk. The depot had been destroyed by fire the night before, and with it the trunk. The plaintiff sued the defendant both as carrier and as warehouseman. The defendant pleaded that the plaintiff had failed to exercise ordinary care when she left the trunk in the depot overnight, and that such negligence by her caused the loss of the trunk. The defendant also pleaded:

"That the journey from Augusta, Ga., to Edgefield, S. C., was an interstate journey, and was controlled by, and subject to, the federal act to regulate commerce and the amendments thereto, and was subject to the rules and regulations governing passenger and baggage transportation filed by the defendant, Southern Railway Company, with and approved and published by the Interstate Commerce Commission, and said rules and regulations relating to transportation of passengers and baggage as published were on file in the ticket office of the defendants at Augusta, Ga., for the use of the public, and certain portions of said rules and regulations were printed on the ticket purchased by plaintiff at Augusta, Ga., and the plaintiff is bound by the same."

There are 24 exceptions, but the only question much argued at the bar was the defendant's liability as a carrier betwixt the states, and we shall consider that issue alone; the case turns upon it. A decision involves the application of the federal statutes to regulate commerce between the states, as construed by the final arbiter of those statutes, the Supreme Court of the Union. The exceptions which make the issue arise on the charge of the circuit court, and the particular matters in the charge excepted to are these: That the court was requested to charge and ought to have instructed the jury the following postulates: (1) That when the defendant company filed with the Interstate Commerce Commission a schedule of rates and rules for the transportation of passengers and baggage, and when that Commission approved the same, then such rates and rules became operative and governed the case, and that it was irrelevant whether the rates and rules were posted and published at the railroad station in Augusta or not, and that it was not necessary that the plaintiff should have actual knowledge of such rates and rules. (2) That by such rates and rules the plaintiff is limited to a recovery of \$100 for the value of her trunk, unless she shall have declared aforetime to the defendant at Au-

gusta a greater value than that and paid to the defendant an excess rate thereon. (3) That by such rules and rates jewelry should not be put into checked baggage. (4) That by such rates and rules the defendant was not liable for the trunk as *common carrier* when the same had arrived at the depot in Edgefield. (5) That by such rules and rates the defendant had the right to limit its liability for the trunk to \$100, unless the plaintiff had before so declared and paid a greater value and a higher rate. We shall not decide all these issues; it is not necessary.

[1] There is no pretext that the plaintiff did aught at Augusta but purchase a ticket, check a trunk, and board a train in the usual fashion. She did not declare for her trunk a greater value than \$100, and she therefore paid no "excess baggage." It is not gainsaid as fact that the Interstate Commerce Commission had before this transaction approved the rates and rules of the defendant for the transportation of passengers and trunks; nor is it denied as fact that the rates and rules required the plaintiff to declare if her baggage exceeded \$100 in value, and if it did she was obliged to pay excess thereon; nor is it denied as law that by such rates and rules the plaintiff had to make the aforesaid declaration and pay the aforesaid excess in order to claim now a greater value for her trunk than \$100. *Boston v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 1141. The *Hooker Case*, supra, had not been decided when the case at bar was tried, so that the circuit court and the bar had no chance to know how the court of last resort would determine such an issue. The plaintiff, while tacitly conceding that the *Hooker Case* is decisive of those controversies where the rates and rules are duly posted, as they were there, and where the railroad company is sued as carrier, as it was there, contends in this case that the rates and rules were not, but ought to have been, posted in Augusta, and the trunk was not in actual transit, but had arrived at its destination. Considering in order these two suggested divergent features of the *Hooker Case* and this case, we think the operation of the rates and rules arises out of their approval by the Interstate Commerce Commission, and that act alone makes them the law of the case. It has been practically so held. *Kansas v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, and cases cited. If a failure by the agent at Augusta to post the rates and rules there may abrogate an order of the Interstate Commerce Commission, for its approval amounts to an order, then the operation of that order would depend wholly upon the diligence of many local agents at many localities. We are mindful of the possible embarrassment of the travelling public which may result from this conclusion. A passenger, boarding a train in Augusta to travel less than 50 miles to Edgefield, must take no-

tice of six printed pages of rules and regulations made up by the carrier for his government and filed at the city of Washington. Nor is the duty put upon the carrier, who made and knows the rules, to advise the passenger that such rules exist. But the fundamental law of the land lodged in Congress the power "to regulate commerce among the several states"; Congress set up the Interstate Commerce Commission and endowed it with extraordinary powers; the Supreme Court has construed the Constitution and the statutes, and we are held to its conclusions.

[2] The next issue is whether or not the carrier's liability is altered that the trunk had reached Edgefield and been put off the car and into the railroad baggage room. The plaintiff's second cause of action rests on a supposed difference of the liability arising thereout from that resting upon it while it actually carried the trunk. The plaintiff maintains that although under the case of *Hooker*, supra, the defendant would perhaps not have been liable to her above \$100 had the trunk perished by flames in the cars while they were on the tracks en route to Edgefield, yet after the cars reached Edgefield and the trunk was put out of them and into the baggage house, the defendant's liability was immediately changed from that of carrier to that of warehouseman, and that such liabilities are essentially different. In the *Hooker Case* the court used language which suggests such a difference. Therein the court said:

"It is to be borne in mind that the action as tried and decided in the state court was not for negligence of the railroad company as a warehouseman for the loss of the baggage after its delivery at [the] * * * station, but was solely upon the contract of carriage in interstate commerce."

Amongst the rules set out in the filed and posted schedule and relied upon by the plaintiff is this one:

"The carrier * * * shall cease to be liable as common carrier for property transported in baggage cars when the same has arrived at destination."

That rule does not state what is the liability of a common carrier for property while being transported in baggage cars; it assumes that such liability exists and is fixed by law; it only declares that such liability shall cease when the baggage has arrived at destination. Such liability is that of insurer of baggage, so that when the trunk was being actually carried by the cars, the company insured its safety. But such insurance ceased by the rule when the trunk arrived at Edgefield, which was the destination. Nor does the rule define what *arrival* at destination means; it assumes that the law fixed the meaning of that expression; it only declares that whenever and however arrival is accomplished, at that time and henceforth the plenary liability of insurer should cease. The plaintiff might have said to the defend-

ant's agent when she disembarked from the cars at Edgefield:

"Keep my trunk for a week. I will pay the storage charges thereon, and I will call again for the trunk."

In that event, and upon compliance by the carrier, the railroad company would occupy to the plaintiff only the relationship of warehouseman, under well-defined obligations, and the act of Congress and the rules and regulations of the Commission, so far as it now appears, would be beside the question. But the instant case is not of that sort. When the trunk was ejected from the baggage car onto the ground, the obligation of the carrier did not instantly cease, and the obligation of the warehouseman did not instantly set in. It was the duty of the carrier to put off the trunk, and it was the duty of the passenger to then take the trunk, but, in the nature of the case, not immediately. The passenger has a reasonable time to lay hands on, and the carrier has a like time to take hands off; and until that time transpires, the trunk has not arrived, and a new relationship thereabout has not set in. *Spears v. Railroad*, 11 S. C. 188. When that time has transpired, it may be the law will regard the situation as amounting to a *constructive delivery*. *Heyman v. Railroad*, 203 U. S. 278, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130. What is a reasonable time for delivery must, in some cases, be determined by a jury. Where there is a dispute about what took place between the passenger and the carrier at the time the trunk left the cars, and therefore, whether or not a new relationship was instituted between them, the issue of a reasonable time to deliver ought to go to a jury. But in the case at bar there is no difference between the parties about what was said and done at Edgefield in the afternoon of the 3d of July. The lady said she arrived at Edgefield when it was "almost dusk"; that she did not then claim her trunk, and that she then said nothing to the agent about it; that she went into the country, and came back to Edgefield for the trunk next morning before 9 o'clock. The agent said he put the trunk in the baggage room, and that nobody called for it that night; that the office closed before 9 o'clock.

[3] There is only one inference to be drawn from the testimony, and that is the reasonable time to deliver and to claim the trunk had not elapsed; that therefore the trunk had not "arrived" at its destination, and that it was on the night of the fire, in contemplation of law, in transit from the passenger at Augusta to the passenger at Edgefield; that the railroad company was at that time its insurer; and that by the acts of Congress and the rules and rates of the Interstate Commerce Commission the liability of the carrier to the passenger was limited to

\$100. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088.

The other issues made by the exceptions are irrelevant.

Our conclusion is that there must be a new trial, unless the plaintiff shall remit all the recovery save \$100, and that within 30 days from the filing of this opinion. It is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(100 S. C. 363)

WILLIAMS et ux. v. COLUMBIA MILLS CO. et al. (No. 9043.)

(Supreme Court of South Carolina. March 29, 1915.)

1. LANDLORD AND TENANT ⇨180—EJECTION—ACTION FOR DAMAGES—EVIDENCE.

In an action by a former mill employé against the mill company for wrongful discharge from a millhouse, testimony by the employé that he was discharged because he had arranged to give a barbecue, and wanted to be excused from work for one or two days, was not objectionable.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. ⇨180.]

2. EVIDENCE ⇨501—OPINION EVIDENCE—DAMAGE TO FURNITURE.

In an action for damages caused by wrongful ejection from a house, where plaintiff had stated the facts, he can give his opinion as to the damage done to the furniture.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2292-2305; Dec. Dig. ⇨501.]

3. LANDLORD AND TENANT ⇨180—EVICTION—ACTION FOR DAMAGES—EVIDENCE.

In an action for wrongful eviction of a tenant, testimony by another that she paid the rent for plaintiff is admissible if proof of the payment of rent was competent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. ⇨180.]

4. LANDLORD AND TENANT ⇨180—EVICTION—ACTION FOR DAMAGES—EVIDENCE.

In an action for the wrongful eviction of a mill employé from a millhouse, where the company claimed a rule that a family which furnished only one hand for the mill could not occupy such a house, evidence for the plaintiff that other operatives who had only one hand working in the mill rented similar houses was competent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. ⇨180.]

5. JUSTICES OF THE PEACE ⇨129—CONCLUSIVENESS OF JUDGMENT—EVICTION OF TENANT.

A judgment dispossessing a tenant in a proceeding under Civ. Code 1912, § 3506, so long as it is unreversed, estops the tenant from claiming damages for the eviction, except for excessive force used therein, though the statute provides that a tenant wrongfully dispossessed shall have an action for damages.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 408-411; Dec. Dig. ⇨129.]

**6. LANDLORD AND TENANT — 180 — EXEM-
PLARY DAMAGES — WRONGFUL EVICTION —
STATUTE.**

Under Civ. Code 1912, § 3509, giving a tenant wrongfully discharged an action for damages against a landlord, punitive damages may be allowed.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. — 180.]

**7. APPEAL AND ERROR — 209 — QUESTIONS
PRESENTED FOR REVIEW—PUNITIVE DAM-
AGES.**

An exception that there was no evidence to support a finding for punitive damages cannot be considered on appeal, where the question was not raised in the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1290-1298, 1300, 1303; Dec. Dig. — 209.]

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by Henry M. Williams and wife against the Columbia Mills Company and another. Judgment for the plaintiffs, and defendants appeal. Reversed.

Melton & Sturkie, of Columbia, for appellants. C. M. Efrd, of Lexington, and B. L. Abney, of Columbia, for respondents.

FRASER, J. This is an action for actual and punitive damages, brought by the plaintiffs against the defendants for negligently and maliciously ejecting them from a dwelling house owned by one of the defendants.

It seems that the plaintiff Henry M. Williams was employed by the defendant Cotton Mills Company as a weaver; that he asked for leave of absence to attend to some private business, but was refused permission. Williams left without permission, and his loom was given to another. Mrs. Williams also worked in the mill, but the house was one provided for operatives and set apart to Mr. Williams. Mr. Williams came back and demanded his loom, but he was told he could not get his former position, but was offered a position that paid less, which he declined to accept. The company claimed that it was necessary for them to furnish operatives with dwelling houses, which they did at a very cheap rate, and the house occupied by Mr. Williams was one that must furnish two hands for the mill, and, inasmuch as he no longer supplied two hands, it was necessary to give his house to another, and notified him to vacate the house. He declined to vacate, and the company applied to the magistrate to eject him. The following is the affidavit filed with the magistrate:

"State of South Carolina, County of Lexington.

"Personally appeared before me J. L. Gunter, who, being duly sworn, deposes and says: That one Henry Williams has been, and is now, in the unlawful possession of a certain house, the property of the Columbia Mills Company, situate in the town of New Brookland, Lexington county, and state of South Carolina.

"That the said Columbia Mills Company have notified the said Henry Williams to quit and

give them possession of the above-described house.

"That the said Henry M. Williams is now in arrears of rent, and has failed and refused to work for said company. J. L. Gunter.

"Sworn to and subscribed to before me this the 6th day of August, 1912.

"Henry Buff, Magistrate."

The following is the notice served by the magistrate:

"State of South Carolina, County of Lexington.

"To Henry Williams: You are hereby required to show cause before the undersigned, Henry Buff, magistrate, at his office in Brookland Bank Building, within three days from the personal service of this notice, why you should not be ejected from the premises now occupied by you in the town of Brookland, on Saltwell street, No. 59, and owned by Columbia Mills Company, according to the act of the assembly of the state of South Carolina passed the twenty-second day of March, Anno Domini eighteen hundred and seventy-eight.

"Witness my hand and seal this 7th day of August, A. D. 1912.

"[Signed] Henry Buff, Magistrate. [L. S.]"

The plaintiff Mr. Williams saw the magistrate and told him he could not move as he did not have another place, and he wanted time to secure a new place. There is some evidence that there were more than one interview, and some promise by the magistrate, but no evidence of any formal return or other reason for failure to quit, except that Mr. Williams wrote a letter addressed to the company and the magistrate in which he stated that his rent was not in arrears, and he was entitled to 30 days' notice to quit. This letter he showed to an officer of the company, but there is no showing that it was called to the attention of the magistrate.

The warrant of ejectment is as follows:

"State of South Carolina, County of Lexington.

"By Henry Buff, magistrate in and for the said county, in the said state.

"To Any Lawful Constable—S. P. Venson:

"Whereas, complaint has been made by Columbia Mills Company, through their agent, J. L. Gunter, a notice to show cause why he should not be ejected from certain premises unlawfully occupied by him was duly served upon Henry M. Williams on the 7th day of August, 1912;

"And, whereas, the said Henry M. Williams having appeared and made answer to the said notice, within three days thereafter, to wit, on the 7th day of August, 1912, and no sufficient cause having been shown by the defendant aforesaid:

"These are, therefore, to authorize and require you forthwith to eject the said Henry M. Williams and all and every person whatsoever in possession of the said premises, by or through the said Henry M. Williams, and to deliver to the said Columbia Mills Company, or their agent, J. L. Gunter, their heirs and assigns, full possession of the same.

"Herein fail not, under pain of the penalties that will fall thereon.

"Witness my hand and seal this the 17th day of August, 1912.

"Henry Buff, Magistrate. [L. S.]"

This action was brought for the ejectment under an invalid proceeding and for unnecessary force in the progress of the ejectment. The defendants denied the use of unnecessary force, the invalidity of the

proceedings, and pleaded the estoppel of the judgment in ejectment.

The pleadings are long, but this statement shows the issues before this court. The case was tried before a jury, and judgment given for the plaintiffs. From this judgment, the respondents appeal upon nine exceptions.

The appellants have stated the questions in shorter form in their argument, and these will be adopted in part.

[1] 1. The first exception alleges:

"The first exception alleges error on the part of the trial judge in admitting the testimony of Henry M. Williams that he had arranged to give a barbecue, and that he wanted to be excused from working for one or two days in order to prepare and give a barbecue, was the cause of his discharge by defendant."

The effect of this statement was merely that the respondent quit the appellant's work to attend to his private enterprise. There was nothing objectionable in that statement, and the objection cannot be sustained.

[2] II. The second exception complains that the plaintiff was allowed to give his estimate of the amount of damage done to furniture in moving it. The plaintiff had stated the facts, and could give his estimate of the amount of damage.

[3] III. The third exception alleges error in the trial judge in admitting evidence of Lillian Stightler to the effect that she had paid the rent of the house occupied by the plaintiff for three weeks after the plaintiff had quit work in the mill. If the question of the payment of rent was an open one, then it made no difference whether the plaintiff paid his own rent or it was paid by another, and this exception cannot be sustained on this ground. Whether it was an open question in this action we will see later.

[4] IV. "The fourth exception alleges error in admitting the evidence of J. Wesley Williams to the effect that he knew operatives who rented houses in the mill village who had only one hand working in the mill." This exception cannot be sustained. The appellant undertook to show that there was a rule that a family that furnished only one hand for the mill could not hold such a house as that occupied by Mr. Williams. It was directly in reply to this to show that there were several families that furnished only one hand and occupied the same kind of house.

[5] V. The appellant asked his honor the presiding judge to charge the jury that, if they believed that the defendant applied to a regular magistrate for ejectment proceedings, and that the notice required by the statute was served, and no sufficient cause shown, and the magistrate issued his warrant of ejectment, from which the plaintiff did not appeal, or take any proceedings to set it aside, and no unnecessary force was used in the ejectment, then the jury should find for the defendants. In other words, until the ejectment proceedings were set aside, the

plaintiffs were estopped to show that he was wrongfully dispossessed by reason of these proceedings. This request was refused.

The proceedings are under the statute, which, with its amendments, is now section 3509, Code of Laws of South Carolina, vol. 1, and provides:

It shall be lawful for the person so letting said premises to apply to a magistrate, whose duty it shall be to have a notice served upon the person so refusing to be dispossessed, to show cause before him, if any he can, within three days from the date of said personal service of such notice, why he should not be dispossessed and if he fails to show sufficient cause, it shall be the duty of the magistrate, forthwith, to issue his warrant directed to the sheriff of the county, or any constable thereof, requiring him without delay to dispossess said person from the premises so let, and authorizing him to use such force as may be necessary.

Complaint was made to the magistrate. He issued a notice to quit. In his warrant of ejectment he finds that no sufficient cause was shown. There was but one thing for the magistrate to do.

This section applies to tenants whose leases have expired and tenants who have not paid their rent. If the person on whom the notice is served would deny his tenancy, or that his lease has expired, or that his rent is in arrears, he must do so in that proceeding and make his showing to the magistrate. If he does not see fit to do so, he must go out, or the magistrate must have him put out. If the person on whom the notice is served comes in and makes his showing before the magistrate that he is not the tenant of the claimant, or that his lease has not expired, or his rent is paid, then the magistrate must have a hearing, and the claimant must make his showing. There is nothing in this in conflict with *Richland Drug Co. v. Moorman*, 71 S. C. 236, 50 S. E. 792. In that case the person notified came in and claimed title. It is true that the statute provided that a tenant "wrongfully dispossessed" may have his action for damages; but, until he gets rid of the judgment in the ejectment proceedings, he is estopped by that judgment to show that he is "wrongfully dispossessed."

In *Ex parte Townes*, 97 S. C. 56, 81 S. E. 278, this court has recently held that it is the duty of one served with process to make answer, even when the answer would have deprived the magistrate of jurisdiction to hear the cause. Miss Townes, in that case, ignored the summons, and she was not only bound by the judgment, but denied the right afterwards to have it opened. A court is entitled to have its processes respected.

In *New York Life Insurance Company v. Mobley*, 90 S. C. 552, 73 S. E. 1032, this court held that an action to set aside a judgment rendered in a case in which it was alleged that the defendant was not served with the summons was a collateral attack, unless the defect appeared on an inspection of the proceedings.

The findings of the magistrate in ejectment proceedings is a judgment in those proceedings, and it cannot be attacked collaterally in this or any other case. Of course, this does not refer to an abuse of process after judgment, but those facts that would have prevented the issuance of the warrant of ejectment should have been set up in those proceedings. The respondent in this case is bound as long as those proceedings stand.

This exception is sustained.

[8] VI. Exceptions 6, 7, and 8 raise the questions of punitive damages under this statute. The statute says:

"That in case any tenant is wrongfully dispossessed he, she or they, may have an action for damages against said landlord."

The statute does not restrict the damages, and the courts have no right to do so.

[7] VII. The last exception complains that there is no evidence upon which to base a finding of punitive damages. There was no motion for a nonsuit or direction of a verdict on that ground, and this exception cannot be considered.

The judgment appealed from is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(101 S. C. 37)

AVANT v. SOUTHERN EXPRESS CO.
(No. 9085.)

(Supreme Court of South Carolina. May 8, 1915.)

MASTER AND SERVANT §70—WAGES—IMPLIED CONTRACT—EVIDENCE.

Where plaintiff, suing an express company for services as route agent, proved that he was put to service as route agent and proved what was a reasonable compensation for such services and the company admitted the rendition of the services, he could recover reasonable value of the services under an implied contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 82-86; Dec. Dig. § 70.]

Appeal from Common Pleas Circuit Court of Florence County; C. J. Ramage, Special Judge.

Action by J. J. Avant against the Southern Express Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Willcox & Willcox, of Florence, for appellant. Gasque & Page, of Florence, for respondent.

GAGE, J. Action on a contract of personal service for the recovery of \$779.80, wages; verdict for \$260; defendant appeals.

History: The plaintiff, prior to May 1, 1912, had been what is called in common parlance "agent" for the Southern Express Company at Florence, at a wage of \$100 per month. On May 1, 1912, he undertook and did perform the duties of "route agent" for the same company, which service had aforetime earned a wage of \$150 per month; and

he performed such duties for practically five months. All are agreed that for the five months (and some days too) after May 1st the plaintiff did act as route agent, and there is no denial that the wage therefor had been \$150 per month. All are agreed that for five months' labor the plaintiff was paid \$100 per month; it was not agreed whether the labor so paid for was that done as agent, or for that done as route agent, or for that done as both. The complaint alleges, in effect: (1) That plaintiff did the labor of agent and route agent both; (2) that the service of route agent was "placed upon him" by defendant, in addition to his service as agent; (3) that he was paid \$100 per month for his work as agent, but was denied payment for his work as route agent. The answer, in effect, denies allegations 1, 2, and 3, and alleges: (1) That plaintiff took up temporarily the duties of route agent; and (2) plaintiff and defendant agreed that for such service he was to be paid \$100 per month and his expenses; and (3) that such payment has been made. The charge of the court to the jury was exceptionally lucid and commendably brief. No exception has been made to it, or to the admission, or the refusal to admit testimony. There are two exceptions, and they both charge error in the refusal of the court to direct a verdict, and in the refusal of the court to grant a new trial.

The appellant contends exactly: (1) That the plaintiff sued on a contract and then proved there was no contract; and (2) the plaintiff offered no testimony to show what the service as route agent was worth. We think there is no merit in either of the contentions. The jury has in effect repudiated the claim of the plaintiff that he was both agent and route agent, and has in effect found that he was route agent only, and the compensation for that service was reasonably worth \$150 per month. That is what the verdict means. It is true the plaintiff did say he had no contract. His counsel asked him, "What was your contract?" He answered, "I had none." But that is not conclusive; his case must not depend on one question and one answer thereto. The plaintiff did prove he was put to service as route agent; that was admitted by the defendant's pleading. The plaintiff thereby proved and the defendant thereby admitted an implied contract betwixt the parties. The law made the contract for the parties; it wrote into the transaction an agreement by the plaintiff to serve as route agent and an agreement by the defendant to pay therefor a reasonable price, in the absence of an express contract fixing the price. That is elementary law. The jury found in effect that there was no express contract about the compensation. The plaintiff then proved what was a reasonable price therefor, to wit, that usually paid by the company to a route agent on that run,

which was \$150. That compensation the jury found, and the verdict is true.

The judgment of the circuit court is therefore affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 32)

ALDRACH v. SOUTH CAROLINA LIGHT, POWER & RYS. CO. (No. 9084.)

(Supreme Court of South Carolina. April 30, 1915.)

1. TENDER — 13—SUFFICIENCY—CHECK.

Unless expressly received as such, a check is not payment, and therefore its proffer is not tender.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 29-32; Dec. Dig. —13.]

2. ELECTRICITY — 11—ELECTRIC COMPANIES — FAILURE TO FURNISH CURRENT — SUFFICIENCY OF EVIDENCE.

In an action against a power company for breach of contract in having shut off the current from plaintiff's moving picture theater, evidence held insufficient to show payment or tender of week's charges by plaintiff, so as to render denial of further service a breach of contract by defendant.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. —11.]

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; Thos. S. Sease, Judge.

Action by W. F. Aldrach against the South Carolina Light, Power & Railways Company. Judgment for plaintiff, and defendant appeals. Reversed.

Sanders & De Pass, of Spartanburg, for appellant. Gwynn & Hannon, of Spartanburg, for respondent.

FRASER, J. This is an action by the plaintiff against the defendant for damages. The plaintiff was the proprietor of a picture show operating in the city of Spartanburg. The undisputed testimony is as follows: The defendant agreed to furnish the light at a "flat rate," payable weekly, in advance. There was evidence of an agreement to put in a meter, but the meter was not installed, and there is no evidence of a new contract for deferred payment. The first and second week the plaintiff paid the charges. On the third week, the last week, the plaintiff delayed payment. On Saturday, the last day of the last week, the defendant made several attempts to collect the amount due. In the afternoon of Saturday, Mr. Walker, an agent of the defendant, met the plaintiff, and the plaintiff gave him a check on a bank in Charlotte, N. C., for the amount due. This check was carried by Mr. Walker to the office of the defendant. The defendant refused to accept the check. The plaintiff says:

"About half or three-quarters of an hour this man and a lineman came back and said that Mr. Aiken [defendant's agent] refused to accept

the check, and that I would have to pay him in cash. I told him I could not pay in cash, and he motioned to the lineman, and he went up the pole and cut off the light."

Again:

"I offered Walker, when he came back, to get him the money or a good indorser. He motioned to the lineman to cut off."

There was evidence that the plaintiff then applied to Mr. Aiken to restore the connection, but this was refused, and the plaintiff brought this suit for failure to furnish the light according to the contract. The plaintiff recovered judgment for \$50 in the magistrate's court, which was affirmed in the court of common pleas. The defendant appeals to this court on several exceptions.

[1, 2] Only one question need be considered. Is there any evidence that the defendant violated its contract? We see no evidence of it. The plaintiff said the original contract was for \$10 per week. As to the time of payment he is silent. The defendant's witness testified twice that the payments were to be in advance. The plaintiff went back on the stand, but did not deny that the payments were to be made in advance. It is true the record shows that during the second week there were two payments, and they were not in advance, but there is no word of testimony to show that the time of payment was changed by agreement. On the third week indulgence was given until the last day of the last week and the latter part of that day. It is also true that the charge per week was changed from \$10 to \$7. There was evidence that the defendant agreed to put in a meter. About this there was dispute. It is not clear that the failure to put in the meter played any part in the case. The defendant demanded \$7 and the plaintiff gave his check for \$7. The defendant refused the check. The check is not payment (unless so received). It is not tender. The plaintiff did not rely upon it as either, for he attempted to prove a real tender. In this he failed. He says, "At that time I had the money." Where? In his room, in his pocket, or in his hand? Again, "At the time I offered the money, I was in a position to pay the money." This is no clearer than the other. Plaintiff is not required to use the word "tender," but he is bound to prove the facts from which tender may be inferred. If the plaintiff had said to Mr. Aiken, "If you will connect up the wires again, I will pay you the \$7," the statement of an offer would have been true, but it would not have been payment or tender. The plaintiff must prove his right to the lights and the defendant has deprived him of that right. This the plaintiff failed to do, and the judgment is reversed.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J. (dissenting). This action was commenced in a magistrate's court, and is

for the recovery of damages alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, in refusing to furnish lights to operate a picture show. The jury rendered a verdict in favor of the plaintiff for \$50, which, on appeal to the circuit court, was affirmed.

The first ground upon which Mr. Justice FRASER, who delivered the leading opinion, reverses the judgment is that the *undisputed* testimony shows, that the defendant agreed to furnish the light at a "flat rate," payable *in advance*. The testimony tends to show that the question whether the payments were to be made *in advance* was in dispute. In his return the magistrate stated that "the issue in the case was an issue of fact," and that he saw no reason to disturb the verdict. Furthermore, the testimony shows that the question whether the plaintiff agreed to pay the defendant in advance was in dispute. W. B. Aiken, a witness and agent for the defendant, testified that "he [the plaintiff] paid a part of the week in advance;" also "he [the plaintiff] was extended credit for part of the week." One of the receipts was dated the 17th of July, 1913, and the other on the 26th of July, 1915, but was only for \$5, and was given more than a week after the first receipt. The reasonable inference from these facts is that the weekly payments were not to be made *in advance*.

The second ground assigned by Mr. Justice FRASER is that there was some negotiation for a meter, but the meter was not installed, and there is no evidence of a new contract. Again, the record shows that he was in error. The plaintiff testified:

"Mr. Aiken agreed to put in a meter. As the rate was too high they were charging me, I had a box fixed for protecting the meter, and he kept promising me that the meter would be put in. For the second week I paid him \$5. I expected the meter to be put in on Wednesday. He did not put in the meter, and on Saturday I paid him for the last three days. The third week he continued to promise. On Saturday I paid him. He said that because he had not put in the meter, he would make a reduction. I was then told that Mr. Aiken had agreed to take \$7. I gave him a check upon the Charlotte National Bank, in which I had the funds, and he went away."

The foregoing testimony is corroborated by the statement of J. B. Walker, an agent and witness for the defendant, who testified that the bill which he presented at the end of the third week was for \$7. The defendant did not deny that it failed to install the meter.

Under the circumstances the issues were properly submitted to the jury, as no questions of law were involved. Furthermore, section 407 of the Code provides that "upon hearing the appeal [from an inferior court] the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects, which do not affect the merits," which seems to have been done in this case.

For these reasons I dissent.

(101 S. C. 24)

ABLE v. HALL. (No. 9082.)

(Supreme Court of South Carolina. April 29, 1915.)

1. JUSTICES OF THE PEACE §122—PROCESS—TIME TO ANSWER.

Code Civ. Proc. § 97, subd. 16, provides that, when \$25 or more is demanded, the complaint in a magistrate's court shall be served not less than 20 days before the day fixed for trial, provided that, if plaintiff shall show the grounds of an apprehension that the debt may be lost in an affidavit served with a copy of the complaint, he may make such process returnable in such time as justice may require. *Held* that, where the only affidavit made and served was an affidavit for an attachment, and defendant, after objecting to the jurisdiction of the magistrate, withdrew from the case and did nothing to waive his right to 20 days' notice, a summons to appear in 15 days was illegal, and the judgment thereon was voidable for lack of jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382-388; Dec. Dig. §122.]

2. JUSTICES OF THE PEACE §122—JURISDICTION—MAGISTRATE'S REPORT.

Where there was no affidavit before a magistrate authorizing him to make the summons returnable in 15 days, under Code Civ. Proc. § 97, subd. 16, his report that he in fact followed the direction of the proviso of that subdivision availed nothing.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382-388; Dec. Dig. §122.]

3. JUSTICES OF THE PEACE §84—PROCESS—WAIVER OF IRREGULARITIES.

Where defendant, after appearing specially and objecting to the jurisdiction of a magistrate because the summons was made returnable in 15 days, withdrew from the case, the giving of a bond after a judgment against him, pursuant to Code Civ. Proc. §§ 295, 296, relative to bonds to release attachments, was not a waiver of his right to challenge the judgment because he was not given 20 days in which to answer.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 266-278; Dec. Dig. §84.]

4. APPEARANCE §9 — GENERAL OR SPECIAL—APPLICATION TO DISCHARGE ATTACHMENT.

Within Code Civ. Proc. 1912, § 295, providing that, whenever a defendant shall have appeared, he may apply to the officer who issued an attachment, or to the court for an order to discharge it, the appearance may be either general or special.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. §9.]

Appeal from Common Pleas Circuit Court of Aiken County; H. F. Rice, Judge.

Action by R. G. Able against I. S. Hall. Judgment for plaintiff, and defendant appeals. Reversed.

J. B. Salley, of Aiken, for appellant. E. L. Asbill, of Leesville, and Claude E. Sawyer, of Aiken, for respondent.

GAGE, J. Action before a magistrate's court to recover \$62.40, the purchase price of two steers. Judgment for the plaintiff. Appeal here by the defendant.

There is only one exception by defendant, and it makes one issue. The issue is that

the magistrate had no jurisdiction to try the case, for the reason the defendant was allowed by the summons only 15 days in which to appear, when by law he was entitled to 20 days.

[1] It is true, if a defendant be simply summoned to answer in 15 days when the statute allows him 20 days, and the defendant appears and challenges the jurisdiction on that ground, and does no act to waive his right to 20 days' notice, and the magistrate nevertheless gives judgment against him, then the judgment is voidable for lack of jurisdiction.

In the case at bar the defendant appeared and objected to the jurisdiction of his person; but the court overruled the objection, the defendant withdrew, and judgment went against him. The case, therefore, is not like those of *McDonald v. Floyd*, 91 S. C. 119, 73 S. E. 769, and *Rogers v. Townes*, 97 S. C. 56, 81 S. E. 278.

It is true the magistrate may, by the words of the statute, and for good reason, make the process returnable in such time as the justice of the case may require. That is to say, in the case at bar the magistrate may have summoned the defendant to answer in 15 days instead of 20 days. But therefor the magistrate must have had some proof of the advisability of such procedure. *Moore v. Railroad*, 76 S. C. 835, 56 S. E. 971. We infer from the "case," for the plaintiff has furnished no points and authorities, that the plaintiff relies therefor upon an affidavit of the plaintiff made contemporaneously with the summons and served therewith. It is manifest from its words that the affidavit was made, not to procure a shortening of the time to appear, but to procure the issuance of a warrant of attachment against the steers, to stand security for the satisfaction of any judgment which might be recovered. For besides the language of the affidavit, on the same day of its execution, an undertaking was made, and a warrant of attachment was issued.

The summons to appear in 15 days was therefore illegal, and was not done pursuant to the proviso of subdivision 16 of section 97 of the Code of Procedure.

[2] Nor is the defect cured by the testimony of the witnesses at the trial, nor by the report of the magistrate. If the magistrate did not in fact follow the direction of the above-cited proviso, then his report that he did follow it availeth nothing.

The summons was issued and served on January 18, 1912. The appearance day was February 1, 1912. On that day defendant appeared, and "without submitting himself to the jurisdiction of the court, and for the sole purpose of objecting to the jurisdiction of the court, and moved the court to dismiss the above-entitled action against him, and to release and set aside the warrant of at-

tachment issued herein, upon the following grounds: (1) Because the summons and complaint served on the defendant herein are absolutely null and void, because it required the defendant to answer the complaint within 15 days after the service thereof, when, under the law, the defendant is entitled to 20 full days from the service thereof before being required to answer the complaint in this action, as the amount involved is more than \$25; and, the summons being absolutely void, this court has no jurisdiction to entertain the cause. (2) The warrant of attachment should be set aside, because the bond has no surety thereon, as required by the acts regulating attachments, particularly the attachment for purchase money (act of February 25, 1903). Furthermore, the said bond is imperfect and defective in that it has no complete defeasance clause therein." The magistrate overruled the defendant's motion. "Then defendant and his attorney withdrew from the court, and the magistrate proceeded with the trial."

Up to this point in the procedure there had been nothing done by the defendant to waive his right to have the action dismissed.

[3] But the defendant on February 19, 1912, "appeared before the magistrate and gave bond to the plaintiff in the sum of \$131, conditioned for the payment to the plaintiff of such sum as he may recover in his action." The judgment had at that time been rendered against the defendant nearly three weeks before. The defendant proceeded in making the bond under sections 295 and 296 of the Code of Procedure. It is true section 295 provides that such a bond may be given "whenever the defendant shall have appeared in such action."

[4] Appearance may be general or special. It was special in this case. Strictly construed, the statute contemplated the execution of the bond before February 1st, and not after judgment on that day. But the magistrate accepted the bond; and the promise to pay such sum as the plaintiff may recover may be referred to the contingent liability of the defendant, consequent upon the affirmation of the magistrate's judgment.

We think that the giving of the bond did not amount to a waiver of the right of the defendant to stand on his demand made aforetime for 20 days to prepare for trial. It has been held that the making of such a bond does not amount to a waiver of the right to move to vacate the attachment. *Bates v. Killian*, 17 S. C. 553. Nor ought it to amount to a waiver of the right to challenge the judgment.

We are therefore of the opinion that the judgment below must be set aside; and it is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 11)

SANDERS v. ATLANTIC COAST LINE R. CO. (No. 9080.)

(Supreme Court of South Carolina. April 24, 1915.)

1. CARRIERS — 264 — CARRIAGE OF PASSENGERS — PERFORMANCE OF CONTRACT OF TRANSPORTATION — ROUTES.

A passenger desiring to purchase a ticket for an interstate journey by a circuitous route was given one not specifying any route, and therefore good over the direct route only. The ticket was paid for as over the direct route, and the rate over the circuitous route would have been higher. After boarding the train he was repeatedly warned that the ticket would not be honored beyond a certain point, and upon his refusal to pay a cash fare after reaching such point he was ejected. The ticket tendered could not have been accepted over the route the passenger desired to take without violating the act of Congress prohibiting discrimination as to interstate passengers. *Held*, that the passenger was not entitled to recover; since his damages were not the proximate result of the agent's act in selling him the ticket, but of his own negligence in attempting to ride thereon after notice that it could not be accepted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1037-1039; Dec. Dig. — 264.]

2. CARRIERS — 251 — CARRIAGE OF PASSENGERS — CONTRACTS — TARIFF SCHEDULES.

No liability of a carrier can be predicated upon the misrepresentations or mistakes of its agents as to the rates applicable or privileges or facilities to be afforded under tariffs filed with the Interstate Commerce Commission; since passengers and shippers, as well as the agents of the carrier, are conclusively presumed to know them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1014, 1026; Dec. Dig. — 251.]

3. CARRIERS — 251 — CARRIAGE OF PASSENGERS — CONTRACTS OF TRANSPORTATION.

While a railway conductor should heed the reasonable explanation of a passenger as to his right to ride on his ticket, he need not carry out an agreement made by a ticket agent nor allow a passenger to ride on a ticket furnished him which would be in violation of law, although the company might be liable for the agent's wrongful act in furnishing such ticket.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1014, 1026; Dec. Dig. — 251.]

4. CARRIERS — 357 — CARRIAGE OF PASSENGERS — EJECTION — EXCESS FARE.

A railway conductor may lawfully eject a passenger for refusing to pay an extra charge required by railways where passengers have failed to get tickets.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1419, 1433; Dec. Dig. — 357.]

5. CARRIERS — 358 — CARRIAGE OF PASSENGERS — EJECTION — MILEAGE TICKETS.

Where a mileage contract expressly provided that coupons therefrom would not be accepted on trains in place of tickets, the refusal of a railway conductor to accept such coupons and the ejection of the passenger offering them did not make the carrier liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1434-1438; Dec. Dig. — 358.]

Watts and Fraser, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Sumter County; Thos. S. Sease, Judge.

Action by M. R. Sanders against the Atlantic Coast Line Railroad Company. From a

judgment for plaintiff, defendant appeals. Reversed.

Mark Reynolds and L. W. McLemore, both of Sumter, for appellant. L. D. Jennings and R. D. Epps, both of Sumter, for respondent.

HYDRICK, J. According to plaintiff's testimony, the facts appear to be as follows:

On June 5, 1913, plaintiff was at Fayetteville, N. C., and wanted to meet a business engagement at Barnwell, S. C., in the afternoon or evening of that day, and go thence to Atlanta, Ga., in time to meet his wife, who was to arrive there in the early morning of the next day, on a train from Greenwood, S. C., where she resided with plaintiff. His wife was sick, and was going to Atlanta for medical treatment, and he was anxious to get there in time to meet her and take her to a sanatorium. Plaintiff went to defendant's ticket agent at Fayetteville and told him only of his engagement at Barnwell, and asked if he could get a ticket on which he could get to Barnwell in time to meet it. After some investigation, the agent told him that he could sell him such a ticket, and that his route would be via Florence and Sumter to Columbia, S. C., over defendant's lines, and from Columbia to Barnwell over the Southern Railway. Plaintiff had an interstate mileage book which was good over all the roads in this route, and, in exchange for mileage coupons therefrom, the agent gave him a passage ticket from Fayetteville to Barnwell, and told him that, according to the schedules, he should get to Columbia about noon, and to Barnwell about 4:30 p. m. that day.

The agent could have given him a ticket which would have entitled him to transportation over the route indicated, and, according to the schedules, he could have arrived at Barnwell about the time stated. But the ticket given him indicated no special route, and therefore it entitled him to transportation only over defendant's lines by the direct route from Fayetteville to Barnwell, over which it was impossible for him to get to Barnwell that day, because defendant's local train for Barnwell left Sumter before the arrival of the train from Fayetteville. The distance from Fayetteville to Barnwell over the direct route is 201 miles, while the distance by Columbia is 226 miles. The defendant's agent at Fayetteville testified that he detached only 201 mileage coupons from plaintiff's book, and denied that plaintiff asked him for a ticket via Columbia, or said anything to him about his engagement or desire to get to Barnwell that day; that he merely asked for a ticket to Barnwell, which he gave him over the direct route.

The conductor on the train between Fayetteville and Florence, to whom plaintiff first presented the ticket, told him that his ticket was not good over the route via Columbia,

and that he could not get to Barnwell on it that day.

On arriving at Florence, plaintiff had to change cars, and, while waiting for the train for Sumter, he went to Mr. Hare, defendant's assistant superintendent, and explained the situation to him, telling him that he intended to hold defendant to the contract which he said he had made with the agent at Fayetteville. Mr. Hare called up the Fayetteville office over the telephone, and asked why the ticket had been irregularly sold. It seems, however, that the agent who sold the ticket was not then on duty, and, as plaintiff's time was limited, Mr. Hare advised him to go ahead on the ticket as far as Sumter, as it entitled him to passage to that place, and said that he would wire him further instructions on the train.

The conductor on the train between Florence and Sumter, to whom the ticket was next presented, told plaintiff that it was not good via Columbia, and advised him to get off at Sumter and buy a ticket to Columbia. Plaintiff informed him of his anxiety to get to Barnwell that day, and thence to Atlanta, and his reasons therefor. The conductor replied that he was as sorry as he could be, but that he could not honor the ticket further than Sumter. He afterwards showed plaintiff a telegram from Mr. Hare, which read as follows:

"Cond. No. 51: Please say to Mr. M. B. Sanders, holding mileage exchange ticket Fayetteville to Barnwell, that the agent at Fayetteville advises he only pulled two hundred and one miles from book which is local mileage all A. C. L. route via Florence and Sumter. Suggest to him that if he desires to go via Columbia on Southern that he purchase ticket via that route and handle the one he has. Wire [with?] Mr. T. C. White at Wilmington for refund for unused portion."

The word "wire," in the last sentence of the telegram, is evidently a misprint in the record or in the telegram for "with." At any rate, plaintiff testified that Mr. Hare advised him in the telegram to pay the cash fare or buy a ticket from Sumter to Columbia, and that the unused portion of his ticket would be refunded. At first plaintiff seems to have been inclined to do this, but afterwards decided to stand on his contract, as he expressed it, and insist on being carried via Columbia on the ticket which had been given him.

After leaving Sumter the conductor approached plaintiff and asked if he had gotten a ticket, and, on being told that he had not, and that he would insist on being carried on the ticket he had, the conductor told him that, unless he paid his fare in cash, he would eject him. Plaintiff then offered to pay \$1.05, which is the price of a ticket from Sumter to Columbia, when bought at the Sumter office; but, by a valid rule of the company, conductors are required to collect \$1.20 of passengers who fail to get tickets. Plaintiff refused to pay the extra charge, but offered to pay his fare with coupons from his mileage

book, which the conductor refused to accept, and thereupon plaintiff was ejected at Wedgefield. There was nothing in the manner of his ejection of which complaint is made, and he can recover, if at all, solely upon the conduct of the defendant's agent at Fayetteville; for the testimony shows that the other agents of defendant treated him with the utmost courtesy and consideration, and accorded to him every right to which he was entitled under the law.

Besides a general denial, defendant set up in its answer the defenses that, under its tariff, filed with and approved by the Interstate Commerce Commission, and duly published, plaintiff was not entitled to be carried to Barnwell, via Columbia, on the ticket which had been given him, and that, in attempting to ride on it after he had been repeatedly warned that it was not good and would not be accepted for his transportation over that route he was guilty of contributory negligence, and suffered no injury as the proximate result of any wrongful act of defendant, and on those grounds, besides others which related to the matter of damages, moved the direction of a verdict. The motion was refused, and the jury found for plaintiff \$500 punitive damages. From judgment on the verdict, defendant appealed.

[1] There was no error in refusing the motion to direct the verdict on the first ground above stated. The issues arising out of the interstate feature of the transaction and the law applicable thereto were not alone necessarily conclusive of plaintiff's rights. It is true that, under defendant's tariff filed with the Interstate Commerce Commission, approved by it, and published, as alleged and proved at the trial, plaintiff was not entitled to transportation on his ticket over the route via Columbia, and defendant could not have accepted the ticket for his transportation over that route without violating the act of Congress, and no liability can be predicated upon its refusal to violate that act. The ticket did not indicate any particular route, and therefore, on its face, it entitled plaintiff to transportation over defendant's lines only over the direct route. If defendant had acceded to plaintiff's demands, and carried him on that ticket via Columbia, it would have accorded to him a privilege and advantage which it did not allow to all other interstate passengers holding similar tickets. The act of Congress prohibits such discriminations, and no contract granting them, directly or indirectly, can be lawfully made or enforced in the courts. Nor can liability be predicated upon the failure to perform them when made.

[2] It is well settled, too, that under the act of Congress and the decisions of the Supreme Court of the United States construing it, no liability of a carrier can be predicated upon the misrepresentations or mistakes of its agents as to the rates applicable, or privileges or facilities to be afforded under the

tariffs filed with the Commission. Passengers and shippers are conclusively presumed to know them, as well as the agents of the carriers. This question has been so recently and frequently considered and decided both by the Supreme Court of the United States and by this court that it is not deemed necessary to state the reasons therefor, or even to cite the decisions.

But it does not follow that a carrier may under no circumstances incur liability for the negligent act or omission of his agent affecting the interstate transportation of passengers or freight, when it does not relate to or affect the applicable rate or the privileges or facilities to be afforded under the published tariff, or any of those matters which have been regulated by the act of Congress upon that subject. To illustrate, the Southern Railway Company operates two lines from Columbia, S. C., to Charlotte, N. C. Now, if a passenger should desire to go from Columbia to Charlotte via Spartanburg, and should ask and pay for a ticket over that route, and the agent should negligently give him a ticket good only over the direct route from Columbia to Charlotte, and the passenger should suffer damages, as the proximate result of that negligence, the company would be liable; because, although it would be an interstate journey, the negligence of the agent would in no wise relate to or affect the applicable rate or the privileges or facilities to be afforded the passenger under the tariff filed and published, but solely to the kind of ticket given him. So here, if plaintiff had not been warned that his ticket was not good over the route via Columbia, the defendant would have been liable for damages sustained by him, if any, by reason of his ejection, assuming, but not deciding, of course, that the agent at Fayetteville negligently or willfully gave him the wrong kind of ticket, for the transaction did not involve any contract or attempt to contract relative to rates or privileges or facilities not afforded to all passengers in similar circumstances, but solely the kind of ticket given him. In *McKeown v. Railway*, 98 S. C. 338, 82 S. E. 437, the carrier was held to be liable in damages to an interstate passenger for his ejection from a train growing out of the misrepresentation of the ticket agent that the ticket sold was good on that train.

But plaintiff cannot recover for any damages sustained by reason of his ejection, because such damages, if any, were not the proximate result of the act or omission of defendant's agent at Fayetteville, but of his own heedless conduct in attempting to ride upon the ticket, after he had been told, and should have known, that defendant's agents could not lawfully accept it for his transportation over the route which he took. If he had had the right to ride over that route on that ticket, his ejection would have been unlawful, and his recovery would have been sustained, notwithstanding his refusal to

pay cash fare. *McKeown v. Railway*, supra. But, as he had no such right, under the circumstances, it was his duty to buy a ticket or pay the cash fare. *Carter v. Railway*, 75 S. C. 355, 55 S. E. 771; *Hunter v. Railway*, 90 S. C. 507, 73 S. E. 1017.

[3] In *Smith v. Railway*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708, this court said that it is the duty of a railway conductor to heed the reasonable explanation of a passenger relative to his ticket and his right to ride thereon. The duty is no less incumbent upon the passenger to heed the reasonable explanation and warning of the conductor, or other agent of the carrier, in the premises. Both should be reasonable, and approach each other and the subject of difference in the mutual spirit of accommodation. *Teddars v. Railway*, 97 S. C. 153, 81 S. E. 474. The rule announced in the *Smith Case* cannot be carried to the extent of requiring a conductor to carry out an agreement made by a ticket agent, or to allow a passenger to ride upon a ticket furnished him, which would be in violation of law, notwithstanding the company may be liable in damages for the wrongful act or omission of the agent in furnishing such ticket.

[4, 5] It only remains to consider the contention of respondent that his ejection was unlawful, because the conductor refused to accept \$1.05 as the cash fare, and also because he refused to accept coupons from his mileage book. Neither contention can be sustained. The charge of \$1.20 was within the rates prescribed by law, and it was competent for the company to make the rule requiring passengers without tickets to pay that amount. It was the duty of the conductor to enforce it. The mileage contract held by plaintiff expressly provides that coupons therefrom will not be accepted on trains, except in certain contingencies, of the existence of which there was no proof in this case.

Judgment reversed.

GARY, C. J., and GAGE, J., concur.

WATTS, J. (dissenting). I do not agree in the opinion of Mr. Justice HYDRICK. The plaintiff was an interstate passenger, and the mileage taken from him from Fayetteville, N. C., to Barnwell, S. C., was 201 miles. The distance from Fayetteville, N. C., to Columbia, S. C., was less than 201 miles, and if the agent of the defendant made a mistake in routing him, he certainly would have the right to ride over defendant's road the number of miles he had paid for, which would have carried him to Columbia. In addition to this the evidence shows that the defendant attempted to exact from him between Sumter and Columbia not only the fare provided for, but an excess fare fixed, not by the Interstate Commission, but by the Railroad Commission of the state of South Carolina. This was without authority of law, and was an unlawful invasion of plaintiff's rights, as

under no circumstances should he have been required to pay more than the rates fixed by the Interstate Commerce Commission. He could not be both an intrastate and interstate passenger at the same time, and be treated as a wrongdoer because he failed to comply with the rules and regulations of the Railroad Commission of South Carolina.

I think the exceptions should be overruled, and judgment affirmed.

FRASER, J., concurs.

(76 W. Va. 193)

WOODALL et al. v. BRUEN et al.
(No. 2644.)

(Supreme Court of Appeals of West Virginia.
April 13, 1915.)

(Syllabus by the Court.)

1. PERPETUITIES Ⓒ6 — EXECUTORY LIMITATION.

An executory limitation by deed or will, which need not necessarily vest within a life or lives in being and 21 years and 10 months thereafter, violates the rule against perpetuities and is void, whether it might wholly and absolutely prevent alienation of the property beyond such period or not.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. Ⓒ6.]

2. PERPETUITIES Ⓒ6 — OPTION — EXECUTORY LIMITATION—RESTRAINT ON ALIENATION.

An option for the purchase of land at such time in the future or within 99 years from its date, as the optionee may elect, partakes of the nature of an executory limitation, vesting no immediate interest in the land, and constitutes an unreasonable restraint upon alienation thereof, even though such option is, in form, a reservation of right to the grantor in a deed by which the land is conveyed.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. Ⓒ6.]

3. VENDOR AND PURCHASER Ⓒ57—"OPTION TO PURCHASE."

An option of purchase is a mere personal right, not an interest in the optioned land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. Ⓒ57.]

For other definitions, see Words and Phrases, First and Second Series, Option.]

4. VENDOR AND PURCHASER Ⓒ57—"OPTION TO PURCHASE"—CONDITION SUBSEQUENT.

Such a reservation differs materially and essentially from a condition subsequent, capable of working a forfeiture to the grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. Ⓒ57.]

Appeal from Circuit Court, Kanawha County.

Suit by E. A. Woodall and others against Alexander J. Bruen and others. From decree for defendants, plaintiffs appeal. Reversed and remanded.

Linn & Byrne, of Charleston, for appellants. Brown, Jackson & Knight, of Charleston, for appellees.

POFFENBARGER, J. Deeming certain options to repurchase the minerals in their lands, created by clauses in the deeds under

which they hold, to be in contravention of the rule against perpetuities, and therefore void, the plaintiffs filed their bill to cancel them as constituting clouds on their titles, and the court dismissed it on a demurrer thereto.

Two deeds are involved, both of which were executed by Alexander M. Bruen and wife, one bearing date October 18, 1890, and the other December 8, 1881. The former conveyed 66.12 acres of land to John Harvey Burdette, and the other 210.36 acres to E. A. Woodall. Burdette conveyed his tract to Underwood, who later conveyed it to Woodall. On June 25, 1908, Woodall leased both tracts to E. T. Crawford for oil and gas purposes. Prior to the execution of this lease, however, the heirs of Bruen, by a deed dated January 31, 1907, had assigned, transferred, and conveyed the options or reservations in the Burdette and Woodall deeds, to the United Fuel Gas Company, and that company claims the right, by virtue of the assigned options, to purchase the minerals in Woodall's lands at the price of \$1 per acre.

The reservation or option in the Burdette deed reads as follows:

"And the said party of the second part, as a part of the consideration of this purchase, covenants and agrees to and with the said A. M. Bruen, that whenever at any time hereafter the said A. M. Bruen, his heirs or assigns, shall pay or tender to him, the said party of the second part, his heirs, or assigns, the sum of sixty six ¹²/₁₀₀ dollars, in legal money, being one dollar per acre of the land herein conveyed, the said party of the second part, his heirs, or assigns, shall and will convey to said A. M. Bruen, his heirs, or assigns, the right to dig, mine, remove and ship, on and from the premises, all the limestone, coal, iron, or other minerals which may be in and upon said lot No. 28, together with such rights of way, through, over, and upon said lot No. 28 as may be necessary to the convenient digging, mining, removing and shipping of said limestone, coal, iron and other minerals, reserving only so much thereof as may be used for domestic purposes."

The one in the other deed differs from it only in respect to the land, the repurchase price, and the following limitation thereof:

"The covenant respecting a reconveyance of these premises as before mentioned is to be null and void after ninety-nine years."

[1-3] Except in one respect these option clauses admittedly fall under the condemnation of the rule against perpetuities as defined in *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 527. Here the options were reserved to the grantor in the deeds. In *Starcher Bros. v. Duty*, the optionees were strangers to the title. The argument in support of the decree rests upon two submitted propositions, erroneous definition of the rule in the case just mentioned, and differentiation upon the dissimilarity of relations of the optionees to the properties.

The submission of the first of these propositions is accompanied by an admission of the existence of two lines of authority on the question involved, one of which harmonizes

with the position the court has taken. The rule itself, as well as the divergent interpretations thereof, rests upon considerations of public policy, undue restraint upon alienation of property being regarded as highly detrimental to the interests of society in general. According to one view, the general welfare in this respect is sufficiently protected by inhibition of suspension of the absolute power of alienation, or absolute suspension of such power, for an unreasonable period of time. Such suspension occurs when the situation of the property is such that nobody can sell or convey it until after the lapse of that period. But for the rule, such conditions could be created. It is unnecessary here to illustrate the methods of creating them. In the opinion of other jurists, the rule goes further and condemns limitations that clog alienation and unduly restrain it for an unreasonable length of time, without absolute prevention thereof. So interpreted, it forbids practically all executory limitations, whether by will or deed, that do not vest within the time arbitrarily prescribed as being reasonable, a life or lives in being and 21 years and 10 months; and, even though the holders of the respective rights have it in their power to combine them and put the property on the market, the restraint upon alienation is deemed to be incompatible with the welfare of society in general. Such was the situation in the *Starcher and Duty Case*. The rule is thus applied in England, Massachusetts, Maine, Pennsylvania, New Jersey, and Illinois, and the interpretation has the approval of Prof. Gray, author of a leading work on the subject. The books abound in learned arguments for and against the policy of this broader scope of the rule, as well as the support or justification it has in principle and precedents. Perhaps in the greater number of American jurisdictions, the narrower interpretation prevails; but in some of them it has been adopted by statute.

[4] It is said the construction to which this court has committed itself is inconsistent with the law respecting conditional grants, a subsequent condition violation of which forfeits the estate granted being valid, however long it may run from the date of the grant. But this argument overlooks very important distinctions. The right or possibility of reverter is regarded as a present vested interest in the land, not an executory interest to vest in the future. *Brattle Square Church v. Grant*, 3 Gray (Mass.) 142, 63 Am. Dec. 725; *Jones, Real Prop. Conv.* § 714. Moreover, nobody but the grantor or his heirs, or the successor of a corporate grantor, can enter for the condition broken. Neither a stranger nor an assignee can do so. *Jones, Real Prop. Conv.* §§ 723 to 728, citing numerous authorities.

"And therefore, if an estate be made upon condition that upon such a contingency a stranger shall enter, or the estate shall cease, and another shall have it, however this may be so

drawn as it may be a good condition to give him, his heirs, etc., that doth make the estate, an entry, yet it cannot be good to give the estate or an entry, to a stranger." *Shep. Touch.* 127.

"The right of entry for condition broken is not assignable at common law." *Jones, Real Prop. Conv.* § 728; *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101.

Hence the principle governing estates upon condition subsequent never confers title by way of executory limitation.

Nor is the situation of the Bruen heirs the same as if their ancestor had made a conditional grant. Bruen parted with all interest in the land, and reserved only a personal right, an option of repurchase, which, if valid, would amount to an executory limitation, giving him, his heirs and assigns, a future, not present, estate in the land upon a contingency, his or their election to buy at a stated price. No analogy between a repurchase and an entry for condition broken is perceptible. In the former case, there is no condition, no possible forfeiture, and no possibility of a reverter or right of re-entry. The provision cannot be consistently interpreted as anything more or less than an option of purchase, running in one case forever and in the other for 99 years. From these conclusions, it results that there is no ground upon which the case can be distinguished from that of *Starcher Bros. v. Duty*.

The 99-year limitation is too remote, for it might have extended beyond the lives of all living persons for whose benefit the option was reserved and 21 years and 10 months. *Johnston's Estate*, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621; *Shallcross' Estate*, 200 Pa. 122, 49 Atl. 936; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363; *Quinlan v. Wickman*, 233 Ill. 39, 84 N. E. 38, 17 L. R. A. (N. S.) 216; *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103.

Having carefully re-examined the principles of the *Starcher and Duty Case*, and seeing no reason for departure therefrom, nor any ground upon which this cause can be distinguished from it, we will reverse the decree complained of, overrule the demurrer, and remand the cause.

LYNCH, J., absent.

(76 W. Va. 161)

BIG HUFF COAL CO. v. THOMAS et al.

(Supreme Court of Appeals of West Virginia.
April 13, 1915.)

(Syllabus by the Court.)

1. QUIETING TITLE — CLOUD ON TITLE — BILL — ALLEGATION OF POSSESSION.

A bill by a grantee to cancel a prior contract of sale, executed to another by his grantor, as a cloud on his title, must aver possession of the land.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.]

2. QUIETING TITLE — 4—REMEDY AT LAW.

Equity will not entertain a suit to cancel a contract for the sale of land solely on the ground that it was procured by fraudulent representations. In such case the law affords full, adequate, and complete remedy.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. §§ 5-13; Dec. Dig. —4.]

3. CANCELLATION OF INSTRUMENTS — 10 — REMEDY AT LAW.

Although equity jurisdiction to cancel written instruments does not depend upon the adequacy of a legal remedy, yet it will decline to exercise it if complainant's remedy, either by action or defense at law, is plain, adequate, and complete.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 7, 9, 18-22; Dec. Dig. —10.]

4. CANCELLATION OF INSTRUMENTS — 37 — FAILURE OF BILL—EFFECT ON CROSS-BILL—INDEPENDENT ISSUES.

Where plaintiff files a bill praying for the cancellation of a written contract, and defendant files a combined answer and cross-bill alleging affirmative matter, not only as defensive, but also as cause for affirmative relief, and prays for specific enforcement of the contract, the bill and cross-bill present independent issues, and the failure of the original bill does not necessarily carry with it the cross-bill.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. —37.]

5. SPECIFIC PERFORMANCE — 8, 87—RIGHT TO RELIEF—DISCRETION.

Specific performance is not a remedy existing as a matter of right, but rests in the judicial discretion of the chancellor; and, to entitle a complainant to the relief, he must show that he has acted in good faith, and has been ready, willing, and eager to perform the contract on his part.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18, 225, 238-241; Dec. Dig. —8, 87.]

For other definitions, see Words and Phrases, First and Second Series, Specific Performance.]

Appeal from Circuit Court, Wyoming County.

Suit by the Big Huff Coal Company against S. B. Thomas and others. From decree for plaintiff, the defendant named appeals. Reversed and remanded.

R. F. Dunlap, of Hinton, for appellant. Holt, Duncan & Holt, of Huntington, for appellee.

WILLIAMS, J. On October 1, 1909, L. B. Cook, by written contract, sold to S. B. Thomas the mineral underlying two certain tracts of land in Wyoming county, described as containing 900 and 416 acres, respectively, and all the timber thereon, for mining purposes, except the poplar, ash, cucumber and walnut, at the price of \$35 per acre, the quantity to be ascertained by survey, to be thereafter made. A survey was to be made by J. W. Heron, of Huntington, and was to be begun within 25 days, and completed as soon as possible. Cook was then to execute to Thomas, or to any one whom he might in writing designate, a deed with covenants of general warranty and against all incum-

brances. One-third of the purchase money was to be paid in cash, on delivery of the deed, and the remaining two-thirds in one and two years thereafter, with interest, and was to be secured by retention of a vendor's lien. Cook was also required to give Thomas 5 days' written notice of the time when he would be ready to deliver the deed. The contract was signed by L. B. Cook and his wife, and by Thomas, and acknowledged by him only, and recorded in Wyoming county October 14, 1909. The paper is spoken of throughout the record, by witnesses and attorneys, sometimes as a contract, and sometimes as an option. But it is, in express terms, a contract of sale. It recites a cash consideration of \$1, and Cook testified that nothing was actually paid. This point is not material to the validity of the contract; for it is under seal, which imports sufficient consideration. But it is important in determining whether or not plaintiff's bill is bad on demurrer, for not averring its readiness to restore Thomas to his status quo. Nothing having been paid by Thomas, there was nothing to be restored to him, and no tender was necessary.

For reasons hereinafter to be given, the sale was never completed, and on the 16th of September, 1911, Cook sold the same, and other lands, to James D. Lowry, and on the 21st of October following he and L. B. Cook made a joint deed therefor to the Big Huff Coal Company, a corporation; the respective wives of the grantors uniting in the conveyance. The deed conveyed all the mineral in both tracts, and all the timber on the larger tract, under 18 inches in diameter, except the poplar, ash, cucumber, and walnut, and all the timber, without regard to size, except the poplar, ash, cucumber, and walnut, on the smaller tract. The 900-acre tract was found to contain but 850 acres, and will be hereafter so designated in this opinion. Lowry and the Big Huff Coal Company purchased with knowledge of the Thomas contract. In his deed to the Big Huff Coal Company Cook expressly assigned to it all the rights he had in his contract with Thomas, and authorized said company "to sue for its benefit to enforce said option or agreement, or to cancel or set aside same." But it was expressly stipulated that the acceptance thereof was not to be considered an acknowledgment of the validity of the Thomas contract, or of his right to enforce it.

Shortly after the recordation of its deed the Big Huff Coal Company brought this suit to cancel the Thomas contract, as constituting a cloud upon its title, alleging that he had procured it through false and fraudulent representations made to Cook; that he had made material alterations in it, after he had procured Cook and his wife to sign it, without their knowledge or consent; and that he had failed and refused to comply with it after

he had received written notice from Cook that he was ready to make him a deed in compliance with its terms. The bill further alleges abandonment of the contract by Thomas long before Lowry purchased the land; also that he was not, on the 1st of October, 1909, or at any time since, ready, able, and willing to comply with his contract by making payment for the land; and that said Cook and wife had taken no steps to have the contract canceled for fraud, because they were lulled into a state of quietude and inaction by the continuous and repeated misrepresentations of said Thomas. L. B. Cook and wife and James D. Lowry, as well as S. B. Thomas, were made defendants to the bill. Thomas demurred, and also filed a combined answer and cross-bill, denying the allegations of fraud and failure on his part to comply with the contract, and denying that he had in any way altered or changed the terms of the contract. He averred that he was always, and is now, ready and willing to comply with his contract, but that L. B. Cook had not cleared his title of certain defects, which made it impossible for him (Cook) to perform the contract until about the time he sold the land to Lowry, and that he had no knowledge of that sale until after it had been consummated by deed to the plaintiff. The cross-bill answer made L. B. Cook and wife, O. F. Cook and A. H. Cook, who claimed a conflicting interest in the larger tract of land, parties defendant, and prayed for specific performance of his contract, averring his ability and readiness to comply with its terms. L. B. Cook and wife and Lowry and the Big Huff Coal Company all demurred and replied specially to the cross-bill answer. Their replies deny the allegations of the cross-bill, and contain, in substance, the same matter averred in the original bill. On the issues thus joined numerous depositions were taken; and on the 29th of May, 1912, the cause was heard and a final decree entered overruling the demurrer to the original bill and canceling the contract of October 1, 1909. Thomas has appealed, and assigns numerous errors.

[1-3] One is that the demurrer to the plaintiff's bill was improperly overruled. The bill does not aver actual possession of the land by plaintiff, and it is insisted that this omission is fatal. This court has held, in numerous cases, that, to entitle a plaintiff to maintain a bill to remove cloud from title, he must have the legal title, and must also be in actual possession. *Iguano Land, etc., Co. v. Jones*, 65 W. Va. 59, 64 S. E. 640; *Whitehouse v. Jones*, 60 W. Va. 650, 55 S. E. 730, 12 L. R. A. (N. S.) 49; *Poling v. Poling*, 61 W. Va. 78, 55 S. E. 993; and *Clayton v. Barr*, 34 W. Va. 290, 12 S. E. 704. The mere constructive possession, which, in the absence of actual possession, follows the title, and is good for some purposes, is not sufficient to support a bill to remove cloud from title. Plaintiff must have a *pedis possessio* on the

land, else he will be left to his remedy at law. *Mackey v. Maxin*, 63 W. Va. 14, 59 S. E. 742, and *Hitchcox v. Morrison*, 47 W. Va. 206, 34 S. E. 993. But counsel for appellee insist that the rule respecting possessor does not apply where other distinct grounds of equity jurisdiction exist, and that jurisdiction exists, in the present case, to cancel the contract on the ground of fraud. That equity will relieve against fraud is generally, though not always, true. It declines jurisdiction, even in matters of fraud, where the party complaining has a full, adequate, and complete remedy at law, either by action or defense. The contract here involved is simply executory. It does not purport to pass title, and, if Cook were the party complaining, he could not maintain the suit without having possession. The court would not entertain his suit to cancel the contract on the sole ground that it was fraudulently procured, simply because he might be personally liable on it. The law gives him a remedy, by an action for the deceit; and, if an action were brought against him for a breach of it, he could defend by proving the fraud. It is only on the ground that the contract constitutes a cloud on his title that even Cook himself could maintain a suit to cancel it, and, to sustain such a suit, possession is indispensable. If Cook could not maintain such a suit without possession, certainly his grantee cannot; for it acquired no greater equities than he had. If the contract was actually procured by fraud, Cook was in no danger from it, for Thomas could confer no greater rights upon another, by assigning it, than he had himself. Moreover, there is no privity between the plaintiff company and Thomas respecting the contract, and hence no mutual obligation or liability. Neither has a personal right of action against the other for its breach. Hence plaintiff is only indirectly interested in the alleged fraud, as an extraneous matter, rendering void a writing which, on its face, is a menace to its title, giving right to apply to equity to have it removed as a cloud. It is not directly and personally affected by the fraud, and, if it cannot maintain its suit as one to remove cloud, it has no right whatever to ask for a cancellation of the contract. So that, even if Cook could have it canceled for the fraud personally affecting him, it does not follow that plaintiff could do so. But Cook himself could only maintain a suit in equity as one to remove cloud. He could not have the contract canceled solely for fraud. Equity will not entertain a suit to cancel every kind of contract simply because it was fraudulently procured. The party complaining must be in some way endangered by it to entitle him to that relief. Equity refuses to cancel non-negotiable instruments, or negotiable instruments overdue, for fraud; because the obligor in such cases has a full, adequate, and complete defense at law, and stands in no

danger. 6 Cyc. 292, and 24 A. & E. E. L. (2d Ed.) 636. Likewise it refuses to cancel policies of insurance, after the death of the insured, on the ground that the policy was procured by fraudulent representations. *Globe Mutual Life Ins. Co. v. Reals et al.*, 79 N. Y. 202; *Des Moines Life Ins. Co. v. Seifert*, 210 Ill. 157, 71 N. E. 349; *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501. While equity jurisdiction in the federal courts depends upon the judiciary act, still it would seem to be, in this respect, but declaratory of the principle adopted and followed by courts of equity generally. The general rule is that, although jurisdiction to cancel written instruments does not depend upon the adequacy of complainant's legal remedy, yet equity will refuse to exercise it where complainant's remedy, either by action or defense at law, is plain, adequate, and complete. 6 Cyc. 290; 2 Pom. Eq. §§ 911, 914; 4 Id. §§ 1377, 1399. "Where complainant has a complete remedy at law, equity will not assume jurisdiction, even in case of fraud." *Huff v. Ripley & Tinsley*, 58 Ga. 11. *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, was a suit in equity by the purchaser of cattle praying for a cancellation of the contract of purchase on the ground that it was procured by fraudulent representations, and the court denied relief, for the reason that complainant had a full, adequate, and complete remedy by action at law for deceit. *Bruner v. Meigs et al.*, 64 N. Y. 506, was a suit by the purchaser of real estate to rescind the contract of purchase on the ground that the vendor had no power to sell, and relief in equity was denied, for the reason that complainant had a perfect defense at law. The failure to aver possession was fatal to plaintiff's bill, and the demurrer thereto should have been sustained for that reason. In other respects the bill is good. We do not think it is multifarious, or that its allegations are inconsistent.

[4] But defendant Thomas, by his answer in the nature of a cross-bill, set up affirmative matter, not only as a defense to the original bill, but as cause for affirmative relief, and prayed for the enforcement of his contract. The bill and the cross-bill presented two suits—two issues relating to the same subject-matter; and the cross-bill may stand independent of the original bill. The court could dismiss the original bill, and still retain the suit presented by the cross-bill. Being a cross-bill for affirmative relief, as well as an answer, it does not necessarily fall with the original bill. *W. Va.*, etc., *Land Co. v. Vinal*, 14 W. Va. 637, syl. pt. 14; *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199, and discussion by Judge Brannon at page 524; 1 Hogg's Eq. Proc. § 205; *Ragland v. Broadnax et al.*, 29 Gratt. (Va.) 401; *Fishburne v. Ferguson*, 85 Va. 326, 7 S. E. 361; and *Griffin v. Griffin*, 118 Mich. 446, 76 N. W.

974. Therefore sustaining the demurrer to the original bill does not dispose of Thomas' cross-bill. The special replies or answers thereto of Cook and the Big Huff Coal Company set up the same matters in defense that were made the basis of plaintiff's prayer for relief in its original bill; and the evidence in the case is just as applicable to the one suit as to the other.

[5] Was Thomas entitled to have the contract specifically enforced? That depends, primarily, on whether or not he was at all times ready, willing, and eager to carry out the agreement on his part. Upon that issue he carries the burden, and we do not think he is sustained by the evidence. J. W. Heron, the surveyor at first mutually agreed on to make the survey, did not do it, and the parties thereafter agreed upon George Beddow, who did it. Thomas assumed to pay him, and Cook paid his helpers. After the survey was completed Beddow furnished Thomas with his report and plat of the survey. Thomas then had an abstract made of Cook's title, and it showed certain defects, and numerous judgment and trust deed liens on the land, amounting to something like \$20,000. One of the defects in the title to the 850-acre tract consisted of a tax title claimed by C. F. and A. H. Cook under a tax deed made to them, before L. B. Cook acquired title by deed from J. M. Laidley, trustee in bankruptcy, in a bankruptcy proceeding against John Cook, the former owner. Pending the bankruptcy proceeding, the land was sold for delinquent taxes, in the name of John Cook, and purchased by C. F. and A. H. Cook. L. B. Cook claims that, notwithstanding their tax title, he was induced by C. F. and A. H. Cook to purchase the same land at the bankruptcy sale; that there was an agreement between them to share in the land. On the 6th of October, 1891, he conveyed to them, in severalty, the surface, reserving to himself the mineral of all kinds underlying the tract of 850 acres and a tract of 22 acres, and also reserving the "timber sufficient for all mining purposes, said timber to consist of any timber that may now be growing or that may hereafter grow on said real estate, except the poplar, ash, cucumber, and walnut." But C. F. and A. H. Cook did not then expressly release by deed their claim to the mineral and the timber reserved by L. B. Cook. Why they would accept a deed from him, having the older title themselves, is not clear, unless, as L. B. Cook says, it was in pursuance of their agreement to become jointly interested in the land. It became necessary for L. B. Cook to clear his title of their claim.

The other principal objection to Cook's title was a recorded option he had given the Standard Realty Company of Huntington in 1908. After these defects were called to L. B. Cook's attention, early in 1910, he denied any right of C. F. and A. H. Cook in the

mineral and timber sold to Thomas, and sought to obtain from them a release without suit. He finally compromised with C. F. Cook by agreeing to pay him the sum of \$4,000, and took from him a release of his claim upon the mineral and timber embraced in the sale to Thomas. That deed bears date November 22, 1910, was acknowledged December 2, 1910, and recorded March 25, 1911. A vendor's lien was retained to secure the payment of the \$4,000; and on the 14th of September, 1911, he obtained a release deed from A. H. Cook and wife and J. M. Cook, in which C. F. Cook and wife also joined. This deed was acknowledged on the day of its date, and recorded October 3, 1911. The release of the option held by the realty company was obtained in March, 1910, and recorded October 27, 1911. After obtaining the foregoing releases Cook was in position to make substantial compliance with his contract, and so notified Thomas. True, the releases were not recorded until some time thereafter; but that is not material if Thomas had the five days' written notice provided for in the contract. That he did have such notice is fully borne out by the record. As early as December 10, 1910, James H. Gilmore, attorney for Cook, wrote Thomas that, so far as the claim of C. F. and A. H. Cook was concerned, the title was cleared, and requested him to let him know what he intended to do in the premises; and on December 18, 1910, Thomas answered, admitting receipt of a letter from Messrs. Childers & Gorby, also attorneys for Cook, written as early as the 22d of the previous November, advising him of the release by C. F. Cook. He says he wrote them on the 22d of November, requesting a copy of the release, and had received no reply, and requests Gilmore to send him certified copies of the releases, so that he can have his attorney to examine them, and says, if he finds the title in good shape, he will then be ready to carry out his contract "within a reasonable time." In their letter of November 22d Childers & Gorby advised him of the release of the tax title, and that L. B. Cook expected him to comply with his contract within a few days, else Cook would take steps either to compel him to do so, or to cancel the contract. Again, on March 21, 1911, L. B. Cook and wife, through their attorney, Gilmore, wrote Thomas they were ready to execute to any person whom he would designate a deed with covenants of general warranty and against all incumbrances, in compliance with the contract, and would deposit it at the Citizens' National Bank in Pineville on the 29th of that month. Thomas did not reply to this letter, and gave no directions concerning the grantee to be named in the deed. He testified that he started to Pineville on the 29th of March, and got as far as Lester, and phoned from there to Mr. Worrell, his attorney, and requested him to go to the bank and ascertain whether or not the deed had been

deposited, and says that afterwards Mr. Worrell wrote him the deed had not been filed. If he was acting in good faith, and was ready, as he testifies, to comply with his contract, why did he not go to L. B. Cook and tender him the cash payment and demand a deed? If he had been as eager to comply with his contract as he was to get it, he would have learned from Cook himself that his title was cleared up, although the releases were not then recorded. On the 4th of May, 1911, Cook again wrote Thomas that he would execute to any one he might designate a deed in compliance with his contract, and would deliver it at the same bank previously named on the 13th of May. He was also advised that, if he would furnish copies of the courses and distances of the boundary lines, ascertained by the recent survey, they would be incorporated in the deed. He did not reply to this notice, but, notwithstanding, Cook and wife, on the 12th of May, 1911, made and acknowledged a deed for the land, according to the description of it given in the contract of sale, and deposited it in the bank. Again, if he was ready to comply with his contract, and was acting in good faith, why did he not furnish Cook with a copy of the calls from Beddow's survey and report, and inform him to whom he desired the deed made? Cook testified that he wrote Beddow at least twice for a copy of his survey and plat, and also for his original deeds he had turned over to him by which to make the survey, and received no reply. In this he is borne out by Beddow himself, who swore the reason he did not furnish Cook with the information was because Thomas had requested him not to do so. Gilmore testified that he caused L. B. Cook and wife to execute and acknowledge the deed, and placed it in the bank on the morning of May 13, 1911, where it remained for several days, and that he notified Howard & Worrell, who, as he had been advised by letter from Thomas, were his counsel in the matter, that the deed was in bank for inspection. Thomas swears he did not see the deed, and does not think he saw a copy of it. But in this he must be mistaken; for he is contradicted by a letter from his attorneys, Howard & Worrell, which he files as an exhibit with his deposition. The letter is dated May 21, 1911, and purports to be a reply to one from Thomas, received just before, and imports that, instead of replying to Cook, or to his counsel, on receipt of the notice that the deed would be ready for delivery on the 13th, Thomas wrote his own counsel instead. Howard & Worrell in their letter, written by Worrell, say they inclose a copy of the deed, and that it was not delivered at the bank, as the notice said it would be, and further say the deed was not sufficient; that nothing had been released on the land. They say furthermore:

"There is trouble about this deed. They have not complied with the contract of option,

for they have released nothing. Gilmore told me so much the day he wrote the deed: This is one of Gilmore's foxy tricks to get us to sue Cook instead of Cook suing you. Have you acknowledged receipt of Gilmore's letter? If you have not, do not, and it will be up to him to show that you have yet had notice of this deed. I suppose we will eventually have to sue him, but for the present it might be well for us to give him a counter notice that we had inspected his deed, and that it does not comply with the option, and that we expect to hold him to the contract, and we will be in the same position that he is in, or that we were both in at the beginning. Think over this last proposition and tell us what you think of it. I think it will be sufficient."

This letter also tends very strongly to show that the real purpose was to procure delay in closing up the sale; that Thomas was playing for time, and trying to keep the land tied up with his contract until he could make a profitable sale of it to some one else. It shows that he was expecting to be sued by Cook, and was trying to construct a defense to defeat him if possible. It indicates that he was not ready to comply, and still desired to make Cook believe he was ready. In his testimony Thomas expressly admits that he was at no time personally able to buy the land, but claims he had other purchasers who were ready to take it off his hands, or to join with him in the purchase, whenever Cook was in a position to make a good title. He names certain persons who, he says, had agreed to purchase the land, and were able and ready to comply with Cook's terms of sale to him. But he produced no binding agreement with them to do so, and offered none of them as witnesses in his behalf. He exhibits an option to J. W. Heron, trustee, signed only by himself, dated November 23, 1909, agreeing to sell him the land at \$50 an acre, provided he elected to take it in 40 days, and pay in cash one-third of the purchase price. He also produced another paper, not signed by any one, proposing to organize a joint-stock company with a capital of \$80,000, for the purpose of buying, developing, reselling, and leasing the land, and mining coal and manufacturing coke thereon. It recites that L. B. Cook is the owner of the land, and that J. W. Heron, D. E. Mathews, and H. T. Lovett are the owners of an option to buy the same at \$50 an acre. According to the plan therein provided, Heron, Mathews, and Lovett were to assign their option to the proposed company in consideration of \$12,000 of its capital stock. The paper is also a prospectus, giving the number of coal seams in the land, with a chemical analysis of each; a computation of the tonnage of coal; the location of the seams with reference to mining facilities; its accessibility to the railroad; and other matters of interest to prospective investors. It was prepared some time in 1910, the exact date not appearing, but it was evidently after Thomas had given the option to Heron, Mathews, and Lovett; for that was given November 23, 1909, less than two months after Cook's sale

to Thomas. The optionees are the parties to whom Thomas claims to have sold, and who, he says, were ready to take the land and comply with the terms of the purchase from Cook. But, we think, the fact that they were not ready to do so is fully disclosed by this prospectus, showing the plan contemplated for raising the money. That plan was never perfected, the company was never formed, and the money was not forthcoming, so far as the record discloses.

At the time Cook tendered Thomas the deed, to wit, on the 13th of May, 1911, he was in a position to comply, substantially, with the contract on his part. True, there were then judgment and trust deed liens on his land, but it was understood between the parties that they were to be discharged with the purchase money. Cook was selling his land in order to get the money to pay off these liens; and Thomas knew he had a right to apply the purchase money to their payment. So likewise, with respect to the vendor's lien retained by C. F. Cook in his deed of release, the right to pay off that lien at any time was expressly given by the terms of the deed.

Being plaintiff in the cross-suit for specific performance, Thomas is required to show, before he can obtain that relief, that he was acting in good faith, and was ready and eager to perform the contract on his part. *Henking v. Anderson*, 34 W. Va. 709, 12 S. E. 869; *Clay v. Deskins*, 36 W. Va. 350, 15 S. E. 85; *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; and *Wilkinson v. Poling*, 74 W. Va. —, 82 S. E. 47. Specific performance is not a matter of right, but is purely an equitable remedy, resting in sound judicial discretion; and a party who does not show himself to have been ready, prompt, and eager to comply with his contract will be denied the relief. *Bowles v. Woodson*, 6 Grat. 78. Measured by that rule, Thomas' suit must fail. He was never at any time ready to make the cash payment. He says so himself. He was depending on making a sale of the land to others, who could comply with the terms of his contract, and failed. In his letter to Gilmore, written on the 16th of December, 1910, he virtually admits he was not then ready, because he therein says, if his attorney finds Cook's title in good shape, he will be ready to carry out his contract "within a reasonable time." Five days was all the time he had under his agreement.

In view of Thomas' failure to prove a case entitling him to relief, it is unnecessary to consider the evidence taken on the question of fraud in the procurement of the contract as a defense to his suit. He has failed to prove a *prima facie* case.

The lower court decreed a cancellation of the contract in compliance with the prayer

of the original bill. This was error for which the decree must be reversed. The Big Huff Coal Company was not entitled to relief on its bill, and it cannot obtain affirmative relief on its defense to the cross-bill. The court should have sustained the demurrer to the original bill, and have given plaintiff leave to amend, if it should so elect, and it should have dismissed Thomas' cross-bill. The decree appealed from will, therefore, be reversed, and this court will enter a decree in accordance with this opinion, and will remand the cause. If the plaintiff in the original bill is not in position to amend its bill, or should decline to do so, when the cause is remanded, its bill also should be dismissed. Thomas, having substantially prevailed, is entitled to his costs in this court.

LYNCH, J., absent.

(76 W. Va. 186)

TELLURIC CO. v. BRAMER et al.
(No. 2819.)

(Supreme Court of Appeals of West Virginia.
April 13, 1915.)

(Syllabus by the Court.)

1. LOST INSTRUMENTS — 8 — PROOF — MUNI-
FICENT OF TITLE.

To establish or set up a lost instrument rising to the dignity and importance of a muniment of title, the evidence of its former existence, loss, and contents must be clear, strong, and conclusive.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. — 8.]

2. LOST INSTRUMENTS — 8 — WEIGHT OF EVIDENCE.

Circumstances casting doubt upon the existence of any of these essential elements will prevail over slight, direct, oral evidence, though aided by corroborative facts.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. — 8.]

3. LOST INSTRUMENTS — 8 — PROOF OF CON-
TENTS—SUFFICIENCY.

The recollection of a very aged man as to the legal effect of a deed he claims to have executed more than 20 years before the date of his testimony is insufficient to prove the contents thereof.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. — 8.]

Appeal from Circuit Court, Harrison County.

Suit by the Telluric Company against John H. Brainer and others. From decree for defendants, plaintiff appeals. Affirmed.

Davis, Swartz & Templeman, of Clarksburg, for appellant. Homer Strosnider, of Clarksburg, for appellees.

POFFENBARGER, J. On this appeal from a decree dismissing a bill filed for the purpose of establishing a lost deed for an interest in the oil and gas in a certain tract of land, numerous questions have been discussed. Substantially they are sufficiency of the evidence to prove the execution, con-

tents and loss of the alleged deed, and the defenses of laches on the part of the plaintiff and bona fides of a purchase of the land since the alleged conveyance of the interests claimed.

The tract of land now yielding considerable quantities of oil is owned prima facie by the heirs of Mary E. Brainer in its entirety, and the plaintiff claims by virtue of the alleged lost deed one-half of the oil royalty and one-half of the gas royalty or rental. It is the aggregate of two tracts formerly owned by John H. Brainer, the husband of Mary E. Brainer, which tracts were conveyed to him as containing, respectively, 100 acres and 2 acres. In order to relieve himself of financial embarrassment, John H. Brainer, on January 17, 1890, conveyed these two tracts of land to James Monroe and Alford Rogers, for and in consideration of the sum of \$1,700, to be applied by the grantees, so far as might be necessary, to the discharge of the liens on the land which Brainer and his wife and family continued thereafter to occupy and use. On the 6th day of August, 1894, Monroe and Rogers conveyed the land to Mary E. Brainer for and in consideration of \$1,700, a portion of which, \$557, was to be paid to Rogers on account of a note held by him and the balance applied upon the unpaid liens.

The purpose of the bill is to establish the execution of a deed by Monroe and Rogers to one W. S. Stevenson, conveying one-half of the oil royalty, the alleged equivalent of one-sixteenth of the oil in place, and one-half of the gas rental. If such a deed was executed, the purchase by Mary E. Brainer, if any, was subsequent thereto in date, and the bill alleges notice to her of the previous conveyance to Stevenson, and charges the conveyance to her was made without consideration. It also alleges the conveyance to Monroe and Rogers was upon a trust to pay the indebtedness of John H. Brainer, and that, upon the reduction of the indebtedness to such an extent as to relieve him from pressure, he had the land reconveyed to his wife. If Stevenson obtained such a deed as is claimed by the plaintiff, it was never recorded and its loss is fairly well established.

For some time before and after October 31 1890, the date of the alleged deed, I. C. White, T. M. Jackson, and W. S. Stevenson were engaged in the procurement of oil and gas leases of, and interests in, oil and gas lands in the counties of Monongalia, Harrison, Doddridge, and Lewis, all of which leases and interests were subsequently conveyed to the Telluric Company, a corporation organized in March, 1891, practically all of the stock of which was owned by White, Jackson, and Stevenson. Most of the leases and conveyances were taken in the name of Stevenson. On the 28th day of April, 1891, he executed a deed by which he transferred

to the Telluric Company all of the interests so acquired by him. In this deed, the several tracts of land in which the interests had been acquired were not specifically described. The leases and royalties were grouped in two schedules embodied in the deed, giving the names of the lessors and grantors, the counties in which the lands were, the dates of the conveyances, and the acreages of the several tracts. In Schedule No. 2, the interest sought to be established here was set out and described as follows: "Mary E. Bramer et al. Harrison, October 31, 1890, 200 acres."

On the organization of the Telluric Company, Stevenson became its secretary, and held that position until the time of his death in September, 1903. From the records of the company or Stevenson's private papers, or both, reports, statements, and memoranda made by him have been produced. An expense account shows he had dinner and horse feed at Bramer's October 31, 1890. A paper, purporting to be a list of leases and royalties, partly in the handwriting of Stevenson, contains this entry: "Mary E. Bramer et al. 1/16, Oct. 31, 90, 200, 500.00, all paid"—under headings for dates, acres, and cash. A paper in the handwriting of Stevenson, and purporting to be a memorandum of conveyances and transfers from himself and others, including White and Jackson, to the Telluric Company, names Mary E. Bramer et al. as parties from whom royalties had been obtained and conveyed. This interest is mentioned in two additional papers of similar character. Mr. White has no recollection of ever having seen a deed from Monroe and Rogers, but he directed the purchase of a royalty interest in the Bramer land. He was the geologist of the copartnership, and Stevenson the fieldman, making purchases as directed. The books of the company and papers pertaining to the transactions show expenditures of several thousands of dollars, in the procurement of leases and purchases of royalties. Stevenson rendered a summary of his purchases, including 17 royalties in Harrison county, costing \$3,108.50, and showing the total expenditures in the three counties of Monongalia, Harrison, and Doddridge to have been \$24,632.58, on account of which he acknowledged credit to the extent of \$21,500. He also rendered an account of recording fees paid by him, including the cost of recording 17 royalties in Harrison county. Mr. White thinks the Bramer purchase was one of the 17 purchases included in the item of \$3,108.50. Stevenson carried with him a small memorandum book in which he noted the principal transactions and incidents of his fieldwork. This record partakes largely of the nature of a diary, but it contains minutes of numerous business transactions. In it appears the following entry:

"Friday Oct. 31, 1890. Saw and traded with John H. Bramer, 200 acres, \$500.00. 1/16. Dinner at Bramer's, Rogers signed, also saw

George W. Williams and Alf W. drove to J. S. Pigott, with whom I got supper and stayed."

Monroe, one of the alleged grantors, is dead. Rogers, the other one, is living, and testified positively that such a deed as is claimed by the plaintiff was executed by himself and Monroe; but at the time of the giving of the testimony he was 95 years old, and the transaction to which he testified, if it ever occurred, took place nearly 21 years before the date of his testimony. His wife testified to her recollection of the transaction, as a matter of information from the parties thereto, but had never seen the deed nor joined in it. Both she and her husband say that, on the settlement between Monroe and Rogers, on the one hand, and the Bramers, on the other, and reconveyance of the land to Mrs. Bramer, the alleged purchase money was taken into account and credited. Rogers was unable to speak with certainty as to the place of the acknowledgment of the deed or the officer who took it.

As to the real character of the conveyances to Monroe and Rogers and back to Mrs. Bramer, there is conflict in the evidence. Rogers claims Mrs. Bramer paid nothing for the land, and that her husband transacted the business with him and Monroe and partially repaid the money they had advanced in discharge of liens. In other words, the substance of his testimony is that they took the land upon a trust and, after having satisfied some of the liens and so relieved the financial pressure, reconveyed the land to Mrs. Bramer, at the instance and request of her husband, who had in the meantime contracted other debts. On the other hand, John H. Bramer and his sons say Mrs. Bramer actually purchased and paid for the land. They exhibit a note for \$410, payable to the Merchants' National Bank of Clarksburg, executed by Alford Rogers, James Monroe, and J. W. Monroe, and stamped as having been paid by Mary E. Bramer, and the note of Mary E. Bramer for \$557, payable to Alford Rogers or order. They further say she borrowed \$800 from a man by the name of Ramsburg, to secure which a deed of trust was given on the land, and paid it on the purchase, but their testimony as to the application of said sum is largely conjecture and supposition.

[1, 2] Practically all of the testimony submitted to the court on behalf of the plaintiff was excepted to in detail. Some of the exceptions were sustained, but many of them were overruled. Most of them went to the competency of the witnesses, in view of the death of parties and lack of identification of the documentary evidence. It would be a waste of time to review all of the rulings upon these exceptions, if the rejected evidence treated as admissible and considered upon this appeal is not sufficiently definite, certain, and conclusive. To establish the execution of a lost deed or set up a lost muniment of title, the evidence must be strong,

clear, and conclusive of its former existence, its loss, and its contents. *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382; *Barley et al. v. Byrd et al.*, 95 Va. 316, 28 S. E. 329; *Thomas v. Ribble*, 2 Va. Dec. 321, 24 S. E. 241; *Carter v. Wood*, 103 Va. 68, 48 S. E. 553; *Erskine v. Wilson*, 20 Tex. 77; *Swaine v. Maryott*, 28 N. J. Eq. 589. The following proposition enunciated in *Thomas v. Ribble*, cited, was approved and applied in *Carter v. Wood*:

"Where the issue involves the existence and contents of a written paper, the doctrine seems to be well founded in principle that the greater the value of the instrument the more conclusive should be the proof of its existence and contents. And, where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss, and its contents should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will."

[3] Only one of the many documents relied upon can be construed as containing any reference to a deed of conveyance to Stevenson, and that is the deed from Stevenson to the Telluric Company, which enumerates several conveyances to him, including one from Mary E. Bramer et al. The other papers merely describe the interest claimed as being a royalty. None of them say it had been conveyed or make any mention of a deed. Only one witness, Alford Rogers, a man over 95 years old, testifying more than 20 years after the date of his alleged act, claims to have seen such a deed as is alleged. His wife did not join him in it, nor did she ever see it. She knows only what she says she heard about it. According to her testimony, Rogers and Monroe did not get the money. It was paid to the Bramers. On this point her husband is indefinite. Stevenson's notebook says he spent the night of October 31, 1890, at the residence of J. S. Pigott. Mrs. Rogers says he stayed at her house that night. She and her husband are both flatly contradicted in several instances by the Bramers. Presumptively Monroe was thoroughly cognizant of the effect of the deeds he executed, for he was clerk of the county court of his county and frequently prepared deeds. About four years after October 31, 1890, he and Rogers executed a deed conveying the Bramer land to Mrs. Bramer, with a covenant of general warranty, and without any exception of the alleged conveyance to Stevenson. The execution of the deed to Mary E. Bramer was virtually a settlement of their dealings with John H. Bramer. It occurred in a comparatively short time after the alleged conveyance to Stevenson, wherefore that transaction, if it actually occurred, likely did not escape their attention, and their failure to except any conveyance to him is highly inconsistent with the alleged previous act. An ordinary precaution against liability on the covenant of warranty would have been

an exception of the interest conveyed to Stevenson. None of the documents specify any deed or conveyance from Monroe and Rogers. The references are to Mary E. Bramer et al. At the date of the alleged deed of conveyance, Mrs. Bramer had no title, and the documents do not indicate who the other suggested parties were. A deed from her and her husband could not have been effective at that time. The memorandum in Stevenson's notebook makes no mention of Monroe. It says a trade was made with John H. Bramer, and that Rogers signed, but it does not say what he signed. He may have signed a mere executory contract or an option. He may have made a bargain which was never carried into execution. The documents in the form of memoranda made by Stevenson giving the deed books and pages of the recordation of the muniments of title procured by him, except the one claimed to have been obtained from Mary E. Bramer et al. As to the recordation of it, the memoranda all stop short. Hence he must have known the deed, if any, had not been recorded. His silence for 13 years casts doubt upon the existence of such a deed. The summary of his purchases called for 17 royalties in Harrison county, costing \$3,108.50. His expense account for recordations likewise called for 17 royalties in Harrison county. In this there was probably no charge for the Bramer royalty, since it was not recorded. Hence there must have been 17 without it, and the list of leases and royalties in that county prepared by him shows 18 royalty interests. These circumstances cast doubt upon the question of payment of \$500 on account of a royalty in the Bramer land, notwithstanding the memoranda produced. There is evidence tending to show that Jackson, the associate of Stevenson and White, held a lease on the land at the date of the alleged execution of a deed, and the land was incumbered and its title in an unsettled condition. Under these circumstances, Stevenson may have paid the Bramers \$500 on some sort of a contract, such as an extension or renewal of the lease, or for an option or a contract to be carried into a deed later, and on the adjustment of matters pertaining to the Bramer title. Besides, the contents of the alleged instrument are not shown. Nobody attempts to give them in terms. Rogers says he and Monroe executed a deed for "an out and out sale for half the gas and half the oil." This expresses no more than a mere conclusion as to the legal effect of the paper he says he executed, and comes as a matter of memory of a transaction more than 20 years old. If a deed was executed and could be produced, it might not sustain this conclusion. Generally the proof of the contents of lost deeds goes beyond mere matter of recollection. The parol evidence as to contents is often aided by possession of the lands or a copy of the instrument. Such evidence as is offered here was emphatical-

ly rejected as being insufficient in Board v. Callihan, cited.

All the circumstances considered, and the offered evidence treated as being admissible, without a declaration of its admissibility, we are of the opinion that the requisite degree of certainty and conclusiveness in the proof is not established, if all the evidence tendered were admitted. In view of this conclusion, the remaining questions discussed need not be considered.

The decree complained of will be affirmed.

LYNCH, J., absent.

(76 W. Va. 197)

ROSS v. KANAWHA & M. RY. CO.

(Supreme Court of Appeals of West Virginia.
April 13, 1915.)

(Syllabus by the Court.)

1. RAILROADS ⚡355 — LICENSE TO CROSS UNDER CARS—GRATUITOUS AGREEMENT.

Where a railway company, solely at the instance and for the convenience of persons having no connection with its business, gratuitously agrees to separate cars which it stores on its side tracks, so that such persons may cross the tracks at a particular place, a license or permission to cross over or under the cars when not so separated is not thereby given.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227, 1235; Dec. Dig. ⚡355.]

2. RAILROADS ⚡355 — "TRESPASSER" — PERSON CROSSING UNDER CARS.

One who without permission crawls under cars of a railway company, left standing on its tracks at a place not a public crossing, is a mere trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1220-1227, 1235; Dec. Dig. ⚡355.]

For other definitions, see Words and Phrases, First and Second Series, 'Trespasser.].

3. NEGLIGENCE ⚡32—"LICENSEE"—ATTENDANT RISKS.

A person exercising a privilege which exists solely for his own convenience or benefit is a bare licensee subject to all attendant risks.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. ⚡32.]

For other definitions, see Words and Phrases, First and Second Series, Licensee.]

4. RAILROADS ⚡300—DUTY TO TREAT PLACE AS PUBLIC CROSSING — INVITATION OR RIGHT.

In order to impose on a railway company the duty to treat a place as a public crossing, those who use it as a crossing must do so under legal right or at the invitation of the company. Mere license or permission to cross the tracks of a railway company is not equivalent to an invitation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 955; Dec. Dig. ⚡300.]

Error to Circuit Court, Fayette County.

Action by Chloe Ross, who sues, etc., against the Kanawha & Michigan Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

W. N. King and Leroy Allebach, both of Charleston, for plaintiff in error. Dillon & Nuckolls, of Fayetteville, for defendant in error.

ROBINSON, P. In this case the plaintiff is a little girl, twelve years old at the time of her injury, suing for the recovery of damages from a railway company because of the loss of her right leg. From a judgment in her favor the railway company brings error.

Plaintiff lived in a mining village which was made up of the plant, store, dwellings, and club house of the coal company there operating. She was the daughter of an employee of the coal company, living in one of the dwellings. The coal operation, store, and dwellings were on one side of the railway, the club house on the other. The latter, living quarters for the coal company officials and others, was almost directly opposite the store. Through the village the railway company maintained five tracks, a main line with two tracks on each side of the same. The side tracks were largely used for storing cars needed in the transportation of coal from the several mines in the vicinity. In going to the club house from the main part of the village, it was of course more convenient to go directly across these tracks than to use a public crossing located several hundred yards above. On the day plaintiff was injured, she had been to the club house to deliver milk which her parents sold there. On her way from her home to the club house she found cars standing on the side tracks, with no openings between them, as was usually the case, and crawled under them, or between them at the couplings. She had begun to return the same way when the long string of cars standing on the track nearest the club house, under couplings of which she was crawling, was started by an engine attached thereto at a distance so far she could not have seen it. Just as the cars were about to be moved, a train man who was standing on the other side from that whence she came, noticed her and told her to get back. It was too late. Before she could return, the wheels crushed her leg so that it was necessary to amputate the same.

Out of convenience it was usual for persons to travel directly across the tracks between the store and the club house, going over or under the cars whenever the side tracks were blocked by them. The little girl had frequently gone over there in her duty of delivering milk. The general superintendent of the railway company had gratuitously agreed with the superintendent of the coal company to keep the way open for the convenience of the coal company and its employees by separating the cars when they were left on the side tracks. But this agreement was neglected and had not been well fulfilled

[1] The theory of plaintiff's counsel, em-

bodied in the main instruction given to the jury on behalf of plaintiff, is that by reason of the agreement of the railway company to separate the cars, plaintiff was not a trespasser but a licensee, and that therefore defendant owed her the duty of reasonable care. Upon a true view of the facts proved this instruction was inapplicable, misleading, and erroneous. It as much as told the jury that an agreement to separate the cars gave plaintiff license to crawl under the cars if they were not separated. The agreement gave plaintiff no such license.

Plaintiff proved only that by consent of the railway company she had permission to cross when the cars were separated. No other license was granted to any one. There is not a word in the case implying that the railway company consented with the coal company that agents and servants of the latter might climb over or crawl under the cars in case the railway company failed to separate them. Indeed it is inconceivable that any official connected with the railway company would consent to such a thing. Clearly the failure of the railway company to separate the cars did not give any one a more extended license than that which was actually granted. That license, as we have said, was only to cross the tracks between separated cars.

It must be noticed that the duty of a railway company at a public crossing is not involved in this case. If that were so, the case might be different. It is not even contended that the crossing was a public one. The evidence is too clear that it was not. The railway company had refused to establish a public crossing at the place. Thereafter, at the insistence of the coal company, wholly for the benefit and convenience of the coal company and its employees, the railway company consented merely to separate the cars when placed on the side tracks, so that persons could pass between them. This consent in no way related to any benefit or advantage to the railway company. It had no station at the place. In any view the evidence establishes nothing else than a mere permission by the railway company that persons might, without invitation on its part, cross the side tracks from the store to the club house between cars to be separated thereon. We confess having tried to reason more than this out of the facts and circumstances proved. But that can not be done.

[2] It is clear that this little girl in doing that which brought her injury was a mere trespasser. She had no permission or license to crawl under or between the cars. Defendant owed her only the duty that railway companies owe to trespassers. Even to trespassers, under some circumstances, a railway company owes duty not to injure. If the train men knew, or in reason should have known, that plaintiff was on the track under or between the cars, it was certainly action-

able negligence for them to move the cars while she was in such position. Whether the case warranted a submission to the jury on any theory of duty to a child trespasser we need not say. It was not so submitted. As the case must be remanded for new trial, in which the evidence may be different, we do not think it necessary to speak further in this particular. Though it may have been error to overrule defendant's motion to exclude plaintiff's evidence, defendant offering none, still we do not have the case on demurrer to the evidence calling for final judgment here. Nor can we see clearly that plaintiff may not make a better case on another trial. Notwithstanding conflict in our decisions, the proper practice is to award new trial in such case. *Hoylman v. Railway Co.*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, 17 Ann. Cas. 1149.

[3] Even if the agreement proved could be construed to have licensed plaintiff to climb over or crawl under the cars when not separated, or if plaintiff had been crossing between separated cars when she was injured, in neither case would she have been such a protected licensee as the instruction tended to mislead the jury to believe she was. She would have been only a bare licensee, subject to the risks which pertained to the exercise of the license. For she was there wholly for her own business or convenience. Her being there was not by invitation of the railway company. In a legal sense, the railway company had nothing to do with her being there, except to permit it.

"A case of invitation exists where one goes upon premises for the common interest or mutual advantage of both parties, but if such privilege exists for the mere pleasure and benefit of the party exercising it there is simply a case of license." 1 *Kinhead on Torts*, § 318.

"A mere naked license or permission to enter the premises will not create a duty in favor of the person entering, or impose upon the owner or tenant who grants the license an obligation to provide against dangers or accidents which may arise out of the existing condition of the premises; for the licensee goes upon the premises subject to all the dangers attending his going; and so enjoys the license subject to its concomitant perils." *Buswell on Personal Injuries*, § 79.

True, our cases hold that a railway company owes, under certain circumstances, the duty of reasonable care to a young child on or in dangerous proximity to its tracks. But when there is such duty, it can not arise out of some bare license the child may have. It rests on other grounds, and is determinable by the particular facts and circumstances. Yet the instruction in this case gave great force to a license which, if the same had been applicable, was only a bare license on which could be based no right of recovery for failure to exercise ordinary care. The instruction contained a most erroneous and prejudicial theory. The real question presented in the case as made was whether under the facts and circumstances appearing the railway company owed duty to the child

as a trespasser on the tracks and had failed to fulfill the duty. Properly the case could only be tested on this theory.

[4] Counsel for plaintiff contend that though the crossing was not a public one, yet it was one where the railway company owed the same duty of care that pertains to a public crossing. We readily see that this proposition ignores the fact that only a bare permission to cross between separated cars had been given. But suppose, as plaintiff's counsel infer, that the consent granted embraced permission that persons might cross the tracks though the cars were not separated; still that would not make the place a crossing entailing the same duty on the railway company as at a public one. A bare permission, not an invitation or legal right, existed. That the railway company allowed people to cross did not put on it public crossing duty. The mere naked license or permission relied on in this case will not do that. "Although the place is used repeatedly and frequently as a crossing with the mere silent acquiescence of the company, or with the knowledge and simply passive permission of the company, it would seem that the traveler who uses it is at most a bare licensee, who takes his license with all its concomitant risks and perils, and as a general rule, the company owes him no duty greater than that which is due to a trespasser. In order to impose upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company, and neither suffrance, nor permission, nor passive acquiescence is equivalent to an invitation." 3 Elliott on Railroads, § 1154. That a railway company does not owe public crossing duty to a bare licensee or trespasser on its tracks, has long been settled in this jurisdiction. *Bralley v. Railway Co.*, 66 W. Va. 462, 66 S. E. 653; *Melton v. Railway Co.*, 64 W. Va. 168, 61 S. E. 39; *Huff v. Railway Co.*, 48 W. Va. 45, 35 S. E. 866; *Spicer v. Railway Co.*, 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385.

We do not deem it essential to take up other matters submitted in argument. The judgment will be reversed, the verdict set aside, and a new trial awarded.

LYNCH, J., absent.

(76 W. Va. 174)

CHAMBERS v. SIMMONS. (No. 2710.)

(Supreme Court of Appeals of West Virginia.
April 13, 1915.)

(Syllabus by the Court.)

1. MINES AND MINERALS §54 — CONTRACT RIGHT TO SELL OR BUY OIL PROPERTY — TIME LIMIT.

A contract between the owner and another authorizing the latter to sell on commission, or to buy certain oil property at a stipulated price until a well then drilling should be "drilled in"

and "completed," and which provision was manifestly intended to protect the owner from depreciation in the event of a "dry hole," or loss from appreciation in the value of his property if such drilling well should come in a good well, is limited to the time between the date of the contract and the time immediately before the drilling in and completion of such well into and through all the oil or gas bearing sands in the vicinity of the well, as contemplated by the parties.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 149-152; Dec. Dig. § 54.]

2. MINES AND MINERALS §54—OIL WELL—AGENCY OR OPTION CONTRACT — "DRILLED IN"—"COMPLETED."

The words "drilled in" and "completed," as applied to such oil well then being drilled, and referred to in such agency or option contract, are used synonymously and mean one and the same thing, namely, drilled in and completed through such oil or gas bearing sands.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 149-152; Dec. Dig. § 54.]

For other definitions, see *Words and Phrases*, First and Second Series, Complete.]

3. MINES AND MINERALS §54—OIL PROPERTY — AGENCY OR OPTION CONTRACT — CONSTRUCTION.

The time limit of such a contract cannot be controlled by the contract between the owner of such well and the drilling contractors, not referred to therein, nor made with reference thereto, as to what was meant by the words "drilled in," or "completed," employed in such agency or option contract.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 149-152; Dec. Dig. § 54.]

4. BROKERS §86—COMMISSION—SALE OF OIL PROPERTY—SUFFICIENCY OF EVIDENCE.

In this case the evidence does not support the allegation of the declaration that plaintiff sold or procured purchasers for the property within the time and upon the terms specified in his contract of agency, and entitling him to the compensation provided for therein.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.]

5. BROKERS §50 — COMMISSION — PERFORMANCE—TIME LIMIT.

Where as in this case the agency contract to sell real estate is limited to a certain time, or to a certain event, the contract must be performed within the time specified, unless waived, or the contract extended by the owner, to entitle the agent to the compensation stipulated, or to any compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.]

6. BROKERS §86 — COMMISSION — PERFORMANCE WITHIN TIME LIMIT—SUFFICIENCY OF EVIDENCE.

In this case the facts proven do not show waiver of the time or extension of the contract of agency, or interference by the owner of the property, the subject of the agency.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.]

7. BROKERS §50 — COMMISSION — PERFORMANCE—TIME LIMIT.

Nor do the pleadings and proofs in this case make out a case falling within the rules of *Reynolds v. Tompkins*, 23 W. Va. 229, and *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.]

Error to Circuit Court, Wood County.

Action by Okey J. Chambers against H. J. Simmons. Judgment for defendant, and plaintiff brings error. Affirmed.

V. B. Archer and L. N. Tavenner, both of Parkersburg, and Thos. P. Ryan, of Spencer, for plaintiff in error. Pendleton, Matthews & Bell, of Grantsville, and Van Winkle & Ambler and W. H. Wolfe, all of Parkersburg, for defendant in error.

MILLER, J. In assumpsit the declaration contains a special count, and certain common counts for labor performed, money had and received, money due on account stated, and damages for breaches of defendant's agreement pleaded in the special count.

The bill of particulars, demanded by defendant, consists of two items, the first, to 10% of \$125,000.00, commissions on sale of royalty oil and gas interests in lands situated in Roane County, West Virginia, \$12,500.00; second, to difference between the price at which defendant sold said interests to H. C. Woodyard and others and the price at which plaintiff could and would have sold and was entitled to sell the same under his contract with defendant, \$30,000.00, total \$42,500.00.

The two contracts pleaded as one in the special count are each dated January 23, 1913. The first is designated by plaintiff's counsel as the agency contract; the second, as the option contract. By the first, defendant agreed with plaintiff, that in consideration of one dollar acknowledged as paid, "and the further consideration of the said Chambers *selling or trying to sell* certain Oil and Gas interests * * * as set out and listed" in schedules attached thereto, and made a part of the contract, "for the sum of One Hundred and Twenty-Five Thousand Dollars * * * at least Twenty-Five Thousand Dollars of which is to be paid in cash, should a sale be made and the remainder to be agreed upon with the consent of the said H. J. Simmons, the said O. J. Chambers is to have until the completion of the Cross Well No. 1 to sell said holdings as above set out." By the second contract, and for the like consideration of one dollar, acknowledged as paid, "and the further consideration of the said" plaintiff "*selling or helping to sell the royalties and oil and gas rights*" aforesaid "*the said Chambers is to have an option on all said properties hereto attached for the period of time until the Cross Well No. 1, now drilling is drilled in and completed, * * * at the price of One Hundred and Twenty-Five Thousand Dollars, and in case a sale is made the said Chambers is to have 10% for making said sale for his services, and all over the above amount.*"

The words italicized are especially emphasized by counsel in their briefs and oral arguments, as characterizing and controlling the construction of the contracts. The first,

or agency contract, provides for no compensation to Chambers; but the second contract, which in terms purports an option to plaintiff to buy the property within the stipulated period, contains, as we see, the provision that "in case a sale is made the said Chambers is to have 10% for making said sale for his services, and all over the above amount."

As noted, the declaration pleads these contracts as one, and as together constituting the whole contract between the parties. Nothing is pleaded or claimed by way of damages for breach of the option contract to buy. Both are pleaded as one for damages for alleged breaches of defendant to pay plaintiff the commissions provided and stipulated in the second contract, for "selling or helping to sell," or "*selling or trying to sell*" stipulated in the first, and within the time stipulated in both contracts, namely, on or before the completion of said Cross Well No. 1.

So averring the contract, and as showing performance by him, and his right to recover according to the terms thereof, plaintiff in his said special count further avers, that after much labor and expense and careful attention to details, etc., he "did secure purchasers for said property * * * who were amply able financially to purchase and pay for said property * * * within the period of time * * * provided in said agreement, to-wit, * * * before said Cross Well No. 1, then drilling as aforesaid, was drilled in, to-wit, completed," and that "said purchasers were ready and willing to accept and take a conveyance of the said property * * * and pay the purchase price therefor, * * * and would have purchased" the same "within the time specified and provided in said agreement * * * before the said defendant wrongfully sold" the same.

And by way of assigning breaches of the contract by defendant, it is further averred "that * * * defendant did not or would not perform the said agreement * * * but craftily and subtly deceived * * * plaintiff," and "within the time mentioned * * * to-wit, between January 23, 1913, and when said Cross Well No. 1 was drilled in, to-wit, completed," and "before" the same "was drilled in and completed, in violation of his said agreement, and without the knowledge or consent of plaintiff, proceeded himself to make sale of the said" property "to the same parties that the plaintiff had induced to become purchasers" thereof, at the price stipulated in said contract, "and did not nor would not permit or suffer the said plaintiff to proceed to complete a sale of said property," and whereby plaintiff was then and thereby prevented from further performance of the contract on his part, and whereby he "has lost and been deprived of the profits and the percentage for making

said sale and for his services in and about the performance of his part of the said agreement, to-wit, for helping to sell, * * * for trying to sell, * * * for selling the said property."

On the trial, on the issues joined on the plea of nonassumpsit, the verdict of the jury was for defendant, and from the judgment of nil capiat thereon, plaintiff obtained the present writ of error.

The questions presented for decision by the pleadings and proofs, and by the numerous assignments of error, involving instructions to the jury, given and refused, and the motion of the plaintiff for a new trial, overruled, and the judgment of nil capiat against him, are: (1) When was Cross Well No. 1, drilled in and completed, within the meaning and intentment of the parties to the contract? (2) Did plaintiff in fact, as alleged, sell or procure purchasers for the property stipulated in his contract, by contract binding them to buy upon the terms and within the period stipulated in his contract? (3) Did defendant in any way, as alleged, interfere with plaintiff in completing a sale of said property, within the time stipulated, and thereby prevent him from closing up said sale and earning the commission or compensation stipulated in the contract? (4) Did defendant, either within the time stipulated, or afterwards, waive the time, or extend the agreement, and thereby, or by accepting the previous services of plaintiff in trying to sell, or in discovering and proposing prospective purchasers of the property, to whom defendant afterwards made sale thereof, upon the same or different terms, render himself legally liable to plaintiff for the compensation stipulated, or for any compensation for his services?

[1] On the first question, it is fully proven, and not controverted, that Cross Well No. 1, which the contracts pleaded state was then drilling, was drilled into and completed through all the oil and gas bearing sands known to exist in the neighborhood of that well, on or before January 30, 1913. The witness Nuhfer, contractor who drilled the well, says, "We have it recorded, completed January 30th, 1913, but it was completed the night before * * * along close to midnight." And numerous other witnesses, interested in the well, and in other territory in the vicinity thereof, also present, swear to the same fact. And it is a conceded fact that all the sands penetrated were barren of oil or gas, or in the vernacular of the oil fraternity, that the well was a "dry hole." The contract does not in terms define when the Cross Well should be regarded as drilled in or completed. But we know from its provisions and from its manifest purposes and objects that this provision was intended to protect the owner against depreciation due to the possibility of a dry hole, or loss in

the event the well should turn out to be a good well and to greatly enhance the value of the property over the price stipulated in the contract. The parties could have had no other purpose in putting this provision into the contract. Moreover, what they both said and did before and after the making of the contract, and in the effort to sell the property, shows clearly that such was the purpose of the provisions as to time.

Plaintiff went the next day to Charleston, where he saw McDermott, Elkins and Woodyard, the purchasers, and others, and began his negotiations with them. He admits he represented to them that the Cross Well No. 1 was drilling, and that it was necessary for him to close or make sale before that well came in, for if it came in a good well, the price would be more, and if dry the price would be depreciated. He admits that at the time of the contract defendant told him he had offered the property through C. W. Swisher and H. C. Woodyard, both of whom were then in Charleston, and that he was told to see them, and that he wanted him, the plaintiff, "to go and sell this property before Cross No. 1 well was drilled into the berea grit sand." Chambers admits he told McDermott, and McDermott swears that Chambers told him, that he must make the sale before the Cross Well was drilled in, and McDermott swears that Chambers wanted him to agree to take the property and make deposit of the cash payment before that time. Wherefore, conceding ambiguity in the contract on this question, the parties are concluded by their acts and conduct as to what was meant by a completed well. *Smith v. South Penn Oil Co.*, 59 W. Va. 205, 53 S. E. 152; *Hays v. Forest Oil Co.*, 213 Pa. 556, 62 Atl. 1072; *Glasgow v. Chartiers Co.*, 152 Pa. 48, 25 Atl. 232; *Archer on Oil and Gas*, p. 320.

[2] But counsel for plaintiff reply that one of the contracts says "completed," and that the other uses the words, "drilled in and completed," and that in construing contracts every word must be given some meaning; that a distinction should be made between "drilled in" and "completed," and we are referred to the definitions of these words by lexicographers. When we look to the manifest purpose of these provisions, as disclosed not only by the contracts themselves, but from the acts, conduct and language of the parties, in an effort to execute the contract, we can get little light from the technical definitions of the words employed. "Completed" may mean "drilled in" and "drilled in" may mean "completed," and it is manifest from the record that they were used synonymously by the parties to this contract, and what the parties meant by them is made clear by the purposes of these provisions. It would be difficult to determine how a well, a "dry hole," drilled through all the sands,

could be otherwise completed after it had been drilled into and through all sands, and found to be a "dry hole."

[3] It is furthermore contended that the contract involved here must be construed with reference to the contract between the Fisher Oil Company, owners of Cross Well No. 1, and Nuhfer Brothers, the drilling contractors, and which contains certain provisions for plugging the well, pulling the casing, in certain contingencies, in fulfillment thereof, or the completion of the well within the meaning of that contract. But upon what principle can we say that that contract controls in any way the contract for the selling of the property involved here? The former is not even referred to in the latter. The parties here were not parties to that contract, so far, at least, as the record shows; nor is it shown that they or either of them had any knowledge of its contents. The fact is in evidence that Nuhfer Brothers did not pull the casing until after this suit was brought. Parties to one contract cannot thus be affected by the contracts or dealing between others, characterized as *res inter alios acta*. *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. 819; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160. Other cases cited in 5 Ency. Dig. Va. & W. Va. Repts. 302.

For the foregoing reasons we see no error in defendant's instruction "M," given; saying that if the jury "believe * * * that the Cross Well No. 1 on the 30th day of January, 1913, had been drilled through, and below all of the sands in which oil or gas is found in the same oil and gas fields or territory, in or near which the said Cross Well No. 1 was and is located, then the said well was a completed well, as contemplated by the terms of the contracts described in the plaintiff's declaration."

[4] On the second question: Did plaintiff sell or procure purchasers for the property, as alleged? While the declaration alleges performance of the contract by plaintiff, and that he did so within the time stipulated in the contract, the exact date when it is claimed the sale was so made or purchasers procured, is not alleged. While the pleading is sufficient to admit the evidence, that such sale was made and purchasers procured within the time specified, it was necessary for plaintiff to prove, according to our views expressed on the first question, that this was done on or before January 30, 1913, the date of the actual drilling in and completion of Cross Well No. 1. This fact his own and the evidence of his other witnesses wholly fails to establish; nor is it proven by the evidence of defendant's witnesses. Indeed plaintiff does not pretend to have made any such sale or procured purchasers for the property on or before January 30, 1913. The purchasers named by him are Senator Joseph McDermott, Senator Davis Elkins, and Col. Richard Elkins. He puts these par-

ties all upon the stand as witnesses in his endeavor to support his case. He is shown to have had his principal negotiations with McDermott, to whom he was referred, as a representative of the others. These witnesses all deny in positive terms, that they or either of them ever made any contract with plaintiff, or with anybody else, to purchase the property offered by plaintiff on or before January 30, 1913. The whole of plaintiff's contention is that at Charleston, in McDermott's room at the hotel, he "was trying to force a purchase of this property before they reached the Berea Grit sand in the Cross No. 1," and with his maps spread out on the floor, and exhibiting them to these prospective purchasers, he said to them:

"I would like to close this deal and if you pay Twenty Five Thousand Dollars down on this, why it can stand over until you can check up the property."

To which he admits Senator McDermott replied that "they wouldn't do that." And he further swears that he afterwards saw McDermott, possibly the next day, and that McDermott told him to go back to Spencer, where both parties resided, and see Simmons, and see what was the least price he would take for the property, and that they would buy it from him. Just what day this conversation took place does not appear, but it was before plaintiff left Charleston on January 30, 1913, and defendant claims it was after he had notified plaintiff by phone on January 29, 1913, that the well had come in or was coming in dry, or with a little gas. Plaintiff further swears, that on his way back to Spencer on January 30th, he met defendant at Ravenswood, who was then on his way to Charleston, where he told him, not that he had made a sale, but that he had or thought he had the matter in shape to close up with those people, and that he tried to get Simmons not to go to Charleston, but to go back with him to Spencer, and told him exactly how he expected to close the deal at \$125,000.00. But he admits that on the same occasion defendant asked him what he thought he ought to let them have the property for, and that he replied, about eighty five thousand dollars, and that Simmons replied, that he didn't see why he should take less than ninety thousand dollars, and that plaintiff answered that if he "did that it was up to him to do as he pleased about it."

These admissions were far short of indicating to Simmons a sale of his property in accordance with plaintiff's contract. That plaintiff had not at that time made a sale is positively proven by plaintiff's witnesses McDermott, Elkins and others. Asked on cross-examination: "How far did you get with your negotiations with Mr. Chambers?" McDermott answered:

"Why finally in the end I told him it was too large a property to buy offhand, and I wouldn't think of buying it without investigating it, and his option didn't give sufficient time to make a proper investigation, and advised him to return

home and get additional time on his option, and secure a better price, as I thought the property was too high priced; he said he would try and do that, and that was the last time I saw him; he said he would try and do that."

And the fact is that McDermott never did buy, or become interested in the property.

We cannot detail all the evidence on this question. We give only sufficient of it to show the real situation in which plaintiff's negotiations stood when he left Charleston. And it is an admitted fact that after parting with defendant at Ravenswood on January 30, he never resumed his negotiations, except he says that on Simmons's return from Charleston, he tried to get him to go back with him and close up the deal, but that Simmons declined, saying he was looking for some one from Pittsburg, and wanted the map loaned plaintiff to show him, and which plaintiff gave him.

[5, 6] Though the rule may be otherwise where no time limit is fixed, and the contract is general and not special, the law is well settled in this State, as elsewhere, that where the agency or brokerage contract to sell land is limited in time, the agent or broker must perform the contract, if unhindered by the owner, within the time stipulated in the contract, or else forfeit all right to compensation, and that no recovery can be had on the quantum meruit, for the value of services performed. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899; *Clark & Skyles on Agency*, § 778, p. 1679; *Alexander v. Sherwood Company*, 72 W. Va. 195, 199, 77 S. E. 1027, 49 L. R. A. (N. S.) 985; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 384; *Parker v. Building & Loan Association*, 55 W. Va. 134, 46 S. E. 811; *Hugill v. Weekley*, 64 W. Va. 210, 211, 213, 61 S. E. 360, 15 L. R. A. (N. S.) 1262. On this record then, how can it be contended, on principle, that plaintiff is entitled to damages, on the theory of a literal performance of the contract on his part? It seems to us that the evidence furnishes not the slightest basis on which he can make a stand on this theory of his case.

The third, and next question is, did defendant in any way interfere with the plaintiff in the performance of his contract, excusing strict fulfillment thereof by him, and entitling him to the compensation stipulated, or to any compensation. There is no pretense of any such interference by defendant between the date of the contract and the date of the drilling in and completion of the Cross Well, January 30, 1913. Between those dates plaintiff was at Charleston, and had full sway in attempting to negotiate a sale. He failed. His authority was limited to those dates. On the drilling in of the Cross Well his authority ceased. After that he had no authority to sell, or other authority in the premises. His contract was dead, unless renewed, or continued by act of defendant. In such cases the authorities cited would deny plaintiff compensation.

On the fourth and last question or proposition, neither pleadings nor proofs present a case of waiver of time, or extension of the contract pleaded, unless in point of pleadings such a case is covered by the common counts, and the bill of particulars filed therewith. The first item of the bill of particulars is, for commission for making the sale, not proven; the second, for the difference between the price at which defendant sold, and that at which plaintiff could have sold the property, as to which there is not the slightest proof. The rule of our decisions is that where all that the plaintiff contracted to do, under a special contract, has been done, and nothing remains to be done, except for the other party to pay the price stipulated, the same may be recovered under the common counts, and special pleading is unnecessary. *B. & O. R. R. Co. v. Lafferty*, 2 W. Va. 104; *Lord & McCracken v. Henderson*, 65 W. Va. 321, 64 S. E. 134.

Assuming such a case to be covered by the pleadings, has it been made out by proof? The record is barren of any proof of an extension of the contract. McDermott advised a new contract, but it was not procured, although it was suggested by plaintiff in his interview with defendant at Ravenswood. But there is not a syllable of evidence that a new or extended contract was made, or time waived. At the time of the Ravenswood interview the contract had already expired. And that defendant did not intend to make a new contract, or waive the terms of the old, is manifest from the fact that he shortly afterwards gave an option contract to Woodyard and others, covering additional property, for fifteen days from February 1, 1913, which also expired by limitation; and thereafter and between that date and the date of sale to Woodyard and Davis and Richard Elkins, plaintiff offered the property to others.

But what of the other theory, that plaintiff discovered the purchasers who were accepted by defendant and to whom he is alleged to have sold the property on the same or different terms? Plaintiff presented this theory by instructions proposed, but which we think were properly rejected by the trial court. That plaintiff did offer the property, covered by the schedules attached to his contract, to some of the parties to whom defendant afterwards sold is conceded; and that his services may have been of some value to defendant may also be conceded. But under a contract to sell, limited in time, he cannot claim the benefit of an unfulfilled contract. The stipulation for trying to sell and helping to sell clearly were limited to a sale that should be made during the life of plaintiff's contract. He could not claim compensation for trying to sell or helping to sell when the sale made did not take place within the life of his contract.

[7] Moreover, the property sold by defendant in March, 1913, included other property

than that covered by plaintiff's contract, and the terms and the persons were not the same in all respects. The sale made was to Woodyard, Davis and Richard Elkins, and was of a four fifths interest, defendant retaining a one fifth, and while the price was the same, the property sold embraced much more than that scheduled in plaintiff's contract; it included additional producing wells, and defendant became bound by his contract to complete at his own expense other wells then drilling; so we think plaintiff has failed to make a case falling under the rules of *Reynolds v. Tompkins*, 23 W. Va. 229, and *Ice v. Maxwell*, supra, and other decisions cited.

The instructions given being substantially in conformity with these views, and those rejected either opposed or substantially covered by those given, we see no reversible error in the rulings of the court thereon. It follows, therefore, that there was no error in the judgment complained of, and we are of opinion that it should be affirmed, and it will be so ordered.

LYNCH, J., absent.

(143 Ga. 368)

VESTEL v. EDWARDS et al., Tax Assessors.
(No. 306.)

(Supreme Court of Georgia. April 17, 1915.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW — 229, 284 — TAXATION — 452 — DUE PROCESS — EQUAL PROTECTION.

An act of the Legislature, which has for its object the equalization of taxation by means of a just and fair assessment of property returned for taxation, and which provides for notice to any taxpayer whose returns have been increased, and that, if he is dissatisfied with the action of the county board of tax assessors in assessing the value of his property for taxation, he may demand an arbitration of the question of the valuation of the property returned for taxation, and which provides that, in case of disagreement as to the selection of an umpire, the ordinary or the county commissioners, as the case may be, shall appoint one, and the arbitrators shall render their decision within ten days from the date of the naming of the arbitrator by the board, is not repugnant to the due process clause of the Constitution of the United States, as contained in the fourteenth amendment.

(a) Nor is it obnoxious to the due process clause of the Constitution of the state of Georgia.

(b) Nor does it deprive the taxpayer of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 685, 893-896; Dec. Dig. — 229, 284; Taxation, Cent. Dig. §§ 806, 807; Dec. Dig. — 452.]

2. TAXATION — 480 — PROCEEDINGS UNDER TAX EQUALIZATION ACT — ARBITRATOR — DISQUALIFICATION.

Under the allegations of the petition as to fraud and misconduct, the arbitrator appointed by the tax assessors, who was a brother of one of the assessors, was disqualified from acting as such arbitrator, because of his relationship to the assessor and such alleged misconduct.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 853; Dec. Dig. — 490.]

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Equitable petition by J. P. Vestel against L. G. Edwards and others, constituting the local Board of Tax Assessors of Fannin County. Judgment for defendants, and plaintiff brings error. Reversed.

J. P. Vestel filed an equitable petition against L. G. Edwards and others, as constituting the local board of tax assessors of Fannin county, under the act of the Legislature approved August 14, 1913 (Acts 1913, p. 123), and John E. Cook, as tax receiver of the county, alleging as follows: They had assessed certain wild lands in Fannin county, belonging to the petitioner, at a valuation in excess of their value, and in excess of the valuation assessed on like property in other counties of the state. Petitioner made his return in due form to the tax receiver of the county for the year 1914, within the time allowed by law, at a valuation of \$11,746, which was on a basis of equality with other returns of like property in the county of Fannin, as well as similar lands situated in adjoining and other counties in the state containing that class of lands. On a subsequent date the tax assessors of the county notified petitioner that they had assessed the lands at \$46,984. Being dissatisfied with the assessment, and believing it unfair, unreasonable, and unjust, petitioner gave the tax assessors written notice that he demanded an arbitration as to the value of the lands, and named an arbitrator, a freeholder of the county, who was competent and qualified to act in such capacity and make a just and true return. The tax assessors selected M. Ross as arbitrator, who is also named as a defendant in this case. Petitioner challenged the eligibility of Ross to act as arbitrator, on the ground that he was a brother to the chairman of the board of tax assessors, and therefore was disqualified to represent them in arbitrating the matter in controversy. The tax assessors overruled the objection or protest, and refused to remove the arbitrator appointed by them, or to substitute any freeholder of the county in his stead. It was no part of the purpose or intention of the tax assessors to give petitioner a fair arbitration upon the value of the lands returned by him for taxation. It was "their purpose at the outset to delay and dilidally the matter until the time for arbitration would expire by law," etc. It was part of the purpose of the board of tax assessors, acting in conjunction and collusion with their arbitrator, Ross, to name two of the arbitrators, and thereby make the arbitration sought by the petitioner fruitless, in so far as affording him any redress against the unreasonable assessment made upon his property by the tax assessors. Consequently the arbitrator appointed by the tax assessors, M.

Ross, suggested the names of ten men as arbitrators, all of whom were biased against petitioner, and who had expressed themselves to the effect that the assessment made by the tax assessors should not be disturbed or changed. M. Ross would suggest nobody, or agree to anything, without first conferring with the tax assessors and getting their wishes. Ross has declared frequently that there should not be any arbitration on petitioner's application, unless some arbitrator named by him was agreed upon. Petitioner has sought a fair and just arbitration, as contemplated by the act of 1913; and, as showing his willingness and desire for such arbitration, his arbitrator, T. A. Terrell, offered and announced his willingness to accept any one of 67 named citizens and freeholders of the county who are not in any wise related to any of the parties at issue, or otherwise disqualified from acting in the capacity of arbitrator, but M. Ross declined to accept or consider any one of them. Owing to the dilatory tactics of the tax assessors and their arbitrator in furtherance of their collusive scheme to defeat petitioner of such arbitration, the time for arbitration under the statute has expired without his being able to get an arbitration on the assessment and valuation made of his property by the tax assessors, and no arbitration can now be had under the terms of the statute providing for such arbitration, and petitioner is utterly without remedy or right of relief under the statute; and, now that the said arbitrators have succeeded in defeating your petitioner of the right of arbitration, they intend and say that they will have entered on the tax digest of the county said lands returned by petitioner for taxes, at the valuation placed thereon by said tax assessors, thereby unjustly and wrongfully fixing the value of said properties for taxation at the sum so named by them. Petitioner's failure to get an arbitration under the act is chargeable entirely to the action and fault of the tax assessors and their arbitrator, and petitioner is in no wise at fault or chargeable with the failure to arbitrate, and the action on the part of the tax assessors and arbitrator deprived petitioner of the legal remedy provided by statute. He prays that each and all of the defendants be restrained and enjoined from changing or altering the tax return made by him, and from entering any valuation for the properties on the tax digests of the county, other than that put upon it by petitioner in his sworn return, and that, on the hearing of the case, an injunction be granted against the defendants and each and all of them, their agents and employes, and for such other and further relief as may be necessary for the full preservation and protection of his legal rights.

The defendants filed a general demurrer, and averred, among other things, that the assessment complained of was made on the 5th

day of June, 1914, and that the petition for injunction was filed on June 25, 1914, 20 days after the assessment complained of, at which time neither the defendants nor the superior court of the Blue Ridge circuit would have any jurisdiction to reduce the assessment, and to entertain and exercise jurisdiction would delay the collection of the state's revenue, and would be in contravention of the statute forbidding judicial interference with the collection of taxes. Upon considering the petition and demurrer, the trial judge denied the injunction, and to this ruling the plaintiff excepted.

Thos. A. Brown, of Blue Ridge, D. W. Blair and C. H. Griffin, both of Marietta, for plaintiff in error. Warren Grice, Atty. Gen., for defendants in error.

HILL, J. (after stating the facts as above).

[1] 1. The plaintiff seeks to enjoin the defendants, as tax assessors under the act of the Legislature known as the tax equalization act (Acts 1913, p. 123), from altering or changing the tax returns made by him of certain real estate, and from entering on the tax digest any valuation of such real estate than that placed thereon by petitioner. He attacks the act in question being violative of the due process clauses of the state and federal Constitutions, contained in sections 6359 and 6700 of the Civil Code of 1910. Sections 11, 13, and 14 of the act are especially attacked as being repugnant to the clauses of the Constitutions referred to. It is insisted: (1) That these sections of the act provide for the taking of the property of the plaintiff and other taxpayers of the state similarly situated, and deny to them adequate remedy of law and due process of law, for the reason that it is within the power of the tax assessors to defeat and prevent arbitration under the act, and that no remedy by appeal, or otherwise, is provided. (2) That the act requires the arbitration to be made within ten days from the time of the selection of the arbitrator of the tax assessors, without making any allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of properties and the ascertainment of their values, or for any other cause that might interfere to render such arbitration impossible within the time specified in the act. (3) That there are no standards or methods prescribed or rules fixed for the holding and determination of the arbitration, but the arbitration is left entirely to the whims or caprices of a majority of the arbitrators. (4) That the tax returns of an entire county may be arbitrated by the state tax commissioner and the chairman of the county board of tax assessors, and the entire tax returns of such county increased without any taxpayer of the county being made a party to the arbitration or given a right to be heard with reference to the amount that

his taxes shall be assessed by such arbitration.

The three sections of the act specified are too lengthy to be set out in full in this opinion, but suffice it to say they relate to the duty of the state tax commissioner, who, so far as the record shows, has not exercised any of the duties imposed upon him by those sections of the act, so far as relates to the present case; and therefore whatever we might discuss or decide relatively to that officer, or his duties under the act, would be moot. Until that official has exercised the authority conferred upon him by the act to the detriment of the plaintiff, the latter cannot attack the act with respect to the authority thus conferred. We therefore confine our discussion and decision to the attack made on the act with reference to the county tax assessors, who have acted, and their duties, and especially to section 6 of the act. This last section provides that the board of county tax assessors shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns as laid before them by the tax receiver. The board is to examine all the returns of both real and personal property of each taxpayer, and make such "corrections, changes, and equalizations" as authorized by the act.

"If any taxpayer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of nonresidents of the county, give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator; the board shall name its arbitrator within three days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said taxpayer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the state tax commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises," etc.

It has been held that, in the matter of taxation, due process of law does not require a judicial procedure. And this ruling of the courts was both before and since the adoption of the fourteenth amendment to the Constitution of the United States. *Judson on Taxation*, § 318. And this ruling is based on the ground that revenues must be collected without delay, and cannot await the decision of a common-law trial. Of necessity the sovereign must proceed in a somewhat summary way to collect taxes. *Id.* And while notice cannot be dispensed with in cases where the tax is dependent on valuation of the property, and is not specific, the Legislature may prescribe the kind of notice and the manner in which it shall be given. *Judson on Taxation*, § 321. See *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70.

In *Pittsburg, etc., Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, it was held:

"A tax law, which grants to the taxpayer a right to be heard on the assessment of his property before final judgment, provides a due process of law for determining the valuation, although it makes no provision for a rehearing."

In *McGehee on Due Process of Law*, 239, it is said:

"Since proceedings for the assessment and collection of taxes were in constant use long before the adoption of the Constitution, and have been necessarily employed by the federal government and the various states ever since their formation, the rule that whatever proceedings are in accord with settled usage in England and in this country constitute due process is peculiarly applicable to test the sufficiency of notice and hearing required in such cases. In conformity with this principle, it has been held that the process of taxation 'involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them.'"

In *Gray on Limitations on the Taxing Power*, 577, § 1161, it is said:

"Where, before the assessment becomes final, opportunity is given to appear and make proofs before a board of commissioners, or a board of equalization, having authority to hear complaints and proofs and make correction of the assessment, the opportunity is sufficient."

From these authorities, we think it cannot be said that the sixth section of the act in question deprives the plaintiff of due process of law, required by the state and federal Constitutions; nor do they deprive any taxpayer the equal protection of the laws. Moreover, the sixth section of the act of 1913 provides that arbitration shall be had "in the same manner as is now provided for the arbitration of individual tax returns, except in so far as the existing law may be modified by the provisions of this section." The existing law on this question is contained in the Civil Code, § 1097 et seq., and in the Acts of 1910, p. 24. The Code sections cited do not provide for the selection of a third assessor, or umpire, except as he may be selected by the two assessors appointed by the tax receiver and the taxpayer. But the act of 1910 (Acts 1910, p. 24) provides that the tax receiver may make the assessment if the return of the taxpayer is not satisfactory to him, and the taxpayer, on notice to him within 20 days after receiving such notice, may refer the question of true value to arbitrators, "one to be chosen by himself and one to be chosen by the tax receiver, with power to choose an umpire in case of disagreement, and their award shall be final. * * *

1. Should the two arbitrators provided for in this section fail to agree upon the value of the property, and fail to name an umpire within twenty days after their appointment, the umpire shall be named by the ordinary or county board of commissioners, as the case may be." Construing this act in conjunction with the Code section cited above, it cannot be held that the law does not pro

vide for a case where the arbitrators fail to agree, and one or both arbitrarily or capriciously refuse to agree on an umpire. The act of 1910, as "modified by the provisions of" the act of 1913 (Acts 1913, p. 128), provides that, in case of disagreement of the arbitrators, the ordinary shall appoint the umpire. The disagreement, if any, will at once manifest itself, when application can be made to the ordinary for the appointment of an umpire, who can immediately proceed with his duties. There need be no unnecessary delay in the appointment of an umpire or in the arbitration proceedings. So that, if the parties avail themselves of it, there is a remedy provided by law whereby the ordinary or county commissioners, as the case may be, can appoint an umpire in case of disagreement of the assessors, and the hearing can proceed without delay. The plaintiff having failed to apply to the ordinary or county commissioners, as the case may be, for the appointment of an umpire, in order to arbitrate as provided by law, the court did not err in refusing to grant the injunction on this ground.

[2] 2. It was alleged in the petition that the arbitrator appointed by the board of tax assessors (M. Ross) was disqualified from acting in the capacity of arbitrator, for the reason that he was a brother of the chairman of the board of tax assessors. It was further alleged that the arbitrator named by the tax assessors was not only disqualified, by relationship, from acting as an arbitrator, but that he was entirely and completely under the domination, and subject to the wishes and direction, of the board of tax assessors, whose purpose it was to have their arbitrator name as umpire a man he knew would not act, or one who had already expressed himself as being averse to the rights of plaintiff, and that he had named only persons biased against plaintiff, and those who had expressed themselves to the effect that the assessment made by the tax assessors should not be disturbed or changed; that this arbitrator would not suggest any one or agree to anything, without first conferring with the tax assessors and getting their wishes, etc. Arbitrators are selected by parties to settle their controversies, either by voluntary submission or where provision has been made by law for the appointment of arbitrators. The act of 1913 contemplates that the arbitration provided for shall be conducted in a manner which shall be fair and just to each party. The policy of the law is to permit no one to decide his own case, or to decide the case of those within the prohibited degrees of kinship. Any other rule would result in an arbitration becoming a mere farce. Assuming that the tax assessors are merely nominal parties, and have no personal interest in the result of the award, how would the case stand if it were reversed? Suppose the tax-

payer who is contesting the assessment of his property should appoint his brother as an arbitrator. Would it be contended that such appointment would be either fair or legal? Surely not. It is true there is direct pecuniary interest in the one case and none in the other. But, if it is unfair and illegal to appoint a near relation on one side, why not on the other side? No answer has been filed in this case, so far as the record shows, and the case is here on petition and demurrer, which admits the truth of the allegations of the petition. We think that the appointment as an arbitrator of one who was the brother of the chairman of the board of tax assessors was unauthorized by law; and where it was alleged that such arbitrator in the assessment of the property of the taxpayer acted in such manner as to indicate fraud and misconduct, and that the tax assessors assessed the property at an unreasonable, unjust, and unfair valuation, and by their collusive, arbitrary, fraudulent, and wrongful acts prevented the taxpayer from having an arbitration as provided by law, and that he was remediless, unless a court of equity intervened, and injunction was prayed to restrain and enjoin the assessors and their arbitrators and the tax receiver from changing and altering the tax return made by the taxpayer in his return, as well as other relief, it was error, on a consideration of the petition and demurrer, to refuse an interlocutory injunction.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(148 Ga. 347)

ROYAL v. EDINBURGH-AMERICAN
LAND MORTGAGE CO., Limited.
(No. 297.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL \S 5—PENDENCY OF ANOTHER ACTION—PETITION TO MARSHAL ASSETS—ACTION ON SECURITY DEED.

Under the facts of this case, the petition filed by the administrator for the purpose of marshaling assets, and the order taken thereon, did not operate to prevent a creditor of the decedent, who held a deed to land to secure a debt, upon the subsequent happening of a default, from proceeding to obtain judgment, file a deed, and sell the land as provided by Civil Code 1910, §§ 6037, 6038.

(a) Where, upon the happening of a default, an action was brought by the creditor for the purpose of proceeding to subject the land in the manner pointed out in the statute, a plea, called both one in abatement and in bar, setting up the filing of the equitable petition by the administrator and the order taken thereon, was, under the facts, properly stricken on demurrer.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 27-30, 99-104; Dec. Dig. \S 5.]

2. EXECUTORS AND ADMINISTRATORS ~~456~~—
ACTION OF FORECLOSURE—ATTORNEY'S FEES
—NOTICE.

In such a case, where the note secured by the deed included a provision for the payment of attorney's fees, the filing of an equitable petition by the administrator to marshal the assets, and the order taken thereon, did not prevent the creditor from serving written notice on the administrator and including attorney's fees in his suit, in accordance with Civil Code 1910, § 4252.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941-1987; Dec. Dig. ~~456~~.]

Error from Superior Court, Crisp County; W. F. George, Judge.

Action by the Edinburgh-American Land Mortgage Company, Limited, against T. A. Royal, as administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

John Henry Bedgood gave to the Edinburgh-American Land Mortgage Company, Limited, a promissory note, dated October 4, 1909, and due October 4, 1919, for the principal sum of \$6,000, with interest at 7 per cent. per annum, payable annually, for which interest coupon notes were annexed to the principal note. The note included this provision:

"And should any default be made by me in the payment of either interest coupons hereto annexed, as stipulated, then the principal of this obligation, in the discretion of the holder, shall become due and payable at the date of such default, regardless of the date of maturity."

To the November term, 1913, of the superior court, the payee filed suit against the maker, setting out the clause of the note above quoted, and alleging that a similar clause was included in a deed given to secure the debt, that default had been made in the payment of the interest coupon due on October 4, 1913, and that the plaintiff exercised the right to declare the entire indebtedness due and to sue therefor. The debtor having died, suit was brought against his administrator. The note provided for the payment of 10 per cent. attorney's fees, if it should be placed in the hands of an attorney for collection. The petition alleged that 10 days' notice of the intention to sue had been given to the administrator, as required by the statute. The prayer was for a general judgment, and also for a special judgment against the property included in the deed given as security for the debt. The only plea or answer filed by the defendant was one which prayed that the action be declared to be both barred and abated as a whole, and especially as to attorney's fees, because, in August, 1913, the administrator had filed an equitable petition to marshal the assets of the estate, and an order had been taken thereon, and that this prevented the plaintiff from bringing the present action, or proceeding otherwise than by intervention in that case. In so far as it affects the present

plaintiff, the administrator's petition and the order or interlocutory decree taken thereon are sufficiently set out in the opinion. On demurrer the plea was stricken. The case then proceeded to a verdict and judgment. The defendant excepted.

E. F. Strozler and Hall & Dennard, all of Cordele, for plaintiff in error. Whipple & McKenzie, of Cordele, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. There was no error in sustaining the demurrer to the plea, which prayed that the action be held to be barred and also that it be abated. The plaintiff held a promissory note, the principal of which fell due, unless accelerated, on October 4, 1919. It contained a provision that if any default should be made "of either interest coupons hereto annexed, as stipulated, then the principal of this obligation, in the discretion of the holder, shall become due and payable at the date of such default, regardless of the date of maturity." Interest was payable annually on October 4th, and coupon notes therefor were attached to the note for the principal. A deed was executed by the debtor to secure the payment of the debt. This deed not only created a lien, but conveyed the title. Civil Code 1910, § 3306. As against the creditor, the debtor held only what might be called the equity of redemption, his interest being subject to the outstanding title. When he died, the fee-simple title to the land did not form a part of the assets of the estate in the hands of the administrator. The administrator could not destroy the right of the creditor to pursue his statutory remedy of obtaining judgment, executing a quitclaim deed to the land, levying on it, and bringing it to sale, with the incidental priority of right as to payment from the proceeds, by merely filing a petition for the marshaling of the assets of the estate, alleging insufficiency of assets to pay general creditors, and controversies among them. Civil Code 1910, §§ 6037, 6038.

In the equitable petition of the administrator no attack was made upon this debt, or the deed executed to secure it, nor was it shown that there was any contest or conflicting claim in regard to them on the part of other creditors. It was alleged that the widow of the intestate, on behalf of herself and children, had filed an equitable petition against the administrator to establish a deed, which it was alleged the intestate had executed to her, covering one of the lots of land included in the security deed, and praying that the administrator should marshal the assets and dispose of the other two lots for the purpose of discharging the loan, so as to clear her title. It was not alleged when this deed was executed by the intestate, or whether it was for a consideration or volun-

tary. It may be inferred that, after executing the deed to secure the debt, he made a voluntary conveyance to his wife of such interest as he had. By doing this he could not destroy the rights of his creditor, or confer on his wife the authority to do so.

At the time when the administrator filed his petition to marshal the assets of the estate, in August, 1913, the principal of the debt was not due, nor was there any default in the payment of interest. So that, as matters then stood, the creditor held the title to secure an indebtedness the principal of which would not be due until 1919. The acceleration of the maturity of the principal, because of a default in paying any installment of interest which might occur, was within the discretion of the holder of the note, not within the discretion of the debtor or his administrator. The administrator doubtless realizing that a court of equitable jurisdiction would not, on such a case, decree that the title should be taken away from the creditor and sold years before the debt would become due, unless on a certain contingency, his petition seems to have been cautiously prepared, so as not to make such an issue. It apparently treated the residue, or equity of redemption, as being the property of the estate. The creditor was not made a party, though the fact that it held the debt and deed was recited, and though certain other creditors were made defendants. There was no prayer directly against this creditor. No injunction was granted against it by name. A general order was granted, giving direction to the administrator in regard to assets, and authorizing creditors to intervene for the purpose of establishing their claims. Inasmuch as, under the system of securing indebtedness by deeds with bonds for reconveyance, which is authorized by our statute, the debtor remains in possession, at least until after default in payment, the order granted by the presiding judge directed the administrator to hold, as a separate fund, the rents collected from the lot to which the widow claimed a deed. The same judge who granted this order sustained the demurrer to the plea in abatement to the present action, based upon that proceeding.

We need not discuss whether or not a possible case might arise involving conflicts or controversies in regard to a debt secured by a deed, which might authorize the court to interfere with the statutory proceeding by levy and sale, under an equitable petition for the marshaling of assets, or whether, if an injunction had been granted against a creditor whose debt was thus secured, and he had violated the injunction by beginning suit, the proper remedy would have been by a plea in bar, a plea in abatement, or an attachment for contempt. It is sufficient to say that, under the facts of this case, the

plea, by whatever name called, was properly stricken on demurrer.

[2] 2. Under Civil Code 1910, § 4252, an agreement to pay attorney's fees, in addition to principal and interest, contained in a promissory note, cannot be enforced unless the holder of the note shall give to the debtor or notice in writing 10 days before bringing suit, and unless the debtor shall fail to pay the debt on or before the return day of the court. If the conditions of this statute are complied with, the attorney's fees included in the contract are treated rather as parts of the principal debt than as a penalty. *Morgan v. Kiser & Co.*, 105 Ga. 104, 31 S. E. 45, and citations. Having held that the filing of the equitable petition by the administrator and the order taken thereon did not enjoin the present plaintiff from pursuing his legal remedy on a default in payment of principal or interest, he was left free to exercise the right to give notice to the administrator in order to enforce the stipulation in the note for the payment of attorney's fees. Nor was this prevented by the inclusion in the order or interlocutory decree, taken on the petition of the administrator, directing him not to pay out any funds of the estate, except for certain specified purposes, without first obtaining authority from the court to do so.

In so far as the present plaintiff sought to obtain a general judgment, enforceable otherwise than by sale of the land which was conveyed to secure the debt, perhaps there might have been ground for injunction, or, with proper pleading, perhaps the judgment in the present case might have been so shaped as to be enforceable only by levy and sale of such land, and not stand as a general judgment against the administrator as to any excess. But no such questions as these were properly raised.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(149 Ga. 310)

CRAWFORD v. CRAWFORD et al. (No. 274.)
(Supreme Court of Georgia. April 14, 1915.)

(Syllabus by the Court.)

INJUNCTION — 35 — QUIETING TITLE — 10 —
TITLE OF PLAINTIFF — RIGHT TO RELIEF —
CANCELLATION OF INSTRUMENTS.

Equity will not, at the instance of one in possession of land, afford affirmative relief, such as the cancellation of deeds as clouds upon title, or the grant of an injunction against interference with his possession, where it appears that he has no title and his only relation to the property is possession acquired under such circumstances as that no prescription could be based thereon.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 77; *Dec. Dig.* — 35; *Quieting Title*, Cent. Dig. §§ 38-42; *Dec. Dig.* — 10.]

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Action by J. M. Crawford against W. G. Crawford and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. M. Crawford instituted an action against W. G. Crawford, to cancel certain deeds as clouds upon title, and to enjoin the removal of timber and otherwise interfering with his occupancy of the land. After several amendments the petition was dismissed on demurrer, and the plaintiff excepted. One of the deeds was a sheriff's deed to J. E. Crawford executed in 1895, in pursuance of a sale of the land as the property of plaintiff. The other was a deed executed in 1912, from J. E. Crawford to his son, W. G. Crawford, the defendant. The sheriff's deed was attacked upon the ground that the levy was excessive. Other allegations were: That at the time of the sheriff's sale J. E. Crawford stated to the plaintiff that he would bid off the land for him, and would convey the property to him at the proper time, upon being reimbursed; that on several occasions thereafter J. E. Crawford recognized plaintiff's right to the property by purchasing timber from him, and on one occasion by purchasing a right of way for the purpose of hauling logs across the land; that a few months after the sheriff's sale certain relatives tendered to J. E. Crawford, for plaintiff, the full amount paid to the sheriff, and the tender was refused; that subsequently, in April, 1912, J. E. Crawford executed a deed to W. G. Crawford, his son, for a named consideration, and thereafter the son entered upon the land, took away certain fruit, and cut and removed therefrom timber, and has continued in like manner to interfere with plaintiff's possession; and that in May, 1914, J. E. Crawford having died, another tender was made to his administrator, and one was also made to W. G. Crawford, both of which were refused. The administrator, by amendment, was made a party to the suit. Plaintiff first entered possession in 1861, and remained in possession continuously and was in possession at the time of the institution of the suit. One of the grounds of demurrer complained that plaintiff failed to set out an abstract of title. To meet this attack an amendment was filed, which contained the following:

"When he [plaintiff] went upon said land, he had no title from any one, but said land was unoccupied, and he knew of no owner or claimant to said land, and went into possession of the same in good faith in the year 1861, and since that time he has been in continuous, open, notorious, peaceable, exclusive, and adverse possession and in good faith."

Wm. Butt, of Blue Ridge, for plaintiff in error. Thos. A. Brown and Allison S. Prince, both of Blue Ridge, for defendants in error.

ATKINSON, J. If the allegations of the petition stated a cause of action before the amendment last referred to in the statement of facts, the quoted excerpt from that amend-

ment changed the petition and rendered it subject to demurrer. The relief sought was affirmative and purely equitable—the cancellation of deeds as clouds upon title, and injunction against interference with possession. There was no pretense of title in plaintiff, save as might be derived from his long-continued possession, which commenced in 1861. The excerpt mentioned above shows affirmatively that when he entered possession he did so without any title or claim of title, intending that his possession should be exclusive and adverse. It is true that he says his entry of possession was "in good faith," but that is to be considered in connection with the other allegations; among them, that he had no title from any one, and "he knew of no owner or claimant" to the land. When the whole is considered, it shows his possession to be that of a mere "squatter," which, however long continued, would never ripen into a prescriptive title. *Compton v. Newton*, 129 Ga. 619, 59 S. E. 270; *Powell on Actions for Land*, § 327. As under his averments he had no title and none could be derived under the statute by prescription, he was not in a position to ask for cancellation of deeds as clouds upon title. Nor would such possession serve as a basis for the grant of injunction. This follows from application of the ruling announced in *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371, where it was held:

"Even as against a wrongdoer, an injunction will not, at the suit of a stranger to the title or possession, issue to restrain a trespass and stay waste about to be committed by cutting timber upon land; and one is such a stranger who neither claims the legal title or the right of possession thereunder, nor is in actual possession of the premises, or some part thereof, by himself or another, under such claim of right as might ripen into a title by prescription."

See, also, *David v. Levy* (C. C.) 119 Fed. 799 (2). Thus it appears from the face of the petition that plaintiff was not entitled to the relief sought, and the case was properly dismissed on demurrer.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 314)

SIKES v. SIKES. (No. 277.)

(Supreme Court of Georgia. April 14, 1915.)

(Syllabus by the Court.)

HUSBAND AND WIFE \S 285½—ACTION FOR ALIMONY—NONSUIT—EVIDENCE—SEPARATION.

Under the Civ. Code 1910, § 2986, where a wife brought suit against her husband for permanent alimony, and the evidence on her behalf tended to show that the husband and wife were living bona fide in a state of separation, and that such separation was caused by cruel treatment on the part of the husband toward the wife, it was error to grant a nonsuit.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1076; Dec. Dig. \S 285½.]

Error from Superior Court, Worth County; E. E. Cox, Judge.

Action by Mrs. Clara O. Sikes against B. F. Sikes. Judgment for defendant awarding nonsuit, and plaintiff brings error. Reversed.

Mrs. Clara O. Sikes brought suit against her husband, B. F. Sikes, for the purpose of obtaining permanent alimony, and pendente lite applied, and obtained an order, for temporary alimony and attorney's fees. On the trial before a jury, at the close of the plaintiff's evidence, the court awarded a nonsuit, and the plaintiff excepted. The other facts will sufficiently appear from the opinion.

Claude Payton, of Sylvester, for plaintiff in error.

LUMPKIN, J. (after stating the facts as above). At common law marriage invested the husband with the title to the wife's property and the right to her companionship and earnings. It placed upon him the duty to maintain her suitably, according to his ability and condition in life. No corresponding duty of maintenance was placed upon the wife; and this is still true in this state, even though she may have a separate estate. Out of this obligation on the part of the husband to support his wife arose the theory of the implied agency of the wife to purchase necessities, though they might be living separately; and this not being sufficient for the enforcement of the husband's duty in this regard, the doctrine of alimony was a natural consequence of the obligation of the husband toward the wife. By the English practice alimony was not granted as an independent right, but only in connection with some other proceeding, usually divorce. In a number of the United States acts have been passed providing for the grant of alimony, although no divorce may be sought, and in some instances courts of chancery have granted alimony alone, without the aid of a statute, on the theory that jurisdiction could thus be exercised in the absence of ecclesiastical courts. In Georgia, the power to grant alimony, though no suit for divorce may be pending, is given by statute.

In the absence of express statutory declaration on the subject, the question as to when a wife may have alimony awarded to her if she be living separate from her husband, but no divorce suit has been brought, and when it will be denied her, has given rise to some discussion. Mr. Bishop, after mentioning the different theories of jurisdiction, states this as, in his opinion, the more rational conclusion:

"And the rule will be that whenever the wife is justified in living apart from her husband, and she is without means and he is capable of supplying them, but does not, she may have this alimony." 1 Bish. Mar. & Div. (Ed. 1891) § 1403.

Again he states:

"We are free to adopt the rule, which we have seen to be the still better one in reason, that whenever a destitute wife is living apart from her husband, for a cause legally justifying her, he may be compelled, if able, to supply alimony."

After quoting from Summerville, J., in *Hinds v. Hinds*, 80 Ala. 225, the statement that the broad ground upon which equitable jurisdiction is made to rest is the unquestionable duty of the husband to support the wife, and the inadequacy of legal remedies to enforce the duty, the author adds:

"The necessary result of which proposition is, that whenever the law casts upon the husband the duty to support his wife, and he fails to obey, she may have this alimony suit against him." Id. § 1409.

And still further he says:

"The husband cannot abandon his obligations to his wife; therefore, where in any case the law authorizes her to live apart from him by reason of his ill conduct, it consequently requires him to maintain her while so living." 2 Bish. Mar. & Div. § 829.

Without discussing further general principles or authorities in other jurisdictions, we will consider the matter in the light of our own Codes and statutes. The first Code, which took effect on January 1, 1863, was intended to embrace, in a condensed form, the laws of the state, whether derived from the common law, the Constitutions, the statutes of the state, the decisions of the Supreme Court, or the statutes of England of force here. Section 1706 declared:

"The husband is bound for necessities furnished to the wife, when separate from him, subject to the limitations hereinbefore provided. If the wife be living in adultery with another man, the husband is not liable; but notice by the husband shall not relieve him from liability, if his wife is separated from him by reason of his own misconduct; if she voluntarily abandons him without sufficient provocation, notice by the husband shall relieve him of all liability for necessities furnished to her."

This provision is now included in the Civil Code of 1910 as section 2997. Thus, in dealing with that method of compelling the husband to support his wife to the extent of furnishing necessities, it was recognized that certain conduct on the part of the wife would prevent liability from arising on the part of the husband; and the distinction between the wife's being separated from the husband by reason of his misconduct and a voluntary abandonment of him by the wife without sufficient provocation was also recognized. By section 1689 of the original Code (now section 2976), provision was made in regard to applying, at a regular term of court, for temporary alimony where a suit for divorce or for permanent alimony was pending. By section 1693 (now section 2983), it was declared:

"Permanent alimony is granted in the following cases: 1. Of divorce, as considered in the former section. 2. In cases of voluntary separation. 3. Where the wife, against her will, is either abandoned or driven off by her husband."

Thus the matter stood until 1870. In that year an act was passed which first made certain changes in the law as to granting alimony in connection with divorce cases. By the fourth section, as codified in the Civil Code of 1910, § 2986, it is declared:

"When husband and wife are living separately, or are bona fide in a state of separation, and there is no action for divorce pending, the wife may, in behalf of herself and her minor children, if any, or either, institute a proceeding by petition setting forth fully her case; and upon three days notice to the husband, the judge may hear the same in term or vacation, and grant such order as he might grant were it based on a pending libel for divorce, to be enforced in the same manner," etc.

In *Yoemans v. Yoemans*, 77 Ga. 124, 3 S. E. 354, it was held that an application for the allowance of temporary alimony under this section should be based upon a proceeding for permanent alimony. *Stallings v. Stallings*, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593. It would seem, however, that prayers for permanent and temporary alimony might be included in the same petition. With reference to the effect of the provision of the act of 1870, above cited, and its codification in the Civil Code of 1910, § 2986, upon section 2983, which had been in the Code prior to the passage of that act, two different views may be advanced. On the one hand, it may be contended that the act of 1870 did not enlarge the three instances stated in the pre-existing section of the Code, in which permanent alimony would be granted, that the facts of the present case did not fall within the language of the Code as to any of those cases, and, therefore, that there could be no permanent alimony granted to the wife. On the other hand, it may be contended that the language of the Civil Code of 1910, § 2986, derived from the act of 1870, as to when an application for alimony might be made without a suit for divorce, was broad and comprehensive in its terms, and was not limited by a literal construction of section 2983.

In construing these sections of the present Code, regard should be had to harmonizing them as far as practicable, remembering at the same time that the act of 1870 was the later expression of the legislative will, and that its effect should not be largely destroyed by placing a narrow and restricted construction on the law as it already existed, and then limiting the effect of the later act by the older law so construed.

In *Glass v. Wynn*, 76 Ga. 319, no divorce proceeding was pending, but the wife applied for permanent and temporary alimony. She alleged that her husband treated her cruelly, until she left him. This was denied by the husband. The presiding judge awarded the wife temporary alimony, and the defendant excepted. The judgment was affirmed. Some of the language of Chief Justice Jackson, in delivering the opinion, might indicate that he thought that the fact that the husband and wife were in a bona fide state of separation furnished a sufficient basis for the grant of temporary alimony, and that it was immaterial what brought about the separation. But in other parts of the opinion

he stated that the evidence was in conflict as to what caused the separation, and that, if cruel treatment or voluntary separation were necessary in order to authorize the proceeding, cruelty was sufficiently shown. That case does not establish as an inviolable rule that the mere fact of separation (not mutually voluntary), regardless of its cause or the surrounding circumstances, will give to the wife a right to alimony. But, on the other hand, it does establish the rule that if the wife leaves the husband because of his cruel treatment toward her, this does not prevent her from obtaining alimony. That case has been fully discussed in *Coley v. Coley*, 128 Ga. 654, 658, 58 S. E. 205. On the subject of what constitutes cruel treatment it was cited in *Ray v. Ray*, 106 Ga. 260, 263, 32 S. E. 91, and criticized in *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878.

In *Vinson v. Vinson*, 94 Ga. 492, 19 S. E. 898, voluntary abandonment of the husband by the wife without cause, together with certain other circumstances, was held to be sufficient to make it error on the part of the judge of the superior court to award temporary alimony. In that case it did not appear that any divorce suit was pending.

In *Williams v. Williams*, 114 Ga. 772, 40 S. E. 782, alimony was applied for pending a divorce suit. It was held that where the uncontradicted evidence showed that the separation between the husband and wife was caused solely by the adultery of the latter, uncondoned by the former, it was an abuse of discretion to allow the wife temporary alimony.

In *Parker v. Parker*, 134 Ga. 316, 67 S. E. 812, an action was brought by a wife against her husband for permanent alimony. On the trial, the defendant requested the court to charge the jury that, if they believed from the evidence that the wife left her husband without cause, they would not be authorized to find any alimony for the plaintiff; and that "when I say and use in this connection the word 'cause,' I mean some unlawful act or unlawful doing." It was held that there was no error in refusing such request, the reason assigned being that "the wife is not barred of her right to alimony simply because the conduct of the husband causing her to refuse to live with him did not consist of acts which were unlawful."

In reference to the grant of temporary alimony pending a suit for permanent alimony, where there is no action for divorce, Civil Code 1910, § 2986, provides that the judge may "grant such order as he might grant were it based on a pending libel for divorce," thus analogizing the grant or refusal of temporary alimony in the two classes of cases.

Looking at the provisions of the different sections of the Code touching the duty of the husband to support the wife, and the methods of enforcing that duty if he fails to

perform it, and construing the law so as to have a harmonious intent, we see that, if the husband and wife are separated, he is generally bound to furnish her necessities, but that there are limitations upon this duty, and circumstances which will relieve him from liability to one who furnishes them, such as adultery by the wife, or voluntary abandonment of the husband by her without sufficient provocation, together with notice of his refusal to furnish necessities. We further find that the old rule of granting temporary alimony in divorce cases, almost as a matter of course, has been considerably modified by the change in the law as to the property and rights of married women; and that even the discretion of the judge in granting it may be declared to have been improperly used, under certain circumstances. The act of 1870 must be given a fair construction in its provision as to the granting of alimony where no divorce suit is pending. It was not intended to give an absolute right to the wife to obtain alimony in all cases of separation from her husband, regardless of the cause of the separation or of her own conduct. The trenchant statement of Judge McCay, "that suits for divorce and alimony ought not to be encouraged" (Hill v. Hill, 47 Ga. 333), may well be borne in mind, if a wife deserts her husband without sufficient provocation. While this is true, on the trial before the jury the presiding judge cannot grant a nonsuit because he would not allow a verdict for the plaintiff to stand. He can only do so if the plaintiff fails to make out a prima facie case, or if, admitting all the facts proved and all reasonable deductions from them, the plaintiff ought not to recover. Otherwise, he should submit the case to the jury, under proper instructions. Civil Code 1910, § 5942.

In the present case, some of the testimony dealt with trivial bickerings and incivilities which would furnish no legitimate ground either for a separation or for the granting of a divorce. Apparently an unfortunately too common complication arose from the marriage of a widower with children by a former marriage, and with a fair amount of property, to a widow with children by a former marriage, and with less property. Nevertheless the plaintiff did allege cruel treatment producing danger to health, including a false charge of infidelity, followed by her separation from her husband. Her evidence tended to support these allegations. It was for the jury, not the court, to pass upon its credibility. While some of her testimony failed to show facts which would have authorized a separation, there was enough to require the submission of the case to a jury.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 320)

KENT v. KENT. (No. 278.)

(Supreme Court of Georgia. April 14, 1915.)

*(Syllabus by the Court.)***PETITION FOR ALIMONY.**

The petition for temporary and permanent alimony was good as against a general demurrer (Sikes v. Sikes, this day decided, 85 S. E. 193), and the court did not abuse his discretion in awarding temporary alimony and counsel fees to the applicant.

Error from Superior Court, Jenkins County; H. C. Hammond, Judge.

Action between R. D. Kent and Ida Kent. From the judgment, R. D. Kent brings error. Affirmed.

White & Lovett, of Sylvania, and A. S. Anderson, of Millen, for plaintiff in error. R. P. Jones, of Millen, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 333)

CAMP v. MATHEWS. (No. 320.)

(Supreme Court of Georgia. April 22, 1915.)

*(Syllabus by the Court.)***1. EVIDENCE — § 419—CONSIDERATION—PAROL EVIDENCE.**

Mrs. C. B. Camp instituted an action against R. F. Matthews to foreclose a landlord's lien for money alleged to have been furnished for making a crop during the year 1913. To this proceeding the defendant filed a counter affidavit, denying that plaintiff had furnished him any money or supplies or anything to enable him to make a crop during the year 1913. Certain promissory notes were introduced in evidence to show the amount in which the defendant was liable to plaintiff, and which contained the following recital: "This money is to enable me to make my crop for the year 1913." These notes were dated March 15, 1913, and signed by the defendant. On cross-examination the plaintiff, over objection, testified: "I did not furnish the money as represented by these notes (referring to the notes in evidence) at the time same were executed. I let him have the money in 1911 or in 1912; and the notes in question are renewals of the money I let him have in 1911 or 1912." The defendant also testified, over objection, as follows: "I borrowed \$300 from plaintiff in 1911 to make a crop for that year. I did not pay it back in the fall of that year, but renewed it for the year 1912, and did not pay it back in 1912, but renewed it for the year 1913; and the notes in question are renewals of that debt. The notes in question were given for the money borrowed in 1911." The objection urged to the admissibility of the evidence was that it tended to vary and contradict the terms of the notes. The court overruled the objection, and, at the conclusion of the evidence, directed a verdict for the defendant. To these rulings the plaintiff excepted. *Held*, that parol evidence was admissible to show the circumstances under which the note was made, and to explain the consideration and show the year in which the consideration appearing on the face of the notes was actually advanced. *Anderson v. Brown*, 72 Ga. 713 (3); *Burke v. Napier*, 106 Ga. 327, 32 S. E. 124; *Butts v. Cuthbertson*, 6 Ga. 166. The evidence objected

to did not tend to vary and contradict the terms of the notes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. ¶ 419.]

2. LANDLORD AND TENANT ¶ 245—LIEN FOR ADVANCES — CROPS SUBJECT — RENEWAL NOTES.

"The special lien of a landlord for money or supplies furnished in making a crop exists, and can be foreclosed as a lien, only on the crops of the year in which the advances are made. A balance of indebtedness for a prior year cannot be included in a foreclosure of such a lien, even by agreement of the parties at the beginning of the year that such balance shall be included with the advances of that year." Parks v. Simpson, 124 Ga. 523, 52 S. E. 616. The renewal notes given by the defendant could only act as an extension of time on the old indebtedness, and could not be considered as an advancement of money for the year in which they were given.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 988-990; Dec. Dig. ¶ 245.]

3. DIRECTION OF VERDICT.

Under the uncontradicted evidence, the judge did not err in directing a verdict for the defendant.

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by Mrs. C. B. Camp against R. F. Mathews. Judgment for defendant, and plaintiff brings error. Affirmed.

M. U. Mooty and Judson Andrews, both of La Grange, for plaintiff in error. W. A. Post, of Grantville, and A. H. Thompson, of La-Grange, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 338)

ELDER v. STATE. (No. 312.)

(Supreme Court of Georgia. April 20, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶ 828—INSTRUCTIONS—REASONABLE DOUBT—REQUEST.

The words "reasonable doubt" are of such obvious significance that, in the absence of an appropriate written request, an omission to define them will not require a new trial. Battle v. State, 103 Ga. 53 (2), 57, 29 S. E. 491.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. ¶ 828.]

2. HOMICIDE ¶ 286—INSTRUCTIONS—IMPLIED MALICE.

On the trial of a murder case, it is not advisable for the judge, while instructing the jury on the subject of implied malice, to use the expression, "It may appear in the gleam of a knife, or from the flash from the shot of a gun." Mills v. State, 133 Ga. 155, 65 S. E. 368; Leonard v. State, 133 Ga. 435, 66 S. E. 251; Ricketson v. State, 134 Ga. 306, 67 S. E. 881.

(a) Under the facts of this case, and when considered in connection with the context, the use of the expression quoted above does not require a new trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. ¶ 286.]

3. HOMICIDE ¶ 311—INSTRUCTIONS—RECOMMENDATION OF PUNISHMENT.

The charge, "But if you think for any reason there are extenuating circumstances which do not reduce it from murder to manslaughter, or justify it, but for any reason you think this man should not suffer the death penalty, but should be imprisoned for life, you would express it in your verdict, and that would be the sentence of the court," will not require a new trial. Such language did not circumscribe or restrict the jury in respect to the exercise of their right of recommendation. Valentine v. State, 77 Ga. 470 (4); Inman v. State, 72 Ga. 269 (6); Cyrus v. State, 102 Ga. 617, 29 S. E. 917; Pen. Code 1910, § 63.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 662, 663; Dec. Dig. ¶ 311.]

4. CRIMINAL LAW ¶ 1122—APPEAL—PRESENTATION FOR REVIEW—INSTRUCTIONS.

It is sought, in other grounds of the amendment to the motion for new trial, to assign error upon the instructions to the jury; but neither the instructions nor the assignments of error are set forth with sufficient clearness to enable this court to intelligently pass thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. ¶ 1122.]

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial.

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Eddie Elder was convicted of crime, and brings error. Affirmed.

Wm. M. Smith, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., of Atlanta, and Warren Grice, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 312)

GEORGIA, F. & A. RY. CO. v. TEMPLES. (No. 276.)

(Supreme Court of Georgia. April 14, 1915.)

(Syllabus by the Court.)

1. EVIDENCE ¶ 497—INDEFINITE EXPRESSION OF OPINION—VALUE—DAMAGES.

On the trial of an action for damages caused by the delay of a common carrier in shipping cattle, where the shipper had testified that a certain number of the cattle died, that they were of a stated value each, and that he had been put to a certain expense on account of the delay, it was error to allow him, over objection, to testify that the damage to the cattle contained in the car, other than those which died, would average from \$3 to \$9 a head.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2285-2288; Dec. Dig. ¶ 497.]

2. INSTRUCTIONS.

If there were other inaccuracies in rulings or charges, they were of minor importance, and such as are not likely to occur upon another trial.

Error from Superior Court, Miller County; W. C. Worrell, Judge.

Action by W. P. Temples against the Georgia, Florida & Alabama Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

T. S. Hawes and W. H. Krause, both of Bainbridge, and P. D. Rich and Bush & Stapleton, all of Colquitt, for plaintiff in error. John H. Lewis, of Columbus, for defendant in error.

LUMPKIN, J. Temples sued the Georgia, Florida & Alabama Railway Company to recover damages resulting to certain cattle, on account of a delay in shipping them to their destination. He recovered a verdict. The defendant moved for a new trial, which was refused, and it excepted.

[1] 1. The plaintiff testified that there were 48 head of cattle placed in the car; that the shipment was delayed; and that several of them died, giving the number and values. He was then allowed to testify that the damage to the others would average from \$3 to \$9 a head. It has been held that a person suing for damages cannot broadly give his opinion as to the amount thereof. That is one of the questions to be decided by the jury. *McCrary v. Pritchard*, 119 Ga. 876, 47 S. E. 341; *Miller v. Luckey*, 132 Ga. 581, 583, 64 S. E. 658. A witness may testify to any relevant fact. Though not an expert, if he has knowledge of facts on which to predicate an opinion as to value, he may give it, where value is relevant. But this is different from merely giving a general opinion as to the amount of damages to him or to his property. In the present case the verdict was for more than the value of the cattle which died and the expense shown to have been incurred. The jury evidently based their finding in part on the general estimate of damages mentioned. The impropriety of this testimony will plainly be seen from the fact that it does not appear how many of the cattle the witness thought were damaged \$3 apiece, or how many \$9 apiece, or how many some intermediate sum. The jury were left to make some sort of average or guess.

[2] 2. The grounds of the motion for a new trial assigned error in some other rulings and charges of less importance. The charge was very meager as to the measure of damages. There was an instruction to the effect that if the cattle were damaged in the course of the shipment, after being delivered to the railroad company, it would be incumbent on the company to show that such damage resulted without its fault. Complaint was made that such a charge may have led the jury to believe that this must be shown by evidence introduced by the defendant, rather than from that introduced by either of the parties, and may have injured the latter, as it introduced no evidence. The giving in charge of a part of Civil Code 1910, § 2777, was assigned as error, but it was not likely

to have been misunderstood in the light of the entire charge. If there were any inaccuracies in these matters, they are of such a character that they will most likely not occur again, and, if the defendant desires a fuller charge on any point on the next trial, it can be invoked.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 361)

WILSON et al. v. DUNN et al. (No. 301.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇨103—TAXES—COLLECTION—INJUNCTION—SCHOOL ELECTION—PROOF OF JURISDICTIONAL FACTS.

Where a paper (or petition) signed by certain citizens of a county was filed with the ordinary, asking that he call an election to be held under Civ. Code 1910, § 1535 et seq., for the purpose of voting on the question of local taxation for public schools in a certain school district in the county, and the election was held, the calling of the election determined, at least prima facie, that all the jurisdictional facts required by law for such purpose were made to appear, and that the petitioners were of a sufficient number, as required by statute in such cases. *Vornberg v. Dunn*, 143 Ga. —, 84 S. E. 370. And where, on the hearing of an equitable petition in the superior court, which averred the want of jurisdictional facts presented to the ordinary before calling the election as one ground why an injunction should be granted to prevent the collection of the tax, it did not affirmatively appear from the evidence that such jurisdictional facts were wanting before the ordinary called the election, but, on the contrary, that such facts did exist, it was not error to refuse to grant an injunction on this ground.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. ⇨103.]

2. SCHOOLS AND SCHOOL DISTRICTS ⇨103—TAXES—COLLECTION—INJUNCTION.

Where it appeared, on the trial of such a case as stated in the preceding note, that the superintendents of the election were administered the oath required by law in such cases before the election was held by them, it is not cause for an injunction against the collection of a local school tax authorized by the election that a jurat was not attached to the form of oath taken.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. ⇨103.]

3. SCHOOLS AND SCHOOL DISTRICTS ⇨103—SCHOOL ELECTION—VALIDITY—PROOF.

Where a petition prayed the ordinary of a county to call an election in "Union District" for the purpose of voting on the question of local taxation for public schools, and an election was ordered and held, and the return of the managers of the election showed that it was held at "Union Schoolhouse," and that two-thirds of those voting at such election voted in favor of local taxation for public schools, such petition and return, when construed in connection with the parol evidence that the election was held in "Union District," will be held to sufficiently show that the election was held in Union District. Especially is this true, where

the petition for injunction alleged that the election was held "in the Union School District."

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. ¶103.]

4. SCHOOLS AND SCHOOL DISTRICTS ¶107 — TAXES — COLLECTION — INJUNCTION — VALIDITY OF ELECTION — EVIDENCE.

The petition alleged that an election was held, but that the ordinary did not declare the result as being in favor of local taxation, and that the tax levied against petitioners is therefore void. On the interlocutory hearing it was not error to refuse an injunction, where parol evidence of the ordinary and one of the managers of the election, who delivered the returns to the other managers, tended to show that more than two-thirds of the qualified voters in the school district voted at the election in favor of local school taxation, and that the returns thereof were duly made to the ordinary of the county, who formally declared that the election had resulted in favor of local taxation for public schools, but the ordinary failed to enter the returns on the minutes of his court, for the reason that he did not consider that the law required it, and in pursuance of the declared result the ordinary notified the trustees of the school that the election had resulted in favor of local school taxation, and the latter levied and collected for that purpose school tax in the district for four years preceding the application for injunction, and the school was thus maintained.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 253-256; Dec. Dig. ¶107.]

5. SCHOOLS AND SCHOOL DISTRICTS ¶103, 107—TAXES—ELECTION—VALIDITY — RIGHT TO ATTACK—LAPSE OF TIME.

Where an election was called by the ordinary to be held in a local school district for the sole purpose of ascertaining whether or not two-thirds of the qualified voters were in favor of local school taxation, and the superintendents of such election combined the election on the question of local taxation with an election for trustees of the school district, and one or more of the managers of the election were elected as such trustees, such election was irregular; but it will not ipso facto invalidate the election as to the question of taxation in the school district, the validity of the election of the trustees not being in question. But after the lapse of four years, during which time the complainants have remained silent and paid their taxes in support of the school, such election cannot be thus attacked. *De Loach v. Newton*, 134 Ga. 739 (3), 742, 68 S. E. 708, 20 Ann. Cas. 342; *Dobbs v. Hardin*, 137 Ga. 191, 73 S. E. 532.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 114, 115, 117, 240-245, 252-256; Dec. Dig. ¶103, 107.]

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action by J. E. Wilson and others against M. W. Dunn, Commissioner, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

E. P. Davis, of Warrenton, for plaintiffs in error. Ira E. Farmer and J. B. Burnside, both of Thomson, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(16 Ga. App. 265)

GIBSON v. STATE. (No. 6229.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

CHATTEL MORTGAGES ¶232—SALE OF MORTGAGED PROPERTY—PROSECUTION—INDICTMENT—PROOF.

Where, upon the trial of one accused of selling mortgaged personalty, the property alleged to have been mortgaged and sold is described in the indictment, as "one bull, five years old," and the proof upon the trial was that the defendant had mortgaged the bull described, and had afterwards sold a "red, butt-headed bull," but there was no evidence whatever that the bull sold by the defendant was the same animal as that mortgaged, the verdict was contrary to law, being without evidence to support it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 484-487; Dec. Dig. ¶232.]

Error from Superior Court, Crawford County; H. A. Mathews, Judge.

Levi Gibson was convicted of selling mortgaged personalty, and brings error. Reversed.

W. J. Wallace and R. H. Culverhouse, both of Knoxville, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

BROYLES, J. As indicated in the head-note, the judgment overruling the motion for a new trial in this case must be reversed. We have, however, come to this conclusion reluctantly, for its "earmarks," as disclosed by the record, are strongly suggestive of the defendant's guilt. In fact, we think the verdict might well have been the guarded Scotch one of "not proven." The accused mortgaged to a party, to secure a debt of \$100, "one bull, five years old," and a few months afterwards sold to a third party a "red, butt-headed bull." When the debt became due, and was unpaid, and the officer holding the mortgage *fi. fa.* went to the defendant's premises to levy on the bull, no bull of any kind could be found, and the defendant did not explain, nor attempt to explain, what had become of it, but contented himself merely with stating that the red, butt-headed bull he had sold was not the one he had previously mortgaged. These facts strongly point to the defendant's guilt, but as stated, under our statute, are insufficient to convict him. The escape from punishment of the accused, however, and the loss and damage to the mortgagee, under such circumstances, furnish, in our opinion, a strong argument for the strengthening of the statute in question. We think that, in the interests of justice and public policy, section 720 of the Penal Code might well be amended to provide that, in such cases as this, where the mortgaged personalty cannot be found, a *prima facie* case of the defendant's guilt is thereby established, and the burden is placed upon him of explaining what has become of the mortgaged property.

Judgment reversed.

(16 Ga. App. 296)

BAKER v. STATE. (No. 6434.)

(Court of Appeals of Georgia. May 4, 1915.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

The decision in this case is controlled by the decision in the case of Harvey v. State, 85 S. E. 82, decided May 3, 1915.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Proceeding between D. O. Baker and the State. From the judgment, Baker brings error. Affirmed.

Fondren Mitchell, of Thomasville, for plaintiff in error. H. J. MacIntyre, Sol., of Thomasville, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 254)

SEABOARD AIR LINE RY. v. PARRISH. (No. 5783.)

(Court of Appeals of Georgia. May 4, 1915.)

*(Syllabus by the Court.)***ANIMALS §44—APPEAL AND ERROR §1001—KILLING OF DOGS—RECOVERY BY OWNER—SUFFICIENCY OF EVIDENCE—"PERSONAL PROPERTY."**

Without considering whether the adoption by the Legislature of the act of 1912 (Acts 1912, pp. 46, 47) reciting that "all dogs are hereby made personal property and shall be given in and taxed as other property of this state is given in and taxed" changes the rule laid down in *Jemison v. Southwestern Railroad*, 75 Ga. 444, 58 Am. Rep. 476, *Strong v. Georgia Railway & Electric Co.*, 118 Ga. 515, 45 S. E. 366, and in *Columbus Railroad Co. v. Woolfolk*, 128 Ga. 631, 58 S. E. 152, and in *Gaddis v. Southern Railway Co.*, 9 Ga. App. 272, 71 S. E. 7, and both authorizes a recovery against a railroad company for the negligent killing of a dog and creates a presumption as in cases of injuries to persons or other property, we hold that the court did not err in overruling the motion for a new trial; since it was well settled before the passage of the act referred to, and under the authority cited above, that the owner may maintain an action against one who wantonly, maliciously, or intentionally kills his dog. There was evidence that, though the plaintiff's dog had been standing on the railroad track near the crossing for "about ten minutes before the train passed, and the railroad is straight," "the train did not slack up; it did not slow up except for the crossing; the train did not blow for the dog; it only blew at the crossing;" and that the engineer could have seen the dog. From this evidence the jury were authorized to infer that the killing of the dog was wanton and malicious, and, since they did so find, we may not set aside a verdict with some evidence to support it. The case is controlled by the case of *Southern Railway Co. v. Keel*, 7 Ga. App. 244, 66 S. E. 627, where the facts are almost identical.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 115-122; Dec. Dig. §44; *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. §1001.

For other definitions, see *Words and Phrases*, First and Second Series, *Personal Property*.]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action by H. A. Parrish against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Cann & Cann and Thos. F. Walsh, Jr., all of Savannah, for plaintiff in error. J. P. Duke, of Pembroke, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 262)

McLENDON v. STATE. (No. 6055.)

(Court of Appeals of Georgia. May 4, 1915.)

*(Syllabus by the Court.)***1. FALSE PRETENSES §22, 26—CHEATING AND SWINDLING—ACCUSATION—REQUISITES—OWNER OF PROPERTY—DEFENSE.**

Where an accusation, based on section 703 of the Penal Code of 1910, charges one with cheating and swindling by fraudulently obtaining credit, through false and fraudulent representations as to his ownership of certain property therein described, it is not essential for the accusation to allege specifically in whom the ownership of the property was in fact vested. If the accused falsely and fraudulently represents that the title to the property is in him, and the property described and claimed by him is actually in existence, it is wholly immaterial in what person other than himself the title may be vested. It must be charged that the person alleged to have been defrauded was deceived by the representations and thereby suffered loss, etc.

(a) The accused in such a case may establish a complete defense by showing that he did not knowingly make false representations as to his ownership of the property as alleged, or that the representations were in fact true when made, and the real title to the property was then actually vested in him.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 27, 31; Dec. Dig. §22, 26.]

2. FALSE PRETENSES §26, 38—CHEATING AND SWINDLING—ACCUSATION—SUFFICIENCY—PLEADING AND PROOF.

An allegation in such an accusation that certain false and fraudulent representations were made "to the firm of Rice & Phelps, a partnership composed of W. B. Rice and W. T. Phelps," as to the ownership of certain described property, etc., was not sufficiently definite, as the defendant was entitled to know the specific person or persons to whom the representations were made.

(a) It follows that proof that the representations were made to an agent of the firm, and thus to the firm, would not be admissible under such an allegation; for the defendant is entitled to know precisely to what particular person he is charged with making the false representations, in order to enable him to properly prepare his defense, and the proof should strictly conform to the allegations and show that the representations were in fact made to the identical person or persons named in the accusation.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 31, 50-53; Dec. Dig. §26, 38.]

3. FALSE PRETENSES §30, 38—CHEATING AND SWINDLING—PLEADING AND PROOF—KNOWLEDGE.

Where such an accusation charges that certain representations "were false and fraudulently made" with "intent to defraud," etc., a

further specific allegation that the accused knew that the alleged false representations were in fact false at the time they were made is not essential. If the representations were in fact false and were made with intent to deceive, this would necessarily imply that the defendant knew the falsity of the representations when they were so made. See *State v. Switzer*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789; *State v. Snyder*, 66 Ind. 206, 287; *Commonwealth v. Hulbert*, 12 Metc. (Mass.) 448 (2). If the accusation specifically charges that the accused "knew" that the representations made by him were false, then the allegation must be supported by proof, as was held in *Carlisle v. State*, 2 Ga. App. 651, 58 S. E. 1068.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 37, 50-53; Dec. Dig. §§ 30, 38.]

4. FALSE PRETENSES §31 — FRAUDULENTLY OBTAINING CREDIT—ACCUSSION—REQUISITES.

Where one is charged with fraudulently obtaining credit (Pen. Code 1910, § 703) by making false representations as to his wealth, ownership of property, etc., the accusation must not only charge that a person named was defrauded of money, or of some other valuable thing, but it must further charge that the credit extended to the accused was so given and extended upon the faith of said representations.

(a) The charge in this case that the defendant "by said representations [referring to the alleged fraudulent representations as to his unencumbered ownership of property] of his wealth and respectability did obtain a credit of \$300 from said firm and did get possession of \$300 worth of corn" sufficiently set forth that the credit granted or the alleged advances made were so granted or made upon the faith of the truth of the representations.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 33-41; Dec. Dig. §31.]

5. FALSE PRETENSES §30—CHEATING AND SWINDLING—ACCUSSION—NATURE OF INCUMBRANCES.

Where an accusation charges that the defendant represented that certain property belonged to him, and was "free and unincumbered," etc., when in fact the defendant did not own the property described and the said property was not "free and unincumbered as represented by him," the accusation should set forth the nature and character of the alleged incumbrances on the property.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. § 37; Dec. Dig. §30.]

6. CRIMINAL LAW §1134—OVERRULING DEMURRER TO ACCUSSION—SUBSEQUENT PROCEEDINGS—VALIDITY.

For the reasons stated above, the court erred in overruling the demurrer to the accusation; and, since what thereafter happened in the trial was therefore nugatory, it is unnecessary to discuss the remaining assignments of error, based on what occurred thereafter in the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. §1134.]

Error from City Court of Dublin; James B. Hicks, Judge.

Tom McLendon was convicted of cheating and swindling, and brings error. Reversed.

Burch & Burch, of Dublin, for plaintiff in error. Geo. B. Davis, Sol., M. H. Blackshear, and J. S. Adams, all of Dublin, for the State.

WADE, J. Judgment reversed.

(16 Ga. App. 262)

AKERS v. DECATUR ST. BANK.

(No. 5897.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. BILLS AND NOTES §452—TITLE OF HOLDER—EVIDENCE—PLEA OF GENERAL ISSUE.

The title of the holder of a note cannot be inquired into, unless it is necessary for the protection of the defendant, or to let in the defenses which he seeks to make. Civ. Code 1910, § 4290. The defendant in this case, in his answer to the petition bringing suit on the promissory notes, denied generally the indebtedness alleged in the petition, and, nowhere having set up a legal defense, his denial is, in effect, a plea to the general issue, and was properly stricken on demurrer. *Johnson v. Cobb*, 100 Ga. 139 (2), 28 S. E. 72.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1303, 1352-1364, 1367-1376; Dec. Dig. §452.]

2. PLEADING §123—GENERAL DENIAL—DEMURRER.

Section 5634 of the Civil Code provides that: "In all cases where the defendant desires to make a defense by plea or otherwise he shall therein distinctly answer each paragraph of plaintiff's petition, and shall not file a more general denial, commonly known as the plea of 'general issue.'" *Bray v. Peace*, 131 Ga. 639, 62 S. E. 1025. The defendant in this case, not having complied with this provision of the Code, his answer was properly stricken, on demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 255; Dec. Dig. §123.]

3. JUDGMENT §106—FAILURE TO PLEAD.

The answer and plea of the defendant having been stricken by the court, and no amendment thereto having been offered, there was no defense to the plaintiff's suit, and the verdict for the principal, interest, and attorney's fees sued for was not erroneous.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. §106.]

Error from City Court of Atlanta; H. M. Reld, Judge.

Action by the Decatur Street Bank against G. W. Akers. Judgment for plaintiff, and defendant brings error. Affirmed.

W. A. James, of Atlanta, for plaintiff in error. Lovick G. Fortson, of Atlanta, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 276)

AYERS v. STATE. (No. 6284.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS §238—FURNISHING LIQUOR TO MINOR—QUESTION FOR JURY.

Where the accused was asked by a youth of 18 for a drink of whisky, and replied that he could not let him have it, as he was a minor, and shortly thereafter the accused placed on the ground, near the minor, a bottle with some whisky in it, and went off about 100 yards upon an alleged call of nature, and while he was gone the minor picked up the bottle and took a drink of the whisky, held, that it was for the jury to determine whether it was the intention

of the accused to allow the minor to get hold of the whisky and to drink it, and whether his action in going off for the ostensible purpose of attending to a call of nature, while leaving the whisky behind near the minor, was a mere pretext and subterfuge to escape a possible prosecution and conviction for furnishing intoxicating liquor to a minor. *Blodgett v. State*, 97 Ga. 351, 23 S. E. 830.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324-330; Dec. Dig. § 238.]

2. INTOXICATING LIQUORS §159—FURNISHING LIQUOR TO MINOR—WHAT CONSTITUTES OFFENSE.

There was some evidence to support the verdict. If it was not the intention of the accused to give the whisky to the minor, it was incumbent upon him to see that the minor, who had already asked him for whisky, did not have an opportunity to get hold of the bottle of liquor, and the leaving of the whisky in the virtual control of the minor during the temporary absence of the accused amounted to such criminal negligence as was legally equivalent to the actual intention on his part to furnish the whisky to the minor. See *Blodgett v. State*, supra; 2 *Woollen & Thornton on Intoxicating Liquor*, § 730.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 171-175; Dec. Dig. § 159.]

Russell, C. J., dissenting.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Charley Ayers was convicted of furnishing intoxicating liquor to a minor, and brings error. Affirmed.

Griffith & Matthews, of Buchanan, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, for the State.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J. (dissenting). The ruling in the *Blodgett Case*, which is cited by the majority of the court, is not in conflict with the general principle which involves the necessity of some act, in order to constitute a crime and charge the actor with responsibility for the criminal act. *Blodgett* invited all the bystanders to take a drink. It happened that one of them was a minor. Having done the act of extending the invitation and furnishing the liquor, *Blodgett* was charged with the responsibility of seeing that the crime of furnishing liquor to a minor did not result by reason of the fact that one of his invited guests might be a minor, and, upon the well-settled principle of criminal negligence, he was properly convicted, and the conviction correctly affirmed. There was no hint in the evidence in the case at bar that the accused, by sign or signal, by device, or by the tone of his voice, ever indicated to the minor even tacit acquiescence in the latter's proposal to give him a drink. The witness and the accused were together in the woods. The witness asked the accused if he had any whisky, and the latter replied that he "might have a little." So far as appears from the testi-

mony, this reply of the accused was the only utterance made with reference to intoxicating liquor. After some conversation the accused, desiring to attend to a call of nature, took from his pocket a quart bottle, containing about a half pint of whisky, and, removing his coat, left both on the ground near the witness, where they had been engaged in conversation, and retired about 100 yards, to a spot presumably more secluded, to relieve himself. During his absence the witness took a drink of this whisky. As already stated, there was nothing to indicate that the absence of the accused, for the purpose stated, was not bona fide, nor any testimony that he had in any manner indicated to the minor consent or acquiescence that the latter should take a drink of the whisky.

"A crime or misdemeanor shall consist in a violation of a public law, in the commission of which there shall be a * * * joint operation of act and intention, or criminal negligence." Penal Code, § 31.

It must be conceded that there was no criminal act, such as the manual furnishing or the voluntary release of a single drop of the intoxicating fluid on the part of the accused; and therefore the question resolves itself purely into the determination as to whether the defendant's leaving the bottle of whisky, with his coat, where the minor, if he so desired, could take it without the consent of the accused, is such criminal negligence as to subject one to punishment for furnishing liquor to a minor. The presumption is that all men are honest. In accord with this presumption, it is not my opinion that the duty which devolves upon a citizen, as a matter of morality, to remove all temptation from the pathway of his neighbor, is so incorporated into the criminal law as to require one who finds it necessary to relieve himself at the behest of nature's call to carry a quart bottle with him, for fear that a minor, with whom he had been conversing, may secretly and unlawfully convert the forbidden liquor to his own use.

The defendant stated that the minor asked him if he had any whisky, and that he told the minor he had a little; that the minor asked him for a drink, "and I could not let him have it, as he was a minor. We sat down and talked a while, and I had to step aside, and I set the quart bottle, with about a half a pint of whisky in it, down, and pulled off my coat and laid it down over the bottle. I did not know that Fred drank any of it until after I was indicted. He did not tell me he drank any of it, and I did not tell him to drink any of it. I am not guilty of the offense." It will be observed that the only difference between the statement of the accused and the testimony for the state is in the fact that the accused says that the minor asked him for a drink, but the uniform current of both the testimony and the statement shows an absolute absence of any evidence

of consent upon the part of the accused that the minor should drink his whisky, and the conviction cannot be sustained, except upon the theory that, in covering up the bottle with his coat and leaving it where the minor could get it if he wished to take it stealthily, the accused was guilty of criminal negligence.

(16 Ga. App. 320)

YOUNG v. STATE. (No. 6474.)

(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

ASSIGNMENT OF ERROR.

There is no merit in the one special assignment of error, and the evidence amply supported the verdict.

Error from City Court of St. Marys; Emmett McElreath, Judge.

Proceedings between Lucius Young and the State. From the judgment, Young brings error. Affirmed.

H. R. Lang, of Waverly, and D. S. Atkinson, of Savannah, for plaintiff in error. S. C. Townsend, Sol., of St. Marys, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 238)

SALMON et al. v. LYNN et al. (No. 5842.)

(Court of Appeals of Georgia. May 5, 1915.)

(Syllabus by the Court.)

1. EXECUTION —154— ACTION ON FORTHCOMING BOND—DEFENSE.

Where an action is brought on a forthcoming bond, the execution and breach of which are not denied, a plea, setting up that the title to the property described in the bond was not in fact vested in the principal maker thereof at the time of its execution, and that the surety thereon had been garnished by the plaintiff in another suit, brought for the recovery of the same debt from the said principal, and had been discharged by the judgment of the court from the said garnishment proceeding, raised no legal and sufficient defense to the suit on the forthcoming bond.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 421-424; Dec. Dig. —154.]

2. EXECUTION —155— ACTION ON FORTHCOMING BOND—DEFENSE.

The only issue that can properly be raised in such a suit, where the execution of the obligation is not denied, is whether or not there has been a breach of the bond. "In an action on a forthcoming bond, no issue can properly be raised as to the title to the property involved. The only question to be decided is whether or not there has been a breach of the bond. O'Neill Mfg. Co. v. Harris, 127 Ga. 641, 56 S. E. 739; Hatton v. Brown, 1 Ga. App. 747, 57 S. E. 1044." Rowland v. Page, 4 Ga. App. 269 (3), 61 S. E. 148. See, in this connection, Barfield v. Covington, 103 Ga. 190, 29 S. E. 759; Oliver v. Warren, 124 Ga. 549, 53 S. E. 100, 100 Am. St. Rep. 188, 4 L. R. A. (N. S.) 1020; Jones v. Kendrick, 94 Ga. 645, 21 S. E. 831; Anderson v. Banks, 92 Ga. 121, 18 S. E. 364; Aycock v. Austin, 87 Ga. 566, 13 S. E. 582.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 425-433; Dec. Dig. —155.]

3. EXECUTION —153— ACTION ON FORTHCOMING BOND.

Whether or not a bond sued upon was by its terms made payable to the plaintiff, as provided by section 3301, Civil Code 1910, is immaterial, since such a bond would be "a good common-law bond, and suit could have been brought on it in the name of the sheriff [levying officer] for the use of plaintiff in *fi. fa.* Wall v. Mount, 121 Ga. 831, 49 S. E. 778; Stroud v. Hancock, 116 Ga. 332, 42 S. E. 496." Gelders v. Mathews, 6 Ga. App. 144, 64 S. E. 576. The suit in this case was brought in the name of the lawful constable for the use of the plaintiff.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 408-421, 427; Dec. Dig. —153.]

4. DEMURRER TO PLEA.

The court erred in overruling the demurrer to the plea filed by the defendants.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by Frank Lynn and others against H. B. Salmon, for use, etc., and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Lang & Henson, of Calhoun, for plaintiffs in error. J. G. B. Erwin, of Calhoun, for defendants in error.

WADE, J. Judgment reversed.

(16 Ga. App. 253)

DUNCAN v. E. H. CONE, Inc. (No. 5778.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT —72, 79— AGREEMENT TO PAY BONUS—RIGHT TO ENFORCE—CONSIDERATION—"GRATUITY."

Where, during the pendency of a term of employment at a stipulated salary per month, a voluntary agreement, entirely apart from the contract of employment, is made by the employer to pay the employé as a bonus some indefinite and undetermined share in the profits of the business, "contingent on continuous and satisfactory services," and this voluntary agreement is not supported by any change in place, hours, character of employment, or other consideration, the agreement is not enforceable at law, as it is nudum pactum, and the grant of the bonus so promised is altogether optional because dependent upon whether the services of the employé are "satisfactory" to the employer, and of this he is in such a case the sole judge. Davis & Co. v. Morgan, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171; Phinizy v. Bush, 129 Ga. 479-491, 59 S. E. 259; Purcell v. Armour Packing Co., 4 Ga. App. 253-257, 61 S. E. 138; Worth v. Daniel, 1 Ga. App. 15-17, 57 S. E. 898; Saul v. Southern Seating, etc., Co., 6 Ga. App. 843-847, 65 S. E. 1065. "Where one undertakes to perform for another service or labor for a given sum, any amount paid in excess of that sum, not based upon a new consideration, is a mere gratuity." Willingham Sash & Door Co. v. Drew, 117 Ga. 850 (1), 45 S. E. 237. "Such a promise, made at the beginning of the employment, is enforceable, though it would not be if made pending the term or after the performance was complete." Phillips v. Hudson, 9 Ga. App. 779-781, 72 S. E. 178. And this is true even where the promise is definite. In this case no definite promise was ever made, and the conditional promise actually made was made

during the pendency of the employment and without any additional consideration to support it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 87, 88, 104; Dec. Dig. § 72, 79.]

For other definitions, see Words and Phrases, First and Second Series, Gratuity.]

2. DENIAL OF NEW TRIAL.

There was no error in overruling the motion for a new trial.

Error from Municipal Court of Atlanta.

Action between J. H. Duncan and E. H. Cone, Incorporated. From the judgment, Duncan brings error. Affirmed.

Thos. H. Scott, of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 284)

JONES v. STATE. (No. 6195.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

MASTER AND SERVANT § 67 — LABOR CONTRACT ACT—ELEMENTS OF OFFENSE—LOSS OR DAMAGE.

The evidence failing to show that any loss or damage was sustained by the hirer an essential element in the offense of violating the labor contract act (Pen. Code 1910, §§ 715, 716), the conviction of the accused was unauthorized, and the court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. § 67.]

Error from City Court of Eastman; J. A. Neese, Judge.

Millie Jones was convicted of violating the labor contract act, and brings error. Reversed.

O. W. Atwill, of Eastman, for plaintiff in error. J. H. Roberts, Sol., of Eastman, for the State.

BROYLES, J. Judgment reversed.

(16 Ga. App. 296)

PRATER v. STATE. (No. 6463.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 552—HOMICIDE § 257 — ASSAULT WITH INTENT TO MURDER — INDICTMENT—EVIDENCE.

While it is true that all the charges in the indictment, constituting the ingredients of the crime, must be proved to the satisfaction of the jury, yet they may be sustained either by circumstantial or direct evidence; and the charge in this indictment that the assault was made with a shotgun, and that it was "a weapon likely to produce death," was sufficiently proven by showing the wounds, how they were made, and that the weapon used was in fact a shotgun, and was loaded with shot. Turner v. State, 57 Ga. 107.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552; Homicide, Cent. Dig. §§ 543-552; Dec. Dig. § 257.]

2. HOMICIDE § 233—ASSAULT WITH INTENT TO MURDER—EVIDENCE—MOTIVE.

A conviction of assault with intent to murder, based on direct or circumstantial evidence, may be upheld, although no particular motive for the commission of the offense is apparent to the jury, and although they may be unable to determine from the evidence what the defendant's motive really was. Sterling v. State, 89 Ga. 807, 15 S. E. 743.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.]

3. CRIMINAL LAW § 1159—APPEAL—VERDICT — EVIDENCE.

Where one is charged with the commission of an offense and there is some evidence tending to prove the guilt of the accused, as well as some evidence tending to establish an alibi in his favor, it is for the jury to accept or disregard such evidence as they see proper, and this court will not disturb their finding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.]

4. CRIMINAL LAW § 1208—APPEAL—EXCESSIVE SENTENCE.

It is not within the power of this court to consider an exception that the sentence of the court is too severe, if it does not exceed the sentence provided by the penal statute, under which the accused was convicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Ike Prater was convicted of assault with intent to murder, and brings error. Affirmed.

Eubanks & Mebane, of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., of Rome, and Walter B. Shaw, of La Fayette, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 287)

JOHNSON v. STATE. (No. 6331.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. REFUSAL OF CONTINUANCE.

Under all the circumstances shown by the testimony, this court cannot say that the trial judge abused his discretion in refusing to continue the case on account of the alleged illness of the defendant's mother.

2. CRIMINAL LAW § 594 — CONTINUANCE — ABSENT WITNESSES.

The court erred in overruling the motion for a continuance, in so far as the motion was based upon the absence of two certain witnesses, for though, according to the certificate of the presiding judge, "it did not appear that either of them resided in the state," the uncontradicted testimony showed that while neither of them had any fixed home in the county where the trial took place, "except in such places as they hired out," both had been working in that county for some time just previous to the trial, and were presumably (since nothing appeared to the contrary) still within the limits of the state and within reach of its processes, and both had been duly subpoenaed, and both had agreed to be present and testify at the trial of the accused, and their evidence was clearly material; and it appeared that they were not absent by the procurement or consent of the accused, that

the motion was not made for delay but for the purpose of securing their testimony, that the accused expected to have them present at the next term of the court, and that one of them had been seen in the town where the trial occurred during the previous week, when he had been subpoenaed, and then promised to be present at the trial. It further appeared that the court ordered attachments for these two witnesses on the day preceding, but the clerk was uncertain whether the attachments had actually issued or not; and it also appeared, from the testimony of the accused, that he had made personal efforts to see the witnesses on the day before, after his case had been postponed for the day by the court, but had been unable to find either of them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. ¶594.]

3. CRIMINAL LAW ¶616—REFUSAL OF CONTINUANCE—SUBSEQUENT PROCEEDINGS—VALIDITY.

Since the court erred in overruling the motion to continue, and all else that occurred at the trial was therefore nugatory, it is unnecessary to discuss the other exceptions presented in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1374; Dec. Dig. ¶616.]

Broyles, J., dissenting.

Error from City Court of Carrollton; James Beall, Judge.

Macle Johnson was convicted of crime, and brings error. Reversed.

Smith, Reese & Smith, of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for the State.

WADE, J. Judgment reversed.

BROYLES, J. (dissenting). An application for a continuance of a case is always addressed to the sound legal discretion of the court, and will not be controlled, unless such discretion has been manifestly abused, and in this case I do not think that this court can hold, as a matter of law, that the learned trial judge abused his discretion in overruling the motion for continuance.

(16 Ga. App. 327)

DEAVER v. DILLARD & BELL. (No. 5818.)
(Court of Appeals of Georgia. May 5, 1915.)

(Syllabus by the Court.)

BILLS AND NOTES ¶476—ACTION ON NOTE—PLEA—DEFENSE—CONSIDERATION.

The court did not err in striking the paragraph in the defendant's plea which set forth that the note sued upon was given to the plaintiffs in partial payment for services rendered by them in defending his son upon a charge of murder, under an agreement to "see him through the matter to the end, and as long as he needed an attorney to help free him from the said charge or any penalty growing out of the same," and that the plaintiffs failed and refused, after the conviction of his said son and a sentence to the penitentiary, to aid the defendant in obtaining his pardon, and therefore the consideration of the note had totally failed. The plea admitted that a part of the services for which the note sued upon was given and a cash consideration paid were in fact rendered by the plaintiffs, and therefore failed to show an entire

absence of any consideration supporting the note. Neither does the plea definitely assert that the note sued upon was executed and delivered to the plaintiffs to cover the specific services which the defendant alleged therein were never in fact rendered.

(a) In order for the defendant to set up the defense of total failure of consideration to the note referred to, it was necessary to allege that the services rendered by the plaintiffs were entirely worthless, and a plea that admits that in the trial of the case they performed services as attorneys at law, which were accepted by him, and which alleges that the consideration of a note given in part therefor has totally failed, because some portion of the services for which it was given were not performed, is insufficient in law. See 3 Am. & Eng. Enc. L. (2d Ed.) 831; Hardee v. Carter, 94 Ga. 482, 19 S. E. 715; Stimpson Specialty Co. v. Parker, 10 Ga. App. 295, 73 S. E. 412.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1519-1521, 1523, 1557; Dec. Dig. ¶476.]

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Action by Dillard & Bell against E. M. Deaver. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. A. Brown, of Blue Ridge, for plaintiff in error. Wm. Butt, of Blue Ridge, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 327)

J. I. CASE THRESHING MACH. CO. v. HODGES.

HODGES v. J. I. CASE THRESHING MACH. CO.

(Nos. 5838, 5839.)

(Court of Appeals of Georgia. May 10, 1915.)

(Syllabus by the Court.)

1. PLEADING ¶354—ANSWER—DEMURRER—UNAMBIGUOUS INSTRUMENT—PAROL.

This case is practically controlled by the decisions of the Supreme Court in *Brooks v. Case Threshing Machine Co.*, 136 Ga. 754, 72 S. E. 40, and *Case Threshing Machine Co. v. Broach*, 137 Ga. 602, 73 S. E. 1063. The written contracts upon which the suits in those cases were based are substantially identical with the written contract in the instant case; and hence, under the rulings in those cases, the written contract in the case at bar was plain and unambiguous, and could not be added to or varied by any prior or contemporaneous parol promises or warranties made by the plaintiff. It follows that the answer and plea of the defendant as a whole, as finally amended, should have been stricken on demurrer, as the answer was a manifest effort to add to and vary by parol the terms of the unambiguous written contract between the parties, upon which the suit was brought.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1082-1095; Dec. Dig. ¶354.]

2. DEMURRER TO ANSWER—DENIAL OF NEW TRIAL.

The court erred in not sustaining the demurrer to the answer and in overruling the motion for a new trial.

Error from City Court of Americus; W. M. Harper, Judge.

Action by the J. I. Case Threshing Machine Company against B. C. Hodges. Judgment for defendant, and plaintiff brings error, and defendant files cross-bill of exceptions. Reversed on main bill, and affirmed on cross-bill.

Ellis, Webb & Ellis, of Americus, for plaintiff in error. J. A. Hixon and W. P. Wallis, both of Americus, for defendant in error.

BROYLES, J. Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

(16 Ga. App. 286)

MYERS v. STATE (No. 6240.)

(Court of Appeals of Georgia. May 4, 1915.)

(*Syllabus by the Court.*)

1. INTOXICATING LIQUORS — PROSECUTION—BURDEN OF PROOF.

On the trial of one charged with selling intoxicating liquors, where the sole defense relied upon is that the accused had no interest whatever in the sale, but acted simply as the agent of the purchaser, the burden is on the accused to show how, when, and from whom he obtained the liquor; and, unless he does this to the satisfaction of the jury, they are authorized to conclude that his defense was merely a subterfuge, and that he was himself the seller, or, at least, that he was interested in the sale otherwise than as agent for the purchaser. *Grant v. State*, 87 Ga. 265, 13 S. E. 554; *White v. State*, 93 Ga. 47, 19 S. E. 49; *Mack v. State*, 116 Ga. 546, 42 S. E. 776; *Gaskins v. State*, 127 Ga. 51, 55 S. E. 1045; *Highsmith v. Waycross*, 7 Ga. App. 611, 67 S. E. 677; *Cheatwood v. Buchanan*, 9 Ga. App. 828, 72 S. E. 284.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. § 224.]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from City Court of Nashville; C. A. Christian, Judge.

Will Myers was convicted of selling intoxicating liquors, and brings error. Affirmed.

J. C. Smith and W. R. Smith, both of Nashville, for plaintiff in error. J. H. Gary, Sol., of Nashville, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 261)

PHENIX INS. CO. OF BROOKLYN v. JONES et al. (No. 5843.)

(Court of Appeals of Georgia. May 4, 1915.)

(*Syllabus by the Court.*)

1. INSURANCE — 552—ACTION ON POLICY—DEFENSE—MISSTATEMENTS OF INSURED.

The insurance policy sued upon contained the following clause: "This entire policy shall be void in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." While there were some

misstatements by the plaintiff in her sworn statement to the company made shortly after the fire, as to the value of some of the personalty destroyed, and as to what articles had been removed from the house before the fire, it was not shown that these misstatements were willfully or intentionally made for the purpose of defrauding the company, for the evidence abundantly showed that the personalty which was in the house at the time of the fire, and which was destroyed therein, exceeded the amount of insurance upon all the personalty.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1358; Dec. Dig. § 552.]

2. INSURANCE — 421 — FIRE INSURANCE — CONDITION OF POLICY—RELEASE FROM LIABILITY—RIOT.

The policy contained also the following clause: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for damage by fire only) by explosion of any kind, or by lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon." The evidence showed that before the fire, on several different occasions, the plaintiff's house had been considerably damaged by explosions of dynamite, thrown or placed by an unknown person or persons; but it was not shown by any evidence that these outrages were committed by more than one person, and, under the law, it requires the participation of more than one person to constitute a riot.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1126, 1133, 1134, 1136, 1140-1143; Dec. Dig. § 421.]

3. FIRE INSURANCE—DYNAMITE EXPLOSIONS.

While the evidence showed that these different explosions of dynamite had considerably damaged the dwelling, the great preponderance of the evidence was to the effect that the house, even after such damage, was worth considerably more than the amount it was insured for.

4. INSURANCE — 421 — FIRE INSURANCE — CONDITION OF POLICY—EVIDENCE.

There was a clause in the policy which rendered it void if the building or any part thereof fell, except as a result of fire. The testimony for the plaintiff, however, showed that no substantial or material part of the building had fallen, and that it had not become untenable, and that the plaintiff had not abandoned it as a place of residence, before the fire occurred.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1128, 1133, 1134, 1136, 1140-1143; Dec. Dig. § 421.]

5. FIRE INSURANCE — SUFFICIENCY OF EVIDENCE.

The evidence as to whether the building was destroyed by the fire, or by an explosion of dynamite which occurred a few minutes before the fire, was conflicting and uncertain, but the finding of the jury, that the proximate cause of the destruction of the building was the fire was authorized.

6. INSTRUCTIONS—VERDICT.

While there were some slight errors in the charge of the court, yet the excerpts complained of, when considered in connection with the entire charge and construed in the light of the evidence in the case, do not contain any error of sufficient materiality to require the grant of a new trial. Substantial justice has

apparently been done in this case, and the verdict was authorized by the evidence.

7. COSTS \S 260—DAMAGES—APPEAL FOR DELAY.

It not being apparent that this cause was brought up for delay only, the request of counsel for defendant in error that 10 per cent. damages be awarded is denied.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. \S 260.]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by J. A. Jones and others against the Phenix Insurance Company of Brooklyn. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. H. & Parke Skelton, of Hartwell, and Slaton & Phillips, of Atlanta, for plaintiff in error. Worley Adams, of Royston, J. N. Worley, of Elberton, and A. G. & Julian McCurry, of Hartwell, for defendants in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 238)

MILLS v. SANDERS. (No. 5879.)

(Court of Appeals of Georgia. May 5, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1001—VERDICT—CONFLICTING EVIDENCE.

The mortgage and the mortgage *fi. fa.* were before the court, and there was positive testimony that the property described in both was in the possession of the mortgagor at the time the mortgage was executed. There was also some positive testimony that when the deceased defendant in *fi. fa.* was executing the mortgage he positively and distinctly asserted his absolute title to all the property covered by the mortgage, and there was also evidence that he had declared the title thereto to be vested in the claimant, and the evidence as a whole was conflicting as to the actual ownership of the property. Upon the direct testimony, and some circumstances in proof tending to support the contention of the plaintiff, the jury found against the claimant; and, since there was some evidence to support their finding, we cannot, on the general grounds of the motion for a new trial, set aside the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. \S 1001.]

2. TRIAL \S 256—INSTRUCTIONS—REQUESTS.

The plaintiff in error complains specially that the court erred "in not fully and clearly charging the jury on the issue of the claimant that it was her property by not stating to the jury the contention of the claimant based upon the evidence for the claimant." The court charged the jury: "When she [the claimant] filed that claim * * * to the mortgage *fi. fa.*, that made an issue; and that is the issue for the jury to consider—whether the property is subject to the mortgage *fi. fa.*, or that it is the property of the claimant, or that her right to said property is superior to that of the plaintiff in the mortgage *fi. fa.*" This charge distinctly stated the issue which the jury was required to pass upon, and it was not incumbent upon the judge to attempt a summary of the evidence, or to do more than to instruct the jury as to the exact issue they were to pass upon; there being no timely written request for any

fuller or more precise instruction than was actually given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. \S 256.]

Error from City Court of Ft. Gaines; B. M. Turnipseed, Judge.

Action between Lula Mills and C. R. Sanders. From the judgment, Lula Mills brings error. Affirmed.

E. R. King, of Ft. Gaines, for plaintiff in error. P. C. King, of Ft. Gaines, and Rambo & Wright, of Blakely, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 238)

OWENS v. STATE. (No. 6336.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

DENIAL OF NEW TRIAL.

The evidence authorized the verdict. No error of law is complained of, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Proceedings between Burney Owens and the State. From the judgment, Owens brings error. Affirmed.

Yeomans & Wilkinson, of Dawson, for plaintiff in error. B. T. Castellow, Sol. Gen., of Outhbert, and R. R. Arnold, of Atlanta, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 239)

SMITH v. STATE. (No. 6180.)

(Court of Appeals of Georgia. May 5, 1915.)

(Syllabus by the Court.)

1. JURY \S 95—CHALLENGE FOR CAUSE—GROUNDS—SERVICE IN PRIOR CASES.

Jurors should come to the consideration of a case (especially when it is a criminal one) free from even a suspicion of prejudice or a fixed opinion upon any material fact in the issue to be tried, as to the parties, the subject-matter, or the credibility of the witnesses. Upon a showing, made on a principal challenge for cause, that certain named jurors had served, at the same term of the court on other juries, which had convicted other defendants of the same offense, in cases involving the same transaction, and where it appeared from the testimony of state's counsel that the intoxicating quality of the liquor alleged to have been sold by the accused would be established by the same expert witness upon whose credibility the jurors challenged had already passed, it was error to overrule the challenge. And this is true although the challenged jurors qualified by their answers to the usual questions propounded. *Turner v. State*, 114 Ga. 421 (3), 40 S. E. 308; *McKay v. State*, 6 Ga. App. 527, 528, 65 S. E. 306; 24 Cyc. 280, 301.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 424-430; Dec. Dig. \S 95.]

2. CRIMINAL LAW ⚡1152—**APPEAL—DECISIONS REVIEWABLE—CHALLENGE TO JURORS.**

While the finding of the court, when sitting in lieu of common-law triors, as to the competency of jurors, is not subject to review, a challenge for principal cause being considered a question of law, the judgment of the trial court thereon may be reviewed. *Turner v. State*, 114 Ga. 421 (2), 40 S. E. 308; *Redfearn v. Thompson*, 10 Ga. App. 550 (4), 73 S. E. 949.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. ⚡1152.]

8. CRIMINAL LAW ⚡923—**VERDICT—VALIDITY—DISQUALIFICATION OF JURORS.**

Since, under the rulings in *Georgia Railroad v. Cole*, 73 Ga. 713 (2), and *Smith v. State*, 2 Ga. App. 574, 59 S. E. 311, and cases therein cited, a verdict is void when some of the jurors who rendered it were disqualified to act, consideration of the remaining assignments of error is unnecessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. ⚡923.]

Error from City Court of Valdosta; J. G. Cranford, Judge.

E. R. Smith was convicted of crime, and brings error. Reversed.

O. M. Smith, of Valdosta, for plaintiff in error. Jas. M. Johnson, Sol., of Valdosta, for the State.

BROYLES, J. Judgment reversed.

(16 Ga. App. 289)

LOWTHER v. STATE. (No. 6348.)
(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. LARCENY ⚡58—**DOMESTIC ANIMALS—SUFFICIENCY OF EVIDENCE.**

It is insisted that the verdict was unauthorized because the cow and the yearling driven off by the accused were not shown to be the identical cow and yearling described in the indictment as the property of one Goss. One witness for the state testified that the cow was marked exactly as the indictment alleged the stolen cow was marked, and the description of

both cow and calf agreed with that of the cow and calf mentioned in the indictment. This witness said he had seen the cow belonging to Goss, which was alleged to be stolen, together with the bull yearling in Goss' field, time and again, and he was "sure they [the cow and the yearling driven off by the accused from his pen] were the same cow and yearling that [he] saw in Goss' field." While he admitted, on cross-examination, that he did not know how the cow he had seen in Goss' field was marked, and said, further: "She was the same cow, because she was the same color; it is possible that I may be mistaken about it"—he further testified, on redirect examination, "I know the cow that was in Goss' field was the one that went to my house;" and it is undisputed that the one which went to his house was the one driven off by the accused. The jury were authorized, from his testimony, to find that the cow and yearling which the defendant admitted he drove away were the same cow and calf described in the indictment as the property of Goss.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 166; Dec. Dig. ⚡58.]

2. CRIMINAL LAW ⚡1159—**APPEAL—VERDICT—EVIDENCE.**

The explanation offered in behalf of the defendant is, in some particulars, consistent with the theory of innocence; but, since the jury failed to credit this testimony, and concluded that the defendant was guilty of larceny beyond all reasonable doubt, we cannot arbitrarily set aside their finding. We cannot invade the province of the jury and set aside their verdict, if there is testimony supporting all the essential averments in an indictment or accusation, even though that testimony may appear to us to be somewhat weak and uncertain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. ⚡1159.]

Error from Superior Court, Liberty County; W. W. Larsen, Judge.

O. Lowther was convicted of larceny, and brings error. Affirmed.

Ben A. Way, of Hinesville, for plaintiff in error. W. F. Slater, Sol. Gen., of Savannah, for the State.

WADE, J. Judgment affirmed.

RUSSELL, C. J., concurs, dubitante.

⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(169 N. C. 285)

AMERICAN NAT. BANK OF RICHMOND,
VA., v. HILL. (No. 410.)(Supreme Court of North Carolina. May 12,
1915.)1. PLEADING \S 211—DEMURRER—MOTION TO
STRIKE.

A motion to strike out a part of an answer, the purpose of which is to set up a counterclaim, will be treated as a demurrer ore tenus to it as not stating a valid counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 472, 481; Dec. Dig. \S 211.]

2. BILLS AND NOTES \S 357—HOLDER IN DUE
COURSE—COLLATERAL.

That a note is indorsed to one as collateral security for the debt of the indorser does not invalidate his position as holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 909-912, 961; Dec. Dig. \S 357.]

3. BILLS AND NOTES \S 443—INDORSEMENT AS
COLLATERAL—RIGHT OF ACTION.

The holder in due course of a note indorsed to it as collateral security has the legal right to collect it, and may maintain an action thereon against the maker; it not appearing the indorser's debt has been paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1377-1380, 1383-1392, 1394-1423; Dec. Dig. \S 443.]

4. BILLS AND NOTES \S 370—ACTION—DE-
FENSES—RENEWAL NOTE.

Failure of consideration of a note, unknown to its indorsee, does not affect right of recovery on a note given in renewal thereof, by the maker, directly to the indorsee, whereupon the original note was discharged and canceled.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 963; Dec. Dig. \S 370.]

5. PLEADING \S 142—COUNTERCLAIM.

A counterclaim should allege defendant's cause of action with the same precision and certainty as if alleged in a complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 290, 291, 297, 300; Dec. Dig. \S 142.]

Appeal from Superior Court, Anson County; Rountree, Judge.

Action by the American National Bank of Richmond, Va., against J. E. C. Hill. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action, tried upon these issues:

1. Is the plaintiff the owner and holds in due course the notes described in the complaint? Answer: Yes.

2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: \$935.00, with interest from October 12, 1914.

The defendant introduced no evidence. His honor instructed the jury. There was no exception to the evidence or the charge of the court. In apt time the plaintiff moved to strike out the "further defense," set up by the defendant in his answer. The motion was allowed, and the defendant excepted. The plaintiff introduced evidence sustaining the allegations contained in the complaint. From the judgment rendered, the defendant appealed. The only assignment of error is the granting of the said motion.

H. H. McLendon, of Wadesboro, for appellant. Lockhart & Dunlap, of Wadesboro, for appellee.

BROWN, J. This is an action to recover upon a promissory note, executed by the defendant to the Southern Savings Bank of Wadesboro, N. C., and duly indorsed to the plaintiff before maturity. The execution of the note and its nonpayment are admitted. The findings of the jury under the charge of the court, to which no exception is taken, establishes the fact that the plaintiff is the owner and holder in due course of the said note.

[1] Striking out the answer, or other pleading, or a part of it, is an unusual practice in this state, but is recognized as proper practice elsewhere. "It is often necessary," says 5 Ency. P. & P. 341, "for the court, in the administration of justice, to strike out a count" (citing Sherratt v. Webster, 9 Jur. U. S. 629; Chapman v. King, 4 D. & L. 811, and other cases).

The evident purpose of the part of the answer stricken out is to set up a counterclaim or set-off against the note sued on in plaintiff's hands. We will therefore treat the motion to strike out the "further answer" as a demurrer ore tenus to it upon the ground that it fails to state a valid counterclaim.

[2] It is admitted that the plaintiff bank holds the note of the defendant as collateral security for the note of the Southern Savings Bank. The jury find that the plaintiff was the holder in due course of the note sued on; that is to say, that plaintiff received it by indorsement before maturity for value and without knowledge of any infirmity. The note is a negotiable instrument on its face, and the fact that it was indorsed to the plaintiff as collateral security for the debt of the indorser, the Southern Savings Bank, does not invalidate the position of the plaintiff that it is a holder in due course.

[3] The plaintiff has the legal right to collect the collateral which it has thus received in due course in its own name, and can maintain an action thereon against the maker. Bank v. Oil Co., 157 N. C. 302, 73 S. E. 93.

It is true that where, in an action on a note, the plaintiff proves only an equitable title thereto, the defendant, maker of the note, cannot properly be cut off from matters of defense existing between the defendant, maker, and indorsee or payee. Tyson v. Joyner, 139 N. C. 70, 51 S. E. 803.

In this case, the defendant fails to allege that the debt due to the plaintiff by the Southern Savings Bank has been paid and discharged by the collection of the collateral, or in any other way. There is no allegation in the answer that the payment of the note in this case will overpay the indebtedness due by the said Savings Bank to the plaintiff, and that therefore the defendant would have

a right to set up the alleged counterclaim. If the defendant had alleged in his answer that the plaintiff held a large amount of collateral as security for the note executed to it by the Savings Bank, and that the plaintiff's note had been fully paid by collections from this collateral or otherwise, then a very different case would have been presented for the consideration of the court. As it is, nothing of that sort appears in the answer.

[4] A further and conclusive reason supporting the ruling of the court below is that the answer does not allege any set-off or counterclaim. It simply alleges that the note sued on was given to the Savings Bank as a renewal for one previously given to the Dixie Development Company and indorsed to the Savings Bank and originally given for the purchase money of land; that the Dixie Company cannot make good title to said land for the reason that there was a mortgage on the same in favor of one Little, and another mortgage on the same in favor of the said Savings Bank. When the defendant executed the note sued on to the Savings Bank, it was made payable to the Savings Bank, and evidently the note to the Dixie Company, executed by the defendant, was discharged and canceled. The renewal note to the Savings Bank was a contract between the defendant and the Savings Bank, and if the defendant had any equity, set-off, or counterclaim against the Dixie Company, it was his duty to make it known to the Savings Bank at the time when the Savings Bank discharged the note indorsed to it by the Dixie Company and took the defendant's note payable directly to itself instead.

[5] Again, the allegations of the answer attempting to set up a counterclaim or set-off are too vague, indefinite, and uncertain upon which to raise an issue. It is well settled that the averments as to set-off or counterclaim must be definite and certain. Vague, general, and indefinite allegations are not sufficient. The counterclaim is substantially the allegation of a cause of action on the part of a defendant against the plaintiff, and it ought to be set forth with the same precision and certainty. *Smith v. McGregor*, 96 N. C. 101, 1 S. E. 695. See, also, a case similar to this and from the same county at this term, the *American National Bank v. Northcutt, et al.*, *infra*.

If it be a fact, which is not alleged in the answer, that after the collection of all the collateral in its hands, the plaintiff should have in its possession funds in excess of the amount due by the Savings Bank to it, the proper course is for the receivers of the Savings Bank to institute action against the plaintiff if it fails to make a proper accounting and pay over the funds in its hands in excess of the amount due it.

The judgment of the superior court is affirmed.

(189 N. C. 219)
**AMERICAN NAT. BANK OF RICHMOND,
VA., v. NORTHCUTT et al.** (No. 411.)

(Supreme Court of North Carolina. May 12, 1915.)

PLEADING \S 146—**COUNTERCLAIM.**

A mere allegation of indebtedness, without a statement of its amount, is an insufficient pleading of a counterclaim.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 294-296; Dec. Dig. \S 146.]

Appeal from Superior Court, Anson County; Rountree, Judge.

Action by the American National Bank of Richmond, Va., against R. E. L. Northcutt and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Civil action tried upon these issues:

1. Is the plaintiff the owner and holder in due course of the notes described in the complaint? Answer: Yes.

2. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: \$2,000, with interest on \$1,000 from October 1, 1914, and interest on \$1,000 from November 1, 1914.

When the case came on for trial, plaintiff moved to strike out the "further defense" set up by defendants in the answer. The motion was allowed. Defendants excepted and appealed.

Plaintiff introduced evidence sustaining the several allegations of the complaint. Defendants introduced no evidence. There were no exceptions to the evidence, or to the charge of the court. The following is the "further defense" stricken out by the court:

That plaintiff is a nonresident corporation; that receivers have been appointed by the courts of this state for the Southern Savings Bank of Wadesboro; that said Savings Bank is indebted to plaintiff in the sum of \$—, evidenced by its notes now held by plaintiff; that said notes have not been presented to said receivers for payment; that if the plaintiff is the holder of the notes described in the complaint, they are held by it as collateral security for the payment of the notes of the said Southern Savings Bank, given to the plaintiff, and that they are informed and believe that the plaintiff holds notes and mortgages, the property of the said Southern Savings Bank, as collateral securing said indebtedness, largely in excess of the amount due it by the said Southern Savings Bank, and that the plaintiff has collected a large sum of money from said collateral, and is endeavoring to collect more than is due it on account of the indebtedness of the said Southern Savings Bank, and to that end has instituted numerous suits in the superior court of Anson county for the collection of said notes and collateral security held by it, without alleging in any of the complaints filed in said actions that said notes are held by it as collateral security for said indebtedness, and without making the receivers of the said Southern Savings Bank parties to any of said actions; that R. E. L. Northcutt and W. N. Northcutt are stockholders of the said Southern Savings Bank, and that the defendants herein were depositors in said bank at the time of the appointment of the receivers, as aforesaid, and as such are now among the creditors of said bank. The defendants are informed and believe that the plaintiff had in its possession a large sum of money belonging to the said Southern Savings Bank at the time of

the appointment of said receivers, which said money has not been applied to the indebtedness of said Southern Savings Bank to the plaintiff, and that the same should be applied to said indebtedness; that on account of the matters and things herein alleged, the defendants are informed, advised, and believe that the receivers of the said Southern Savings Bank are necessary and proper to this action, in order that the rights of all the parties may be properly adjudicated and protected.

Robinson, Caudle & Pruette and H. H. McLendon, all of Wadesboro, for appellants. Lockhart & Dunlap, of Wadesboro, for appellee.

BROWN, J. This action is brought to recover on two promissory notes of \$1,000 each, payable to the Southern Savings Bank of Wadesboro, N. C., and indorsed by that bank to plaintiff. The execution and indorsement of the notes by defendants are admitted.

There are no exceptions to the evidence or to the charge; therefore the findings of the jury stand unchallenged. These entitle the plaintiff to judgment unless the defendants have pleaded a valid set-off or counterclaim in their answer, which has been disregarded by the court.

This case is very similar to that of *American National Bank v. Hill*, 85 S. E. 209, from same county, at this term. Much that is said in that opinion is applicable to this appeal.

There is no allegation in the answer that the debt due plaintiff by the Southern Savings Bank, for which the note sued on and other notes have been assigned as collateral, has been fully paid by the collection of the collateral by the plaintiff.

Then again the answer fails to properly plead any set-off or counterclaim. The allegation is that the defendants—

“are stockholders in the Southern Savings Bank, and were depositors in said bank at the time of the appointment of the receivers, and as such are now among the creditors of said bank.”

The answer fails to set out the amount of the deposit and in what amount the Southern Savings Bank is indebted to defendants. It may be \$1, or it may be a much larger sum. If the true amount were set out, and it appeared to be inconsiderable, plaintiff could and probably would admit it and give defendants credit for it on the note and take judgment for the balance. As it is, no counterclaim is sufficiently pleaded that would be good against the Southern Savings Bank, the assignor of plaintiff.

It is well settled that the averments as to set-off or counterclaim shall be definite and certain. Vague, general, and indefinite allegations are not sufficient. The plea must be specific, and must fully apprise the plaintiff of the nature and extent of the defendants' claim. 19 Cyc. P. & P. 751.

In some cases it has been held that, in pleading a set-off or counterclaim, the same definiteness and certainty are required as in

stating a cause of action in a declaration or complaint. *Bernard v. Mullot*, 1 Cal. 368; *Stockton v. Graves*, 10 Ind. 294; *Gragg v. Frye*, 32 Me. 283, and other cases cited; 19 Ency. P. & P. 751.

In this state it is held that a counterclaim, which only alleges that plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness and how it arose, is imperfectly pleaded, and ought to be disregarded. *Smith v. McGregor*, 96 N. C. 101, 1 S. E. 695. In that case the court says:

“A counterclaim should be alleged with clearness and precision; its nature, and the consideration supporting it, when, how, and where it arose, should be stated with reasonable certainty. This the statute requires, and, moreover, it is necessary to just and intelligent procedure. The counterclaim is substantially the allegation of a cause of action on the part of the defendant against the plaintiff, and it ought to be set forth with the same precision as if alleged in the complaint.”

The judgment of the superior court is affirmed.

(169 N. C. 182)

FOSTER v. TOWN OF TRYON. (No. 490.)
(Supreme Court of North Carolina. May 12, 1915.)

1. MUNICIPAL CORPORATIONS — 755, 791 —
DEFECT IN STREET—LIABILITY.

A city is responsible for injuries caused by defects in its streets which might reasonably have been expected to cause injury, where through its officers the city had actual or constructive notice of the defect, which will be presumed when it has existed for such a length of time and under such circumstances that the proper officers, in the exercise of due care and diligence, could have learned of it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587, 1589, 1590, 1647-1651; Dec. Dig. — 755, 791.]

2. MUNICIPAL CORPORATIONS — 821 —
DEFECTS IN STREETS—NOTICE TO CITY.

In an action for personal injuries from a defect in a street, the question of actual or constructive notice to the city of the defect is for the jury, in view of the locality, whether the street is much frequented, whether the defect is conspicuous, etc.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. — 821.]

3. MUNICIPAL CORPORATIONS — 821—DEFECT
IN STREETS—NEGLECT OF CITY—QUEST-
ION FOR JURY.

In an action against a municipality for death of a boy resulting from his horse's stepping into a hole in a culvert under a highway, the question of defendant's negligence held for the jury under the evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. — 821.]

Appeal from Superior Court, Polk County; Webb, Judge.

Action by J. H. Foster, administrator of Charlie Foster, deceased, against the Town of Tryon, a municipal corporation. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover damages for wrongful death, the plaintiff alleging that his intestate was killed by the negligence of the defendant. The intestate, a boy about 12 years of age, was riding on horseback on one of the principal streets of the defendant town, when his horse stepped in a hole about 6 or 8 inches wide, 10 or 12 inches long, and 18 inches deep, and stumbled and caused the death of the intestate by throwing him or falling on him. There was a verdict and judgment for the plaintiff, and the defendant appealed, assigning as error the refusal of his honor to enter judgment of nonsuit upon the conclusion of the whole evidence.

Smith, Shipman & Bridges, of Hendersonville, and Solomon Gallert, of Rutherfordton, for appellant. Spainhour & Mull, of Morganton, for appellee.

ALLEN, J. [1] The duty which municipal corporations owe to those using their streets, and the degree of responsibility imposed upon them by law, are stated clearly and accurately by Associate Justice Hoke in *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309, which has been approved in *Brown v. Durham*, 141 N. C. 252, 53 S. E. 513; *Revis v. Raleigh*, 150 N. C. 353, 63 S. E. 1049; *Johnson v. Raleigh*, 156 N. C. 271, 72 S. E. 368; *Bailey v. Winston*, 157 N. C. 259, 72 S. E. 966, and in other cases. He says:

"The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. * * * The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect exists and an injury has been caused thereby. It must be further shown that the officers of the town 'knew, or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated.'"

Notice of the defect in or dangerous condition of the street may be actual or constructive, and knowledge will be imputed to the corporation if its officers could by the exercise of ordinary care discover the defect and remedy it.

The doctrine of constructive notice rests upon the duty to inspect and repair, or, as stated by Justice Walker in *Bailey v. Winston*, supra:

"The duty * * * to exercise a reasonable and continuing supervision over its streets, in order that it may know they are kept in safe and sound condition for use."

Speaking of the necessity for notice and of the circumstances under which it will be implied, Mr. Elliott says, in his treatise on *Roads and Streets* (section 806 et seq.):

"Whether a defect in a street is caused by the act of a third person or by the failure of the city to repair, there is, in general, no liability on the part of the city unless it has, or ought to have had, due notice of the defect. It is not necessary, however, that it should have actual notice; constructive notice is sufficient. Whenever the defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of the defect, notice thereof will be presumed. Having means of knowledge and negligently remaining ignorant is equivalent to knowledge. It is generally for the jury to determine as a question of fact whether a city has notice or not. * * * The length of time during which a defect or an obstruction is required to exist in order to charge a city with notice must, however, depend largely on the nature of the defect, and the circumstances of the particular case. * * * Where the defect is caused by the municipality itself, or where it makes the improvement, it is bound to take notice of such defects as ordinary skill and prudence will reveal. * * * Where actual notice is relied upon to charge a city with negligence respecting streets, it is sufficient if brought home to a proper officer charged with their maintenance and supervision. Thus, notice to a street commissioner, or a road overseer, is notice to the corporation."

[2] The authorities in our state also support the proposition stated by Mr. Elliott that the question of constructive notice is generally a question for the jury, and this is true because the conditions are so varying under which the principle will be applied that it is impossible in most cases to declare as matter of law that there is or is not constructive notice.

The locality in which the defect exists, whether in a remote section or in a much used and frequented street, the conspicuousness of the defect, so that it may be readily discovered, and other circumstances, have to be considered.

In *Brewster v. Elizabeth City*, 142 N. C. 11, 54 S. E. 784, Justice Brown, discussing the question of constructive notice and the knowledge of defects which may be inferred from the length of time they have continued, says:

"It is not for the court to draw such inference. It is peculiarly a matter for the jury, to be determined upon all the facts and circumstances in evidence."

[3] If these principles are applied to the evidence, the conclusion must follow that the motion for judgment of nonsuit was properly denied. The hole into which the horse stepped was in a culvert or wooden box running across the street for the purpose of carrying water from one side to the other, and which was a little under the surface of the street. The evidence offered by the plaintiff tends to prove that the intestate of the plaintiff was killed by reason of the horse stepping in this hole, and there is evidence that this culvert was originally constructed in a faulty and negligent manner, in that at this place the planks on the top of the culvert near the surface failed to meet by six or eight inches, and that a stone not large enough to completely cover it was placed over this opening

between the ends of the planks and the hole covered with dirt. This was on one of the principal streets of the defendant where there was much travel, and it could be reasonably anticipated that the travel would cause the dirt to fall into the empty box beneath and leave the hole near the center of the street. There was also evidence tending to prove that the hole was seen by one witness two or three days before the intestate was killed, by another witness on the day before, and that the officer of the defendant whose duty it was to repair the streets was notified of the existence of the hole an hour or two before the death of the intestate, and that he at the time of this notice was within 300 yards of the hole. It is also in evidence that the hole could be easily seen, that it was in a conspicuous place, and that the commissioner of streets of the defendant passed by the place where the intestate was killed from four to six times a day. The jury could reasonably infer from this evidence that the hole was near the center of one of the most important streets of the defendant, that it could be easily seen, that it could be repaired in a very short time, and that by the exercise of ordinary care in the performance of the duty imposed upon the defendant to inspect and repair its streets the death of the intestate could have been averted.

No error.

(169 N. C. 75)

HUNTLEY et al. v. McBRAYER. (No. 523.)
(Supreme Court of North Carolina. May 12, 1915.)

1. DEEDS §144—"CONDITION SUBSEQUENT"—AGREEMENTS TO SUPPORT GRANTOR.

Where a deed conveying land in fee provided that it was in consideration that the grantees would see that the grantors were maintained as long as either of them lived, and that, if the grantee should fail to comply with such agreement, the deed was void, a "condition subsequent" was created, and the deed vested the fee simple in the grantee, subject to be defeated by failure to perform the condition; as, if the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and that the grantee shall perform the act after taking possession, the condition is "subsequent."

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 452, 469, 470, 472; Dec. Dig. §144.

For other definitions, see Words and Phrases, First and Second Series, Condition Subsequent.]

2. DEEDS §155—CONDITION SUBSEQUENT—CONSTRUCTION.

Conditions subsequent are construed strictly against the grantor, as they tend to defeat estates, but the construction should be conformably to the letter and obvious intent of the grant, and, if there is only one construction which will give effect to all the words of the instrument, it will be followed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. §155.]

3. DEEDS §160—CONDITION SUBSEQUENT—BREACH—SUFFICIENCY OF EVIDENCE.

In an action involving the title to land conveyed on condition that the grantees should support the grantors, evidence that a demand of some kind was made by one of the grantors upon the grantee was insufficient to show a default by the grantee in the absence of any showing as to the terms of the demand.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 505-517; Dec. Dig. §160.]

Appeal from Superior Court, Rutherford County; Justice, Judge.

Action by Jane Huntley and others against T. C. McBrayer. Judgment for defendant, and plaintiffs appeal. Affirmed.

This is a proceeding for partition of land, in which defendant pleaded sole seisin. William Henson, who once owned the land, and his wife, Jane Henson, under whom plaintiffs claim as heirs conveyed the land to their sons William A. and Jason Henson. William Henson died in 1885 or 1886, and Jason Henson died 11 years ago. William A. and Jason Henson and their mother, Jane Henson, after the death of her husband, conveyed the land to C. M. Robinson, and defendant claims under him. Defendant and those under whom he claims have held the possession since the date the deed was executed in 1885. This suit was brought in June, 1914. The deed of 1885 conveys the land in fee, with this restriction:

"For and in consideration that the parties of the first part are both old and frail, and the parties of the second part agree and bind themselves to see that they are maintained and properly cared for as long as they or either of them live [then follow words of conveyance and the habendum and warranty clauses]. * * * But if the parties of the second part should fail to comply with their part of the agreement, this is all void and of no effect. The parties of the first part are to retain possession of said land as long as they or either of them live."

There were certain facts agreed upon or admitted by plaintiffs, and, among others, that they have no proof that there was any violation of the agreement to support and maintain William Henson during his life, or that he made any demand on the grantees, but they proposed to prove that Jane Henson made a demand, and the grantees failed to respond, though it is not stated for what the demand was made, nor does it appear what was its nature or extent, or at what time the demand was made. There was no offer to prove that the grantees or their assignees had actually failed to support Jane Henson. The court intimated the opinion that plaintiffs could not recover, whereupon, in deference to this intimation, they took a nonsuit and appealed.

Robert S. Eaves, of Rutherfordton, Ryburn & Hoey, of Shelby, and Quinn, Hamrick & Harris, of Rutherfordton, for appellants. Tillett & Guthrie, of Charlotte, for appellee.

WALKER J. (after stating the facts as above). [1, 2] We are of the opinion that the words of the deed create a condition subsequent. No precise words are required to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession, then the condition is subsequent. *Underhill v. Saratoga & Washington R. Co.*, 20 Barb. (N. Y.) 455. The effect of the deed, therefore, was to vest the fee simple of the estate in the grantees, subject to be defeated by a neglect or refusal to perform the condition. It is true that such conditions are construed strictly against the grantor, as they tend to defeat estates, but the construction should be conformable to the letter and obvious intent of the grant, and, if there is only one which will give effect to all the words of the instrument, it will, of course, be followed. 13 Cyc. 687, 688. The meaning of this deed is clear that the grantees shall see to the maintenance and proper care of the grantors during their joint and several lives, and, failing to do so, that the deed shall be "void and of no effect." We have recently discussed the principles applicable to conditions of this sort in deeds, and it would be useless to repeat what is there said. *Britton v. Taylor*, 84 S. E. 280.

[3] The only question we need consider here is whether there was a sufficient offer to prove facts that would show a violation of the condition. It is stated in the facts admitted that a demand was made by Jane Henson upon the grantees, but we are not informed as to its terms, so that we cannot see that it was of a kind to put the grantees in default if they did not comply with it. This would be very indefinite proof, and a wholly inadequately admission, upon which to declare a vested estate forfeited for breach of a condition. It must appear clearly that there has been a substantial failure to perform the covenant for support before the power of the court will be exerted to put an end to the estate conveyed and return it to the grantor.

It is unnecessary to decide as to the legal effect of the deed executed by Jane Henson upon the condition and the right to re-enter for its breach; she being the only beneficiary injured by the alleged nonperformance of the grantees. The deed is not before us, and we will not venture a guess as to its contents. A conveyance of the premises by the grantor to a stranger has been held as

operating to extinguish the grantor's rights in certain cases. 13 Cyc. 707, and note 96, and cases cited; *Berenbroick v. St. Luke's Hospital*, 23 App. Div. 339, 48 N. Y. Supp. 363; *Id.*, 155 N. Y. 655, 49 N. E. 1093. But we do not decide the question, for the reason stated, as it is sufficient to hold that, upon another ground, the intimation of the court was correct, and the nonsuit will not be set aside.

No error.

(166 N. C. 140)

JORDAN et al. v. SIMMONS. (No. 478.)

(Supreme Court of North Carolina. May 12, 1915.)

1. TAXATION — 804, 805 — RECOVERY OF LAND — LIMITATIONS — TAX DEED.

Though Fell's Revisal, § 2909, limiting actions for the recovery of property sold for taxes to three years, provided that, where the owner was under disability at the time of the sale, he may bring the action within three years after the disability is removed, applies only in favor of the purchaser at a tax sale against the original owner. Revisal 1905, § 395, subd. 10, limiting an action for the recovery of real property sold for nonpayment of taxes to three years after the execution of the sheriff's deed, bars an action by the claimant under the tax deed, as well as one against him.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1591-1597; Dec. Dig. — 804, 805.]

2. TAXATION — 809 — SALE — ACTION TO TRY TITLE — LIMITATIONS — PLEADING — NECESSITY.

Revisal 1905, § 395, subd. 10, limiting an action for the recovery of real property sold for nonpayment of taxes, is a statute of limitations, and cannot be relied on unless pleaded.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1385, 1600-1604; Dec. Dig. — 809.]

3. LIMITATION OF ACTIONS — 1 — PERSONS AFFECTED — PARTY IN POSSESSION.

As a general rule, the statute of limitations rarely operate against one in the enjoyment of the right.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 1-3; Dec. Dig. — 1.]

4. HUSBAND AND WIFE — 6 — TAX SALES — WIFE AS PURCHASER.

A wife can acquire a tax title of her husband's property for her own benefit, though the husband cannot acquire such a title in his wife's property; since the wife is under no legal or moral obligation to manage or control the husband's property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 13-18; Dec. Dig. — 6.]

Appeal from Superior Court, Montgomery County; Adams, Judge.

Action by Allen Jordan, for whom Molly Deaton, as heir at law, and J. M. Deaton, as administrator, were substituted as party plaintiffs, against James A. Simmons. Judgment for the defendant on nonsuit, and the plaintiffs appeal. Reversed, and new trial ordered.

Civil action heard before his honor W. J. Adams, judge, and a jury, at September term, 1914, of the superior court of Mont-

gomery county. The action to establish title and recover possession of a tract of land was instituted in May, 1903, and, as it now appears, only Allen Jordan was named in the summons as plaintiff. There seem to be facts in evidence tending to show that it was thereafter prosecuted for both Allen Jordan and his wife, Mary, but there is no entry in the record as it now appears showing that the wife was formally made a party. Both the husband and wife having died, at January term, 1908, Molly Deaton, heir at law of "plaintiffs," and J. M. Deaton, administrator of both plaintiffs, were by formal order made parties plaintiff, and in April, 1910, filed an elaborate complaint styled an amended complaint, and again amended at August term, 1914, in which plaintiff alleges ownership of the land, in general terms; second, that plaintiffs and defendant claim the land under Allen Jordan, and alleging facts in impeachment of defendant's claim on the ground of fraud; third, that plaintiff is the owner under and by virtue of a tax title in which the land was sold for taxes in May, 1898, was bid off by one G. S. Beaman, the bid assigned to Mary Jordan, and conveyed to her by deed of sheriff, pursuant to the tax sale, the deed bearing date May 6, 1899. The defendant denied the ownership of plaintiffs, admitting, in effect, that he had acquired the title through Allen Jordan, denied the allegation of fraud, and pleaded the statute of limitations thereto, and pleaded, further, an estoppel by reason of a judgment in favor of J. P. Leach, the immediate grantor of defendant, against Allen Jordan.

At the close of the evidence, on motion, there was judgment of nonsuit; the case on appeal stating the ruling of his honor and the reason for it as follows:

"It appearing to the court that the tax deeds introduced by the plaintiffs were executed on the 6th day of May, 1899, and the summons in this action issued May 6, 1903, because it was not brought within three years of the date of the execution of the sheriff's deed. There being no evidence of fraud the motion of the defendant is allowed."

Plaintiffs, having duly noted their exceptions, appealed.

W. A. Cochran, of Troy, for appellants.
Thos. J. Jerome, of Greensboro, for appellee.

HOKE, J. [1] In Laws of 1895, c. 119, § 69, it was provided that no action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same is brought within three years after the sheriff's deed is made, etc. The statute contained a proviso giving indication that it was the intent and purpose of the lawmakers that the provision should operate in favor of the claimant under the tax title and against the original owner, and, so construed, the section and the proviso are brought forward in 2 Pell's Revisal, c. 72, § 2909, being the last clause of the section. And see *Lyman v. Hunter*, 123 N. C. 508, 31 S. E. 827. In addition

to this, our general statute of limitations (Revisal, §§ 390-395, subsec. 10) contains provision:

"That an action for the recovery of real property, sold for taxes, is barred unless the same is instituted within three years after the execution of the sheriff's deed."

This last statute, in terms plain of meaning, is broad enough to include actions both for and against the claimant under the tax title, and, where the facts bring the case within its provisions, and the question is properly presented, we think such claimant is also barred after three years from the execution of the tax deed.

[2] It is, however, in strictness, a statute of limitations, and, as such, comes under the established rule that, in order to be effective, it must be properly pleaded. *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091; *Guthrie v. Bacon*, 107 N. C. 337, 12 S. E. 204. On careful perusal of the record, we find no plea of the statute in this aspect of the case, and the defenses arising thereunder are, therefore, not properly available to defendant on the case as now presented.

[3] In addition to this, there is the permissible inference on the facts in evidence that the original owner may have continued in possession of the property until within three years next before action brought, and the general rule is that a statute of limitations rarely operates against one in the enjoyment of the right. *McNair v. Boyd*, 163 N. C. 478, 79 S. E. 966.

[4] It was suggested on the argument that a wife is not allowed to acquire a tax title of her husband's property and hold the same for her own benefit, citing *Laton v. Balcum*, 64 N. H. 92, 6 Atl. 37, 10 Am. St. Rep. 381. It may be that a husband, in the management and control of the wife's property, is not allowed to buy in her property at a tax sale, without her knowledge and consent, and hold same adversely to her. Such conduct might very well be considered such a breach of duty on his part as to render his purchase of no effect against the wife's ownership. But we are not impressed with the position as applied to the facts of this case, and we see no reason, when a husband's property is sold for taxes, why a wife should not be allowed to purchase for her own benefit. The case is referred to in *Black on Tax Titles*, § 286, and, while the author appears to give the general principles, announced his approval, and quotes extensively from the opinion, he seems to be somewhat hesitant about the position, and also quotes from an Indiana case as follows:

"It seems to be settled law that a husband, whose duty it is to look after the business interests of his wife and family, as well as to support them, will not be permitted to acquire title to the property of his wife by purchase at a tax sale, but we know of no law to prevent a wife from purchasing, at a public tax sale, the lands of her husband, * * * provided the purchase is made on her own account and with her own money. A wife is under no legal

or moral obligation to pay the taxes on her husband's property."

On careful perusal of the record, we think the plaintiffs are entitled to a new trial of the cause; and it is so ordered.

New trial.

(189 N. C. 257)

SLOAN et al. v. EQUITABLE LIFE ASSUR. SOCIETY. (No. 475.)

(Supreme Court of North Carolina. May 12, 1915.)

APPEAL AND ERROR ⇨563—STATEMENT ON APPEAL—SUFFICIENCY.

A statement of the case on appeal served on appellee, which consists merely of a skeleton outline of the statement with directions to the clerk to insert parts of the stenographer's notes, the testimony, and the instructions, is not sufficient, under Revisal 1905, § 591, requiring the appellant to serve a plain and concise statement of the case on appeal, and it will be stricken and the judgment affirmed on the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2500; Dec. Dig. ⇨563.]

Appeal from Superior Court, Burke County; Long, Judge.

Action by S. M. Sloan and others against the Equitable Life Assurance Society. Judgment for the defendant, and plaintiffs appeal. Affirmed.

S. J. Ervin and Spainhour & Mull, all of Morganton, for appellants. Avery & Ervin, of Morganton, and W. B. Council, of Hickory, for appellee.

PER CURIAM. The defendant moves the court to strike out the statement of case on appeal and to affirm the judgment upon the face of the record. The motion is allowed. The statement of the case on appeal is in no sense in compliance with the rules of this court or with the provisions of the Revisal, § 591.

The statement served upon the appellee purports to be nothing more than a mere skeleton, and may be illustrated by the following extract:

This was a civil action, tried at the June term, 1914, of Burke superior court before his honor, B. F. Long, judge, and a jury. (The clerk will here copy the first paragraph of the notes of the stenographer as shown by the first page of the said notes and the first six [6] lines of second page of the said notes.)

The defendant offered the following evidence, viz.: (The clerk will here copy the evidence offered by the defendant as shown by the stenographer's notes, including any and all objections and exceptions consecutively, and number the same consecutively from one [1] to four [4] inclusive.)

Here the defendant closed the evidence, and the plaintiffs also closed.

The court instructed the jury as follows, viz.: (The clerk will here copy the judge's charge.)

The statute, as well as the rules of this court, require a plain and concise statement of the case on appeal, and that the evidence shall be stated in narrative form, so far as possible, and the exceptions shall be num-

bered and the assignments of error properly grouped and set up. It is not the duty of the clerk of the court to make up a case on appeal for the appellant, nor to fill up the blank spaces. It is the duty of the appellant to make up his case and fully perfect it before it is served upon the appellee.

Judgment affirmed.

(189 N. C. 119)

SPENCER v. BYNUM et al. (No. 431.)

(Supreme Court of North Carolina. May 12, 1915.)

1. APPEAL AND ERROR ⇨1018—FINDINGS—CONCLUSIVENESS.

Findings by referee justified by evidence competent under the pleadings will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4006, 4007; Dec. Dig. ⇨1018.]

2. APPEAL AND ERROR ⇨1051—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

Error in admitting evidence to prove a fact proved by ample evidence received without objection is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. ⇨1051.]

3. EVIDENCE ⇨417—PAROL EVIDENCE—INCOMPLETE WRITTEN CONTRACT.

Where a contract not required to be in writing is only partly in writing, the remainder may be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. ⇨417.]

4. EVIDENCE ⇨417—PAROL EVIDENCE—INCOMPLETE WRITTEN CONTRACT.

Where a written contract for the dissolution of a firm was devoted exclusively to empowering a partner to take charge of the assets of the firm and apply them to the debts, and to distribute any balance among the partners, a further agreement between the partners as to their rights as between themselves could be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. ⇨417.]

5. PARTNERSHIP ⇨311—DISSOLUTION AGREEMENT—CONSIDERATION.

A firm dissolution agreement, binding partners to forego any claim against a copartner on account of his mismanagement of the firm business, and binding one of the partners to purchase a part of the firm property for no more than its value to enable the firm to pay its debts, is supported by a sufficient consideration.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 718-725; Dec. Dig. ⇨311.]

Appeal from Superior Court, Randolph County; Adams, Judge.

Action by A. A. Spencer against T. M. Bynum and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action to recover certain sums of money which the plaintiff alleges he advanced to a partnership of which the plaintiff and the defendants were members. The action was tried before a referee, and was heard in the superior court upon exceptions to the report.

It appears from the record that the plain-

tiff and the defendant formed a partnership on the 5th day of September, 1908, for the manufacture of lumber; that the plaintiff was in active charge and management of the business of the partnership, and that the defendants did not live where the business was carried on; that the business of the partnership was carelessly handled, in that accounts were not carefully and properly kept, a great deal of timber was injured by permitting logs to remain in the woods too long after being cut, much lumber was damaged by being improperly cared for, and the partnership sustained damage by reason of these facts in the amount of about \$3,000; that the partnership continued under the management of the plaintiff until the 28th of October, 1909, when an agreement was entered into between plaintiff and the defendants for its dissolution.

The referee finds in finding of fact No. 4 that the plaintiff advanced to the partnership the sums of money which he is seeking to recover, and his findings of fact Nos. 8 and 9 are as follows:

"(8) On or about the 28th day of October, 1909, the plaintiff and defendants entered into an agreement to close out the partnership affairs and dissolve the business according to the following terms: The defendant T. M. Bynum purchased and paid for the planer plant at Osgood and the lot and houses there at the price of \$3,000, and the sawmill on the Black Jack tract at \$1,000, the stock of goods on hand at cost, less a discount of 10 per cent., estimated to amount to \$3,000, and the Black Jack tract of timber and another small tract of the Brown timber for \$7,500, agreeing to make the arrangements satisfactory with the Moffitt Iron Works, their principal creditor, which he did, and with the understanding and agreement, made and entered into at the time, that each member of the firm should lose what he had paid into it, embracing the sums set out in foregoing article 4, and when they should get through paying all firm debts divide any remainder, one-half to Spencer, one-fourth to Bynum, and one-fourth to Smith; and also as a part of the agreement at that time it was arranged that the said T. M. Bynum was to have full management and charge of the assets of the company to wind up the affairs of said copartnership. And the said T. M. Bynum did, as a matter of fact, take charge of the property of the firm according to said agreement, has paid its outstanding debts, and has paid certain sums of money to the parties hereto in proportion to their several interests.

"(9) That prior to entering into the aforesaid arrangements on October 28, 1909, the said A. A. Spencer, at the request of the defendants, had made two statements of the liabilities of the company. According to the first of these, the liabilities of the company amounted to the sum of \$18,648.42, which the plaintiff, A. A. Spencer, represented to be a full statement of the liabilities of the partnership so far as he could remember. According to the second of said statements, which was made on the 28th day of October, 1909, the liabilities of the company were placed by him at the amount of \$22,791.53, which the plaintiff again represented to be full and complete so far as he could remember; and in making said statements the plaintiff used the books of the company kept by him and under his direction. In neither of these statements, nor at any time on or before the 28th day of October, 1909, did the said Spencer make any personal claim against the partnership, and at

the time of said statements the said Spencer did not intimate, and the said defendants did not know, that any moneys whatever were due the plaintiff by the firm, and the said defendants entered into the agreement on October 28, 1909, for settlement and dissolution of the partnership affairs in the bona fide belief that the said firm was not in any amount indebted to the plaintiff. That said statements of indebtedness made by the plaintiff were not full and complete in other respects; there being a number of items of considerable amount which were not embraced therein."

At the time the agreement of dissolution was entered into the parties thereto entered into a written agreement giving to the defendant Bynum the exclusive right to take charge of the business and close it up, and then to make settlement with the copartners according to their respective interests. It was also agreed orally that the defendant Bynum would purchase certain property belonging to the partnership at agreed valuations aggregating \$14,500, in order that the purchase money might be used in settling the debts of the partnership, and that each member of the firm should lose what he had paid into the partnership. Some of the evidence admitted for the purpose of proving this oral agreement was objected to by the plaintiff upon the ground that the allegations of the answer were insufficient, and, further, because it tended to vary the written agreement.

The assignments of error are as follows:

(1) That the referee and his honor erred in permitting evidence to be introduced as set out in exception No. 1 as follows:

"Q. What agreement about the \$2,000 be paid to Moffitt? A. Mr. Spencer said he would lose right smart by doing that, but said he would do it. I told him he had gotten more than \$2,000."

(2) That his honor and the referee erred in permitting evidence to be introduced as set out in exception No. 2 as follows:

"Q. What was the agreement in regard to that? A. The agreement was we would put every man would lose what he had put in except what was left."

(3) That his honor and the referee erred in permitting evidence to be introduced as follows:

"Q. He would lose his \$2,000 he had paid also? A. Just make a clean sweep of it."

(4) That his honor and the referee erred in permitting evidence to be introduced, as set out in exception No. 4, in regard to what was the agreement of dissolution.

(5) That his honor and the referee erred in permitting evidence to be introduced as set out in exception No. 5.

(6) That his honor erred in overruling plaintiff's exceptions, as set out in the record, and for rendering judgment for only the sum of \$51.50, as set out in exception 6.

There was a judgment in favor of the defendants and the plaintiff appealed.

T. J. Jerome, of Greensboro, and John T. Brittain and J. A. Spence, both of Ashboro, for appellant. Hammer & Kelly, of Ashboro, for appellees.

ALLEN, J. (after stating the facts as above). [1] The eighth and ninth findings of fact are determinative of the controversy between the plaintiff and the defendants, and we have no power to disturb them if the allegations of the answer are sufficient to justify the admission of evidence upon which they are based, and if the evidence introduced is competent. An inspection of the answer shows that it alleges the agreement entered into at the time of the dissolution of the partnership in almost the same words that are used by the referee in his finding of fact, and we must therefore hold that the answer is sufficient.

[2, 3] We might dispose of the exceptions to evidence set out in the assignments of error upon the ground that the evidence objected to is immaterial and its admission harmless, because it appears from the record that the defendants offered ample evidence of the agreement that was not objected to, and this evidence embraced in the assignments is only as to two or three circumstances which could not reasonably have affected the result, but, in our opinion, all of the evidence tending to prove the oral agreement was competent, and comes within the principle stated in *Nissen v. Mining Co.*, 104 N. C. 310, 10 S. E. 512, and approved in *Anderson v. Corporation*, 155 N. C. 134, 71 S. E. 222, 36 L. R. A. (N. S.) 896, that:

"When a contract is not required to be in writing, it may be partly written and partly oral, and in such cases, when the written contract is put in evidence, it is admissible to prove the oral part thereof."

[4] The written contract introduced in evidence does not purport to contain the entire agreement, and is devoted exclusively to clothing the defendant Bynum with the power and the authority to take charge of the assets of the partnership and apply them to the payment of debts, and to distribute any balance among the partners, leaving in parol the agreement among the partners that they would lose any amount due by the partnership to either one of them, and by proving the parol agreement the written contract is not changed or varied, and may be enforced as it is written.

This disposes of the first, second, third, fourth, and fifth assignments of error, and the sixth assignment is formal, being entered for the purpose of preserving the other exceptions.

[5] It was also urged upon the argument that the agreement embodied in the eighth finding of fact could not be enforced, because there was no consideration to support it, and, conceding that this question may be presented by the exception to the judgment, we think the position cannot be maintained.

In *Institute v. Mebane*, 165 N. C. 650, 81 S. E. 1022, the court approved a quotation from 9 Cyc. 312, that:

"There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has the right to do, whether there is any actual loss or detriment to him, or actual benefit to the promisor or not."

And upon this principle the mutual promises for a dissolution of the partnership, the agreement of the defendants to forego any claim against the plaintiff on account of his mismanagement of the business of the partnership, and the agreement upon the part of the defendant Bynum to purchase a large part of the property of the partnership for the purpose of enabling the partnership to pay its debts, although he paid no more than its value, furnish a consideration sufficient to support the agreement.

The action has been tried by a careful and accurate lawyer acting as referee, and his findings and rulings have been reviewed and approved by an impartial and learned judge, and upon an inspection of the whole record we find no reason for disturbing the conclusion they have reached.

Affirmed.

(169 N. C. 108)

HORTON v. SEABOARD AIR LINE RY. (No. 257.)

(Supreme Court of North Carolina. May 12, 1915.)

1. MASTER AND SERVANT ⇨219—ASSUMPTION OF RISK.

An employé will not be treated as having assumed the risk of injury from failure of the employer to exercise due care in providing a safe place to work and suitable and safe appliances, unless the defect and risk alike were so obvious that an ordinarily prudent person, under the circumstances, would have observed and have appreciated them.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. ⇨219.]

2. MASTER AND SERVANT ⇨221—ASSUMPTION OF RISK—PROMISE OF MASTER TO REPAIR DEFECT.

Where there is a defect in the place of labor or in the tools of the employment, known to the employé, he assumes the risk of injury therefrom by continuing in the employment without objection; but if the employer promises to repair such defect upon protest, even during the time required for the reparation the employé relying on the promise does not assume the risk of injury, unless the danger is so imminent that no reasonably prudent man would rely on the promise.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. ⇨221.]

3. MASTER AND SERVANT ⇨280—ASSUMPTION OF RISK—SUFFICIENCY OF EVIDENCE.

In an action by an engineer against his employer railroad for injuries caused him by the explosion of a water glass, evidence held sufficient on the point of assumption of risk to justify verdict for plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 981-986; Dec. Dig. ⇨280.]

4. APPEAL AND ERROR \S 981—NEW TRIAL \S 104 — NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

The granting of new trial for newly discovered evidence is within the discretion of the court, and not reviewable, although the judge stated his reason, that the new testimony was merely cumulative.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3876; Dec. Dig. \S 981; New Trial, Cent. Dig. \S 218-220, 228; Dec. Dig. \S 104.]

Brown, J., dissenting.

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by James T. Horton against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. No error.

Murray Allen, of Raleigh, for appellant. Douglass & Douglass, R. N. Simms, and W. B. Snow, all of Raleigh, for appellee.

CLARK, C. J. This is an action for personal injuries suffered by the plaintiff, while an engineer in defendant's employment, by the explosion of a water glass on the defendant's locomotive, impairing the sight of the plaintiff's right eye. The case was first here 157 N. C. 146, 72 S. E. 958, when a new trial was awarded. It was here again 162 N. C. 424, 78 S. E. 494, and upon writ of error it was then heard in the United States Supreme Court, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, and, the writ being sustained, the case was remanded to the lower court, where, as we think upon a review of the record, it has been tried strictly in conformity with that opinion of the United States Supreme Court.

The argument of the defendant seeks to put the plaintiff in this predicament: That, if the likelihood of injury from an explosion of the glass was not apparent, then the defendant was not guilty of negligence. But, on the other hand, if such defect was apparent, then the plaintiff assumed the risk and is equally barred from recovering damages. But that was not the ruling of the United States Supreme Court, as we understand it. That court held:

"When the employé knows of a defect in the appliances used by him and appreciates the resulting danger and continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk even though it may arise from the employer's breach of duty. But, where there is promise of reparation by the employer, the continuing on duty by the employé does not amount to assumption of risk, unless the danger be so imminent that no ordinarily prudent man would rely on such promise."

The plaintiff testified that he notified the proper official that the guard glass was gone and asked for one, and the reply was that the road did not have any in stock, but had them in Portsmouth, and the company would send there and get one, and said that the plaintiff would "have to run the engine like she was."

[1] There was evidence from which the jury could find that, while the absence of the

guard glass was a defect causing danger to the plaintiff, and which amounted to negligence on the part of the defendant, yet it was not such an imminent danger as would justify excusing the defendant, if the plaintiff remained on service after reporting the defect and receiving assurance that it would be repaired. The court properly told the jury that:

"Risks not naturally incident to the occupation may arise out of the failure of the employer, the defendant in this case, to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These latter risks the employé is not treated as assuming until he becomes aware of the defect or disrepair or of the risk arising from it unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

[2] The court further charged:

"When an employé does know of the defect and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from his employer or representative the assurance that the defect will be remedied, the employé assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, even during such time as may be reasonably required for its performance or until the particular time specified in such performance, the employé relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man would rely upon such promise."

[3] The defendant excepted to the above instructions, but we think it is strictly in accordance with the decision of the United States Supreme Court in this case, and that upon the evidence the jury were authorized to find, as they did in response to the second issue, that the plaintiff did not assume the risk of injury.

There are numerous other exceptions, but this case has been so fully considered in every aspect of the law, and the facts have been so fully set forth on the two former appeals in this court and also upon consideration of the writ of error in the United States Supreme Court, that it would be work of supererogation to go over the same ground a fourth time. The very careful and learned judge who tried this case below seems to have fully comprehended, and to have closely and carefully followed, the decision of the United States Supreme Court upon the points on which that court gave a new trial, and we find no error in his rulings.

[4] The only other exception that we need refer to is the refusal by the court below of the motion for a new trial for newly discovered testimony. Such refusal was discretionary with the court, and is not reviewable here. It is true the judge stated that the newly discovered testimony, if true, was merely cumulative. But that does not justify us in reversing his judgment denying the motion for a new trial.

The defendant's cause has been very fully

and ably presented, but we find nothing that would justify us in setting aside the verdict and judgment. The court and jury had the benefit of all the light that could be shed upon this controversy, from every angle, by this court and the United States Supreme Court, and seem to have faithfully followed the views of the court of highest resort where it differed from the views of this court, and in other respects to have followed the well-settled decisions of this tribunal.

No error.

WALKER, J. (concurring). The facts, as now presented, are not materially different from those before us on the former appeal. There was then a motion to nonsuit, which was passed by the Supreme Court of the United States without comment. It was hardly necessary to order a new trial for error in the charge, if, upon the whole case, the plaintiff was not entitled to recover by reason of the assumption of risk. It is therefore to be fairly, if not necessarily, inferred, from the refusal to nonsuit, that there was at least some phase of the evidence that carried the case to the jury. The motion to nonsuit was entitled to first consideration, as, if decided favorably to the defendant (plaintiff in error), it fully and finally disposed of the case, and the other questions raised by the assignments of error would therefore have become immaterial. But, if this were not so, the motion should not now be allowed. It is true that the water gauge was "liable to explode," but an explosion was not so imminent as to require that Horton should quit the service of defendant, when he had been promised that the glass gauge would be repaired. A prudent man would probably take such a risk, and it was for the jury to say whether he would. He did not continue his work for any unreasonable length of time, but only for a very short time, and the question of assumption of risk or contributory negligence was eminently a proper one for the jury. Nor can it be said that plaintiff's failure to use the three gauge cocks on the head of the boiler was negligence, as matter of law. He testified that they could be used, and sometimes were used, for the purpose of gauging the quantity of water in the boiler or to ascertain its level, but that they are not altogether reliable or accurate, for he said that they would gauge somewhere near the quantity of water, but will not give the perfect level. He stated that an engine can be run without a water glass and with gauge cocks, if the latter will stay open, but that they are liable to become clogged and are easily stopped up by mud or sediment from the water. To give his language:

"Yes, you can operate an engine without a water gauge, and with the gauge cocks, but not as well. You cannot keep these cocks open. They are liable to stop up, but a water glass has got so much bigger opening here than the gauge cock. They are the safest thing at all,

as they do not stop up like gauge cocks, like all of the gauge cocks I have seen."

He further stated that the mud could not be blown out, if the gauge cocks are packed with it. He said much more in regard to this feature of the case, but the above references to his testimony are sufficient to demonstrate that the case was one for the jury on the question of assumption of risk or contributory negligence.

A motion to nonsuit, or a request for a peremptory instruction to find for the defendant, requires that the evidence should receive the most favorable construction for the plaintiff, and, under our rule, the evidence only that sustains his cause of action should be considered, because the jury might adopt it and reject all the unfavorable testimony.

"It is well settled that on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony." *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616, citing *Purnell v. Railroad Co.*, 122 N. C. 832, 29 S. E. 953; *Hopkins v. Railroad Co.*, 131 N. C. 463, 42 S. E. 902.

More recent cases, affirming the principle, are *Freeman v. Brown*, 151 N. C. 111, 65 S. E. 743; *Morton v. Lumber Co.*, 152 N. C. 54, 67 S. E. 67; *Johnson v. Railroad Co.*, 163 N. C. 431, 79 S. E. 690; *Lloyd v. Railroad Co.*, 166 N. C. 24, 81 S. E. 1003; *Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074. The rule of the federal courts, as to the right of the judge to suggest what the verdict should be, does not apply to a case tried in the state court, even where the cause of action is given by a federal statute like the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]). The power to advise the jury as to their verdict is not equivalent to the right to direct a verdict or to nonsuit, or to dismiss the action. Congress, having conferred concurrent jurisdiction on the state courts in such cases, did not undertake, if it had the power to do so, to regulate the procedure and practice in those courts. The plaintiff might elect to sue in the state court, and, if he did so elect, it was, of course, intended that the suit should be tried according to the local practice and procedure. *Fleming v. Railroad Co.*, 160 N. C. 196, 76 S. E. 212. It would be anomalous to try a case in the state court according to a procedure foreign to its jurisdiction. We take it therefore that, on motion to nonsuit, the evidence, with reference to its probative force and its construction, must be considered with due regard to our practice, as it relates to the remedy. *Florida v. Anderson*, 91 U. S. 667, 23 L. Ed. 290. And this is clearly so where there is no rule on the same subject prescribed by act of Congress creating the right, or where the state rule does not conflict with any such law. *Re Fisk*, 113

U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117. The same is the rule as to evidence (*Ryan v. Bindley*, 1 Wall. 66, 17 L. Ed. 559), as to a discontinuance (*Coffee v. Planters' Bank*, 13 How. 183, 14 L. Ed. 105), as to what is a material variance (*L. & L. & G. Insurance Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575), and, of course, as to the construction of pleadings upon the question of their sufficiency (*Chouteau v. Gibson*, 111 U. S. 200, 4 Sup. Ct. 340, 28 L. Ed. 400). Many other examples might be stated, which would illustrate to what a great extent the highest federal court has gone in conforming the practice, pleadings, forms, and modes of proceedings, as near as may be, to those of the state courts, both under the federal statutes and under the general rule applicable to such questions. If therefore we follow this rule of procedure, the court cannot, under our decisions, consider the testimony of David Campbell, the defendant's witness, or any other part of the testimony offered in its behalf, when passing upon the motion for a nonsuit, except in so far as such testimony favors, or tends to establish, the plaintiff's right to recover, and this rule applies also to defendant's request for a special instruction to the effect that, if the jury believed the evidence, they should answer the issue as to assumption of risk in the affirmative.

But, even if the practice and procedure of the federal courts is applicable, there is ample evidence, as the record shows, to require the submission of the case to the jury, as it will appear by reading the testimony that the choice between a safe method of running his engine and a dangerous one was not left to the plaintiff. Both methods were dangerous. The glass water gauge was safer, in one respect, than the gauge cocks, because it recorded the height of the water in the boiler more accurately and was more likely to prevent an explosion of the boiler, while it presented an element of danger itself because of the absence of the guard glass, and the gauge cocks were dangerous because they did not gauge the quantity of water in the boiler with accuracy, and, having a small tube and being of a different construction, they were liable to be stopped up by mud and sediment in the water. The jury only could decide what a man of ordinary prudence would have done in the circumstances. Whether plaintiff reported the defect in the water gauge and was told that it would be repaired was certainly a question for the jury to decide, in the conflict of testimony. Some extracts from the testimony will, I think, fully sustain these views:

The plaintiff, Jas. T. Horton, testified:

"I told Powie Matthews that the guard glass was gone, and asked him if he had any of them. He was the day roundhouse foreman, and he said, no, they did not have any here. I told him the guard glass to the water glass was gone, and he said they did not have any and did not keep them in stock, and they were in Portsmouth, but he would send to Portsmouth and

get one. He said, 'You will have to run her like she is.'"

Powatan Matthews testified:

"I was asked the question as to whether Mr. Horton reported the absence of that glass, and said, 'I do not remember,' and I do not. That is as far as I go and is as far as I know. I do not remember. I do not deny it."

Edgar W. Barbee testified:

"As to the duty of an engineer in respect to obtaining a guard glass or flag or torpedoes, fuses or anything of that nature, or oil cans, from the storeroom, I would tell the foreman I did not have it. It was customary to send the fireman for it. The requisition would come from the foreman. The foreman would send the article to me. I would put it in myself. You would drop it in just like you put a quarter in a slot machine. * * * Yes, they do pay attention to verbal requests. Yes, you can that way, send your fireman and get a guard glass if they have them in stock."

J. A. Massey testified:

"I had charge of the storeroom. * * * I know who applied for them (guard glasses); the engineers did. They would apply to the master mechanic, general foreman, or the foreman. The glass in the Buckner glass was a supply. I did not have any Buckner water guard glasses in stock down there on August 4, 1910. I did not have any between July 27th and August the 4th. * * * If the engineer wanted a lamp, or flag, or a torch, or torpedoes, or a piece of glass to drop into one of these guards, he would report it to the master mechanic or the general foreman, or the foreman, and ask him for a requisition for whatever article he wanted and bring that requisition to the storeroom, and he would get that directly, and not through the written report of the engineer for repairs."

This evidence shows that defendant had notice that the guard glass was missing, that plaintiff had exercised care and diligence in restoring it, and that he had complied with the rules of the company. The plaintiff testified:

"I did not say with pressure on that tube in the glass case that the water glass is liable to explode at any time. No, that is not so. I have run those a year without their exploding. * * * No, I did not know if it did explode without the guard glass that it would be liable to hurt the engineer, as I have seen lots of them explode without hurting the engineer. * * * Yes, you can operate an engine without a water gauge, with water cocks, but not as well, as you cannot keep these cocks open. They are liable to stop up. But a water glass has got so much bigger opening here than the gauge cock. They are the safest things at all, as they do not stop up like the gauge cocks, like all of the gauge cocks I have seen. * * * I did not attempt to cut it off. I needed it. I did not attempt to run my engine without it."

Ernest Horton, on this point, testified:

"It may last a day, a week, a month, or a year, and it may last an hour, or shorter. * * * Q. Would it be the proper thing, in the event there was no guard glass on the water gauge, to shut off the water glass and run the engine with a gauge cock? A. The proper way, in my opinion, would be to run with the water glass turned on. * * * Q. What is the proper and safe thing to do? A. The proper way, in my opinion, would be to run with the water glass turned on. * * * I have not had one (gauge glass) to explode with me in the last year to my knowledge. * * * In case it does not leak, I do not shut it off."

Edgar W. Barbee, witness for defendant, testified:

"Yes, it is true that engineers on the Seaboard run their engines out with the water glass, without cutting it off, with the guard glass missing, prior to the time Mr. Horton was injured."

From this, and much testimony of the same character, it is apparent that not only one, but many, trips might be safely made with a water gauge unprotected by a guard glass or shield. A pregnant circumstance, which was in evidence and for the jury's consideration, was the fact that the fireman, W. S. Benton, a witness introduced by the defendant, testified that he knew that the guard glass was broken, that in fact he was the man who broke it, as he started out on the first trip with the plaintiff, and that he did not call it to his attention, and that he sat directly in front of the water gauge during the entire trip to Aberdeen and the return trip from Aberdeen to Raleigh; that he made the second trip, also, and likewise faced the same unprotected water gauge, and did it again upon the return trip; that he made the third trip from Raleigh to Aberdeen, and again faced the unprotected water glass; that this explosion and injury to the plaintiff occurred on the return from the third trip to Aberdeen; and that he did all of this without thinking of being hurt.

These quotations from the testimony are made at random. A careful examination of it will disclose that there was a conflict of testimony upon the material issues which, of course, takes the case to the jury.

BROWN, J. (dissenting). I am unable to agree with the conclusion reached by the court in this case. The decision of the United States Supreme Court leaves it open to us to say whether the plaintiff, as a matter of law, assumed the risk of injury from the defective water glass. That question was not passed upon, and if it had been, upon the facts as then presented, that would not prevent a consideration of the question upon this appeal when the facts showing assumption of risk are much stronger.

The United States Supreme Court reversed our judgment and remanded the cause for further proceedings not inconsistent with their opinion. Mr. Justice Pitney states the law of this case as follows:

"When the employé does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time, specified for its performance, the employé, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

Seaboard Air Line Railway v. Horton, 233 U. S. 492, 84 Sup. Ct. 635, 58 L. Ed. 1062.

Applying this rule to the undisputed evidence, I am of opinion that the plaintiff assumed the risk of injury and is not entitled to recover.

Plaintiff was operating an engine equipped with a Buckner water glass, which is so constructed that a thick guard glass is placed over the front of the water glass to protect the engineer from injury in the event the inner glass should explode. The engine was also equipped with another method of determining the amount of water in the boiler; that is, by means of gauge cocks placed on the head of the boiler. Plaintiff made the first trip from Raleigh to Aberdeen on July 27th, returning in the evening of July 28th, and he was returning from the third trip to Aberdeen when he sustained the injury to his eye by the explosion of the water glass, on August 4th. It required two days to make the round trip.

On the morning plaintiff was called to take this engine for the first trip to Aberdeen, he noticed before leaving Raleigh that there was no shield or guard on the water glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and, in accordance with the defendant's requirements, he placed the report on file in the roundhouse, or put it in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs. Plaintiff, and a number of defendant's witnesses, said that these work reports were required to be in writing; that they were filed and distributed among the workmen for the purpose of making the required repairs. It appears in evidence that plaintiff made a written report on this engine at the return of each round trip, and noted every defect in his engine except the absence of the guard glass. On August 4th, while engaged in shifting cars at Apex, N. C., the water glass exploded and injured his eye. Immediately after the explosion plaintiff cut off the gauge glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler.

The guard glass referred to as part of the Buckner equipment is a thick piece of glass one or two inches wide, and eight or nine inches long, with a thickness of about one-half of an inch. Plaintiff testified that the piece of glass in front of the tube is to prevent the flying glass from hitting the engineer in case the inner tube should burst; that the insertion of this glass will prevent flying glass from striking the engineer or other persons in the cab if the tube explodes.

In answer to questions on cross-examination, plaintiff testified:

"Yes, it is dangerous to run it (the engine) without a guard glass. You see the tube might explode. The guard glass is put there to prevent the explosion of the inner tube injuring the engineer. The purpose of the guard glass is to make it safe for the engineer to operate his engine with the Buckner water gauge."

Plaintiff further testified that at the time of the accident the steam pressure in the unprotected glass tube in the Buckner gauge was 200 pounds, and that it was liable to explode at any time. He said:

"I knew that with that guard glass out that the tube was liable to explode with the 200 pounds pressure on it. I knew that it was liable to explode, but I could not tell when."

At the time of his injury, plaintiff was sitting on the left-hand side of the cab, facing the glass, which was within a few feet of his face. He said:

"I was going to cross over on the fireman's side to see the conductor, whether he was ready to couple up, and that put me directly facing the glass, with my eye directly opposite that slit."

And while in this position the explosion occurred. Plaintiff gave an estimate of the dimensions of the inner tube as follows:

"Twelve or fourteen inches long and about three-eighths of an inch thick, and one-half inch in diameter."

Plaintiff described the method of gauging the water in the boiler by the three gauge cocks, and said that Benton, his fireman, brought the engine in from Apex to Raleigh using the gauge cocks to tell how much water he had in the boiler. This was immediately after the accident. He said that he did not cut out the water gauge and use the gauge cocks on any of the three trips he made with this engine; that he did not attempt to run the engine without the water gauge glass. On a former occasion a water glass exploded and injured plaintiff's eye, while he was employed on one of defendant's engines.

Ernest Horton, plaintiff's witness, testified:

"The water glass and gauge cocks are right upon the head of the boiler, right at hand, and he has to use them in running his engine, not constantly though. They are there all the time for his use. By turning those three gauge cocks you can gauge somewhere near about the water in the boiler, but you cannot tell the perfect level. The guard glass on the Buckner water gauge is to prevent the glass from spattering in your face when the inner tube bursts that comes out with the water and steam. This glass is put in there to prevent the glass from spattering out in case that glass bursts."

Dave Campbell, an engineer of 10 years' experience, testified that an engineer can operate an engine in safety by the use of the gauge cocks; that, if his water glass guard is missing, it would be his duty to cut out the glass and use the gauge cocks. He said:

"It is very dangerous to use the Buckner water gauge without the guard glass, because it has a tendency to throw the glass in a certain direction if it explodes. That glass tube on the Buckner water gauge is liable to ex-

plode. I have shut off the water gauge and run on the gauge cocks many a time."

Lewis Archer testified for the defendant that he has been in the railroad business since 1882; that he is familiar with the construction and operation of the Buckner water glass.

"It is a safe water glass with the guard glass in place. With the guard glass out of place, it is one of the most dangerous things you could have on an engine, on account of that slot; when the glass breaks, it throws the glass out of that one place. You can operate an engine without a water gauge with safety, by using the gauge cocks. I consider that the safest plan of operation."

In my opinion the only conclusion to be drawn from this evidence is that no man of ordinary prudence would have continued to work in the face of so great and so imminent a danger. The defendant moved for judgment of nonsuit at the conclusion of the evidence, and requested the court to instruct the jury that if they believed the evidence they would answer the issue of assumption of risk, "Yes." This has the effect of a request to withdraw the case from the jury.

It is said to be well settled by the Supreme Court of the United States that it is the duty of the trial court to withdraw a case from the jury where the evidence is undisputed, or is so conclusive that the court, in the exercise of its discretion, must set aside a verdict returned in opposition to it. *Randall v. Railroad*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Railroad v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213. This rule has been applied by the court in an action involving the defense of assumption of risk, where it appeared from plaintiff's evidence that he assumed the risk. *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281.

In the case of *District of Columbia v. McElligott*, 117 U. S. 622, 6 Sup. Ct. 884, 29 L. Ed. 946, the United States Supreme Court has applied the doctrine which, in my judgment, sustains the defendant's right to an instruction that plaintiff assumed the risk of injury. In that case the plaintiff, who was in the employ of the district, was injured while at work on a bank of gravel. The evidence tended to show that he discovered that there was danger of the bank caving in, and went to the supervisor for more men to do the work, and for one man to watch the bank, and that he received the information that such assistance would be sent. Before the assistance arrived, the bank caved in, causing his injury. The court said:

"Assuming that the District might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so * * * manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril

arose would be removed. * * * If he failed to exercise such care, if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the District supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received." *Roccia v. Coal Co.*, 121 Fed. 451, 57 C. C. A. 567; *Attleton v. Mfg. Co.*, 5 Ga. App. 779, 63 S. E. 918; *Railroad v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578.

In *Alteriac v. Coal Co.*, 161 Ala. 435, 49 South. 867, it is held that:

"Where a miner of many years' experience saw a pot or bell-shaped rock in the roof of a mine, and knew that it was more or less disconnected and liable to fall without warning at any moment, and after telling his superior of it, and that he would not work without timbers, but who returned to the work under the pot or bell-shaped rock on being told to do so, and on the promise that the timber would be sent at once, assumed the risk incident to his return and work thereunder."

In *Erdman v. Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66, the Wisconsin Supreme Court holds that an experienced servant cannot recover if he continues, even for an hour or two, to encounter the obvious and immediate danger of using a cracked saw to cut steel plates.

In the case of *McAndrews v. Railroad*, 15 Mont. 290, 39 Pac. 85, in which the plaintiff continued to use a defective hand car which was likely to jump the track at any moment, the Supreme Court of Montana says:

"If the machinery is not only defective, but so obviously dangerous that no ordinarily prudent man would assume the risk of using it, and the employé does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable, notwithstanding the promise to remedy the defect."

These cases illustrate the rule that after promise to repair the workman assumes the risk if the danger is such that a prudent man would not continue to work in the face of it. That the danger in this case is of that character appears to me to require no argument.

I am of opinion, also, that defendant's request for instruction that plaintiff was guilty of contributory negligence should have been given. This is a question of law when the facts are undisputed. *Strickland v. Railroad*, 150 N. C. 4, 63 S. E. 161; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. Plaintiff used the defective water glass when he had at hand a safe way to operate his engine; that is, with the gauge cocks. This was contributory negligence. *Covington v. Furniture Co.*, 133 N. C. 374, 50 S. E. 761; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17.

There are other exceptions in the record, which are discussed in defendant's brief, raising important questions, but which I will not discuss. What I have written presents my views upon the main questions.

(169 N. C. 133)

COXE et al. v. CARSON et al. (No. 483.)
(Supreme Court of North Carolina. May 12, 1915.)

1. TRUSTS — 336—ENFORCEMENT—EVIDENCE.

The trust created by a deed conveying mining properties, subject to a trust to develop and improve the properties and receive the profits thereof and reconvey to the grantor on receiving from the profits the amount paid out, is not enforceable by the grantor, in the absence of evidence that the profits are sufficient to repay the amount paid by the grantee.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 497; Dec. Dig. —336.]

2. TRUSTS — 365—ENFORCEMENT—LACHES.

A grantee in a deed conveying mining properties, subject to a trust to develop and improve the same and receive the profits, and to reconvey to the grantor on receiving sufficient profits to repay him for the money expended, conveyed, two years later, an undivided interest in fee without any declaration of trust, and 13 years later he and his grantee conveyed the entire land on trusts, one of which provided for an absolute sale to a company, and the deed was registered immediately after its execution, and the company took possession of the property thereunder and conducted mining operations. Before the second conveyance a reasonable time had elapsed to test the mines to determine whether they would yield the contemplated profits. *Held*, that delay of nearly 80 years before seeking to enforce the original trust was laches barring relief, though some of the beneficiaries were married women, since by Act 1899, c. 78, marriage ceased to be a disability under the statute of limitations.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 568-573; Dec. Dig. —365.]

3. TRUSTS — 365—ENFORCEMENT—LACHES.

To prevent operation of laches in a court of equity to defeat enforcement of a trust, the trust must be clearly established, and there must be some fraudulent concealment by the party affected by it of the facts and an explanation of the delay and a showing of proper diligence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 568-573; Dec. Dig. —365.]

4. MORTGAGES — 143—ADVERSE POSSESSION BY MORTGAGEE.

Recovery of mortgaged land by the mortgagor is barred by the 10-year statute of limitations, where the mortgagee and his grantees remained in possession all the time for 30 years.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 281-284; Dec. Dig. —143.]

5. MORTGAGES — 6—CONVEYANCES — MORTGAGE DISTINGUISHED FROM DEED WITH DEFEASANCE.

A conveyance of mining land for a valuable consideration, on the trust to develop the mine and receive the profits, and when repaid the amount of the consideration and expenses out of the profits, to reconvey to the grantor, is not in the nature of a mortgage, where there was no debt owing by the vendor to the vendee, but rather in the nature of a defeasible purchase.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 5; Dec. Dig. —6.]

Appeal from Superior Court, Burke County; Long, Judge.

Action by T. C. Coxé and others against Margaret Carson and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This action was brought to quiet title to land under the statute, and to remove a cloud from the same. Plaintiffs, as heirs and devisees of Frank Coxe, allege title to the land known as the "Brindletown Gold Mines," the interest in one-half of which was acquired by an absolute deed from Joseph C. Mills, Mrs. Margaret Carson, and Mrs. Rachel L. Williams to the said Frank Coxe, dated December 22, 1880, the said parties being at that time tenants in common of said land. The defendants, Mrs. Carson and the heirs of Mrs. Williams, allege in their answer, and offered proof to show, that the deed to Frank Coxe was taken by him subject to a trust—

"to develop and improve the land and to receive the issues, rents, and profits thereof, and when he had received from said land the amount of money which he had paid out, with interest accruing thereon, the property was to be conveyed to the makers of said deed. And the said Frank Coxe, prior to the execution of said deed, agreed that he would take the same and would take charge of said property, develop the same in the best and most practicable way, collect the issues, rents, and profits therefrom, and realize from said property all that the same was capable of producing, and that when the sums of money paid out by him should have been returned to him, he would reconvey the property so conveyed to him by said deed to the said Rachel L. Williams and Margaret C. Carson, and that the said Frank Coxe, during his lifetime, held said property upon said trust and upon the agreement and understanding that his executors would reconvey the same to the said Margaret C. Carson and Rachel L. Williams, in accordance with their interest, as hereinbefore set forth."

On March 23, 1882, Frank Coxe conveyed to Joseph C. Mills an undivided five-twelfths interest in said land, and on February 21, 1895, Frank Coxe and Joseph C. Mills conveyed the land to George Phifer Erwin in trust to secure the performance of certain covenants entered into by the Piedmont Mineral Company, Limited, which company had agreed to purchase the land for the purpose of mining the same for gold and other minerals. J. C. Mills and the Mineral Company took possession of the land, claiming it as their own, the said Mills so far as he had an interest in the same, and the possession was afterwards held adversely by Mills, as to his interest. The Mineral Company worked the mines, but failed to perform its covenants, and finally abandoned their rights under the contract. A few acres of the land were conveyed to May Mills in severalty, and she immediately took possession of the same and has kept possession thereof ever since. The deed of Coxe and Mills to the Mineral Company was registered in Burke county on February 21, 1895, and the other deeds were duly registered soon after they were executed. The plaintiffs denied that any such trust as set up by the defendants had ever attached to their title, and averred that they were the absolute and unconditional owners in fee of the said land. "It was admitted that the said Frank Coxe and J. C. Mills and

other persons claiming under them had been in possession of the said lands described in paragraph 3 of the complaint (which are the lands in question), occupying, using, and receiving the rents and profits therefrom from the 22d day of December, 1880, up to the time of the trial. There was also evidence offered tending to show that the property described in paragraph 3 of the complaint was usually known and referred to in 1880 and since that time as the Brindletown Gold Mining property." The plaintiffs also pleaded the bar of the statute of limitations in every form, also the presumption that all equitable right or interest of the defendants in the land, if any ever existed, had been waived and abandoned, and that said alleged equity had been lost by their laches. The court submitted issues to the jury and directed them to answer the second issue, as to the trust, "No," if they believed the evidence, and find the facts to be as testified to by the witnesses, which the jury did, and from the judgment entered upon the verdict, the defendants appealed.

Martin, Rollins & Wright, of Asheville, and Mangum & Wolitz, of Gastonia, for appellants. Bourne, Parker & Morrison, of Asheville, and Avery & Ervin, of Morganton, for appellees.

WALKER, J. (after stating the facts as above). It is so clear to us, at least, that the defendant's cause of action is barred upon any one of the three grounds we will state that it becomes unnecessary to consider the case upon the instruction given to the jury as to the second issue.

[1] If there was an express trust, the defendants cannot recover on their counterclaim, because, in the first place, it was not to attach to the legal estate in Frank Coxe, unless the mines yielded enough clear profit—

"in any reasonable term of years to pay me [Coxe] back the money I have paid you [Mrs. Carson and Mrs. Williams] and Joe and whatever else I spend on it, with legal interest."

The amount paid by Frank Coxe to the three, Mrs. Carson, Mrs. Williams, and Joseph C. Mills, was \$6,000 on December, 1880. There is no legal evidence that the mines yielded such a profit within a reasonable number of years after the said date, but what evidence there is on that question, unsatisfactory, indefinite, and uncertain as it is in any view, tends to show that no such profit was realized. No court would allow a verdict, finding that there was a sufficient profit, to stand upon any such testimony. It would be bare conjecture and speculation. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851; *Foy v. Lumber Co.*, 152 N. C. 598, 68 S. E. 6. The profits from these mines, up to this date, so far as the case shows, would not be sufficient to pay the principal and accrued interest, which would be \$21,000 or more, even if, we can assume that all the

gold referred to in the testimony was taken from these lands, and this does not take into account the cost and expense of machinery and operation, or other incidental expenditures.

[2] But, upon another ground, the defendants must fail, even if the trust originally was an express one. The evidence shows that in March, 1882, Frank Coxe sold a five-twelfths undivided interest in the land to Joseph C. Mills, and conveyed to him a fee simple absolute, or without any declaration of trust, and Joseph C. Mills took possession of the land under his deed, and in 1895 he and Frank Coxe united in a deed to George Phifer Erwin, by which they conveyed to him the entire land upon the trusts specified, one of which provided for an absolute sale of the lands to the Piedmont Mineral Company. This deed was registered in February, 1895, just after it was executed, and the Mineral Company took possession of the property thereunder and conducted mining operations thereon. These were clearly repudiations of the trust, if any such existed, and the statute of limitations commenced to run from the time that the alleged trustee had placed himself in this hostile attitude towards the beneficiaries of the trust. A reasonable time had then elapsed, that is, in 1895, to thoroughly test the mines for the purpose of determining whether they would yield the contemplated profits. The evidence shows that so much time was not required for that purpose. By act of 1899, chapter 78, marriage ceased to be a disability under the statute of limitations, and married women are no longer exempted from its operation by reason of their coverture. As in 1895 Coxe and Mills had repudiated the trust or considered it at an end by open and notorious acts and conduct indicating an intention no longer to recognize it, and after a reasonable time had elapsed to ascertain if sufficient profits could be realized to repay the purchase money, interest, cost, and expense, the statute then was put in motion, and did not cease to run because of the coverture of Mrs. Carson and Mrs. Williams. There can be no doubt that Frank Coxe and Joseph C. Mills assumed a hostile attitude many years ago, one entirely inconsistent with the idea that they held the land in trust for the defendants or those under whom they claim, and they evinced this hostility to the alleged trust in the most open and notorious manner. In *Badger v. Badger*, 2 Wall. (69 U. S.) 87, at page 94, 95 (17 L. Ed. 836), the court, referring to laches and the rule barring the prosecution of stale claims, said:

"Now, the principles upon which courts of equity act in such cases are established by cases and authorities too numerous for reference. The following abstract, quoted in the words used in various decisions, will suffice for the purposes of this decision: 'Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitations which govern courts of law in like cas-

es, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.' The bill, in this case, is entirely defective in all these respects. It is true, there is a general allegation that the 'fraudulent acts were unknown to complainant till within 5 years past,' while the statement of his case shows clearly that he must have known, or could have known, if he had chosen to inquire at any time in the last 30 years of his life, every fact alleged in his bill."

And in 2 Perry on Trusts (6th Ed., by Howes) § 861, and note, it is said:

"Equity will not usually lend its aid to establish or enforce a stale trust; and, when there has been great delay in bringing suit, even though the trustee has fraudulently concealed the facts from the beneficiary, the latter must definitely set forth in his bill the cause of his ignorance, the impediments to an earlier prosecution of his claim, the means used by the trustees to mislead him, and how and when he acquired a knowledge of his rights" (citing cases).

[3] To prevent the operation of the doctrine of laches or the staleness of the claim by a court of equity, the trust should be clearly established, and there should be some fraudulent concealment by the party affected by it of the facts, and an accounting for long delay in enforcing rights by the cestui que trust, and a showing of proper diligence. It was so held in the *Badger Case*, supra. In *Paschall v. Hinderer*, 28 Ohio St. 568, 578, cited and quoted from in 1 Perry on Trusts (6th Ed.) § 229, and note, at page 338, it is said that the statute will bar where there has been an open denial or repudiation of the trust, brought home to the cestui que trust, which requires him to act, and the time afterward elapsed amounts at law to a bar, or when circumstances exist which, with the lapse of time, raise the presumption that the trust has been discharged or extinguished. This doctrine of presumption of abandonment of rights, or laches, was adopted for the sake of repose, and because time necessarily obscures all human evidence, and deprives the parties of the means of as-

certaining the nature of the original transaction, and may close the doors of proof to those who claim under the party charged with the fraud or the assumption of a trust. It would be unfair and inequitable to listen to a party alleging a fraud or a trust after so long a lapse of time, and especially when it appears that the only parties to the transaction are dead, or so disabled by mental and physical infirmities, as in this case, as to deprive the party against whom the trust is asserted of the benefit of their testimony. And in the same case of *Paschall v. Hinderer*, supra, the court, quoting with approval from *Williams v. First Presbyterian Church*, 1 Ohio St. 478, said:

"Although it is true, as a general rule, that, ^{as} between trustee and cestui que trust, lapse of time is no bar, yet it is equally true, that where the former, with the knowledge of the latter, disclaims the trust, either expressly or by acts that necessarily imply a disclaimer, and an unbroken possession follows in the trustee, or those claiming under him, for a period equal to that prescribed in the act of limitations to constitute a bar, *such lapse of time, under such circumstances* may be relied upon as a defense."

This court affirmed this principle in *McAden v. Palmer*, 140 N. C. 258, 52 S. E. 1034, and referred to *Spedel v. Henrici*, 120 U. S. at page 387, 7 Sup. Ct. at page 612, 30 L. Ed. 718, where it was said by Justice Gray:

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' *Smith v. Clay*, 3 Bro. Ch. 640, note. This doctrine has been repeatedly recognized and acted on here" (citing many cases).

It appears, therefore, that the statute begins to run when the trust is closed, or when the trustee disavows the trust, with the knowledge of the cestui que trust, or holds adversely to the claim of those he represented. *Bacon v. Rives*, 106 U. S. 107, 1 Sup. Ct. 3, 27 L. Ed. 69. But we think this case shows most clearly that Frank Cox and Joseph C. Mills so dealt with this property as their own and as free from any trust, and in such an open, notorious, and public manner, and in such a decisive way, as to fix the defendants, or those under whom they claim, with notice. They do not disclaim knowledge of the facts, or even attempt to account for their long and protracted delay. The law favors the vigilant and not those who sleep upon their rights. In this case, the plaintiffs and those under whom they claim, and the assignees of the latter, have been in possession of this land all the time, apparently claiming it as their own, without

acknowledging any trust or accounting with the defendants, or any one else, for any of the profits, if any were made. Both Cox and Mills committed acts which amounted to a distinct disavowal or repudiation of any trust relation between them and Mrs. Carson and Mrs. Williams. It is not alleged or pretended that they have fraudulently or otherwise concealed any facts from the defendants, so as to put them off their guard and to induce their long delay. Those now claiming that there was a trust should have taken notice long ago that the time had arrived for them to assert it, and instead of doing so, they have delayed action until one of the two important witnesses is dead and the other is so feeble in mind and body, with faculties greatly impaired, as to be practically unable to testify. It would not be just or equitable, under the circumstances, to extend the aid of the court to the defendants, and we must decline to do so. The reasons which induce a court of equity to withhold its aid in such cases are fully given and explained in *Foulk v. Brown*, 2 Watts (Pa.) 216, which was quoted with approval by Justice Burwell in *Cox v. Brower*, 114 N. C. 422, 19 S. E. 365, and Justice Hoke in the case of *In re Dupree's Will*, 163 N. C. 256, 79 S. E. 611, as follows:

"The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them they would accumulate to a burdensome extent. Hence statutes of limitations have been enacted in all civilized communities, and in cases not within them prescription or presumption is called in as an indispensable auxiliary to the administration of justice."

See, also, *In re Beauchamp's Will*, 146 N. C. 256, 59 S. E. 687; *Headen v. Womack*, 88 N. C. 468. It was held in the case of *In re Beauchamp's Will*, supra, that coverture would not prevent the operation of the rule as to long delay and laches. See *Headen v. Womack*, supra.

Plaintiffs contended that defendants could not recover on their counterclaim, because they had not alleged or proved that the clause of defeasance, or the terms, creating a trust, had been omitted from the absolute deed by ignorance, mistake, undue influence, or fraud, which they insist is essential, and they relied on *Sprague v. Bond*, 115 N. C. 530, 20 S. E. 709, but a decision of this point is not necessary, as we base our conclusion on another and sufficient ground.

[4, 6] This case was submitted to the jury upon the theory that the deed to Frank Cox

and his letters to the two feme grantors, constituted a mortgage, as the second issue will show. If this be the true construction, the cause of action was barred by the 10-year statute, the mortgagee having remained in possession all the time, but the transaction partakes more of the nature of a defeasible purchase, as the vendors were not debtors to the vendee (*Robinson v. Willoughby*, 65 N. C. 520), and therefore they could not have been sued by the vendee for the amount (\$6,000) paid to them. The sale was conditioned on the returns being, within a reasonable time, sufficient to pay him back the purchase money, interest, and all expenses of working the mines, and this did not turn out to be the case. The proposition in the letter of April 9, 1881, to Mrs. Carson, was never accepted and carried out, and does not therefore alter the situation. The letter also shows that Mr. Coxie warned the vendors not to rely on the condition as to profits, because he was quite sure they would not be realized, but to rely on the money he had paid to them alone, as no mine in this state had been profitable, so far as he knew. We hold, though, that on the ground of laches and long delay—more than 30 years—unexplained, defendants have lost any right they may have had to an accounting. Besides, the evidence does not show that the condition upon which they might redeem or recover the land was ever fulfilled, but tends to show the contrary.

In the discussion, we have assumed that defendants had an equity, but it is not necessary to decide this question, as, if it ever existed, it has been lost by their delay and inaction. As said by this court:

"Very certain it is, however, that the judgment of nonsuit should not be disturbed, for though it should be established and declared by a verdict that permanent damage has been done to the plaintiff's estate and interest, it is perfectly clear, both from the allegations of the plaintiff and the uncontroverted facts, that the plaintiff's cause of action is barred by the three-year statute of limitations. The statute being properly pleaded, the error as to permanent damage, if any was committed to the plaintiff's prejudice, was harmless, and no good would result by awarding a new trial." *Cherry v. Canal Co.*, 140 N. C. 425, 53 S. E. 133, 111 Am. St. Rep. 850, 6 Ann. Cas. 143.

We, therefore, must affirm the judgment.
Affirmed.

(101 S. C. 141)

CANTEY v. CLARENDON COUNTY.
(No. 9098.)

(Supreme Court of South Carolina. May 6, 1915.)

COUNTIES 6—148—TORTS—LYNCHING OF PRISONER—QUESTION FOR JURY—"MOB"—"UNLAWFUL ASSEMBLAGE."

Under Const. art. 6, § 6, and the statutes enacted thereunder, making an officer, from whose custody and through whose negligence or connivance a prisoner is taken by a mob or other unlawful assemblage of persons and is killed, guilty of a misdemeanor, and making the county

in which such lynching occurs liable to the decedent's representative in exemplary damages of not less than \$2,000, the technical words should be given their technical meaning, unless a contrary intention appears; and as the phrase "unlawful assemblage," used as the alternative of the word "mob," has a technical meaning, it was the duty of the court to instruct the jury and explain the meaning of the words, and its instruction that "mob" meant the same as "unlawful assemblage of persons" was proper.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 213; Dec. Dig. 6—148.

For other definitions, see *Words and Phrases*, First and Second Series, *Mob*; *Unlawful Assembly*.]

Appeal from General Sessions Circuit Court of Clarendon County; H. F. Rice, Judge.

Action by Madison Cantey, administrator, against Clarendon County. Judgment for plaintiff, and defendant appeals. Affirmed.

Purdy & O'Bryan, of Manning, for appellant. Davis & Wideman, of Manning, for respondent.

HYDRICK, J. The plaintiff recovered judgment against Clarendon county for \$2,000 exemplary damages for the lynching of his intestate, Marion Cantey, who was taken from the custody of two constables who were carrying him to jail on a warrant which charged him with assault and battery with intent to kill. One of the constables testified that there were eight or nine persons in the crowd which took Cantey from their custody and shot him to death.

By section 6 of article 6 of the Constitution and the statutes enacted thereunder, the lawmakers undertook to make a law which would at least aid in preventing the crime of lynching in this state. The Constitution provides that in case a prisoner lawfully in custody of an officer is taken from his custody, through his negligence, permission, or connivance, "by a mob or other unlawful assemblage of persons," and, at their hands, suffers bodily violence or death, the officer shall be guilty of a misdemeanor, and provides for his prosecution, and suitable penalties on conviction. The same section provides that in all cases of lynching, when death ensues, the county where such lynching takes place shall be liable to the legal representative of the person lynched in exemplary damages of not less than \$2,000.

Appellant's sole contention is that the trial judge erred in instructing the jury what constitutes "a mob or other unlawful assemblage of persons," and in not leaving it to them to find, without such instruction, whether the persons who lynched Cantey constituted "a mob or other unlawful assemblage of persons," within the meaning of the Constitution and statutes.

It was clearly the duty of the court to instruct the jury and explain to them the meaning of the words used in the Constitu-

tion and statutes. It is a well-settled rule of construction that technical words or phrases used in a statute, especially one dealing with legal proceedings, shall have their technical meaning, unless a contrary intention appears. The phrase "unlawful assemblage" has a technical meaning, and, by using it as the alternative of the word "mob," it is clear that the lawmakers intended that "mob" should mean the same as "unlawful assemblage." Therefore the court correctly defined the word "mob" as an "unlawful assemblage of persons," and correctly defined the latter phrase according to the standard text-books and our own decisions.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 64)

HUNT v. ATLANTIC COAST LUMBER CORPORATION. (No. 9089.)

(Supreme Court of South Carolina. May 4, 1915.)

1. JUDGMENT ⇐80—OFFER OF JUDGMENT—WITHDRAWAL.

An offer by defendant to allow judgment for plaintiff is, under Code Civ. Proc. 1912, § 424, deemed withdrawn when refused, and cannot be considered on motion for nonsuit.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. ⇐80.]

2. APPEAL AND ERROR ⇐1162—REFUSAL OF NONSUIT—EVIDENCE.

Where an order refusing a nonsuit was erroneous, but testimony was subsequently introduced sustaining the complaint, the order will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4521; Dec. Dig. ⇐1162.]

3. TRESPASS ⇐56—TRESPASS TO REAL ESTATE—PUNITIVE DAMAGES.

Where defendant willfully converted to his own use timber which it had cut after ascertaining the fact that it belonged to plaintiff, punitive damages could be awarded.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 144; Dec. Dig. ⇐56.]

4. APPEAL AND ERROR ⇐1052 — HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Error in admitting testimony of a witness because incompetent when offered is harmless, where subsequent evidence renders the testimony competent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. ⇐1052.]

5. TRIAL ⇐194 — RULING ON MOTION FOR NONSUIT—COMMENT ON FACTS.

A judge indicating his opinion on the facts on refusing a nonsuit does not thereby violate Const. art. 5, § 26, providing that judges shall not charge juries as to matters of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. ⇐194.]

6. TRIAL ⇐278—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

An exception to the charge as misleading, in that, while most of the statements of the law, regarded separately and as isolated statements, may be correct, yet, when taken together,

would leave the jury the impression that the court was of opinion that the conduct of defendant was reckless and wanton, is too general.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 686, 689; Dec. Dig. ⇐278.]

Appeal from Common Pleas Circuit Court of Berkeley County; O. J. Ramage, Special Judge.

Action by N. A. Hunt against the Atlantic Coast Lumber Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

The following are the exceptions:

(1) That the court erred in refusing the motion of the defendant's attorney, at the close of the plaintiff's testimony, that the jury be directed that it could not find for more than the sum of \$111, tendered by the defendant before going into the cause in open court; the error being that the motion should have been granted for the reason that there was an absolute failure, and even absence of testimony, to show that any greater amount of timber had been cut, and that having been shown only by the defendant's admission.

(2) That the court erred in refusing to grant the motion of defendant's attorney for a nonsuit as to punitive damages; the error being that the motion should have been granted, for the reason that there was not a word of testimony in the case to support a verdict for punitive damages, there being nothing to show wantonness or gross or willful negligence, or even ordinary negligence, the evidence clearly showing that great precautions were taken to avoid going over the line on to plaintiff's timber.

(3) That the court erred in admitting the testimony of the plaintiff, Hunt, as to the quantity and value of the timber, and the damage done, without which testimony there would have been nothing to go to the jury on; the error being that this testimony was clearly hearsay, and was so admitted to be by the plaintiff witness, and said testimony was admitted over the earnest protest of the attorney for the defendant.

(4) Because the jury found for the plaintiff in the sum of "\$600," under the prayer of the complaint which asked for "\$600 as actual damages, and the further sum of \$2,000 by way of punitive damages"; the jury evidently intending its verdict to be for the sum of \$600 as actual damages, and there being no testimony whatever to support a verdict for a greater amount of actual damages than \$111, tendered by the defendant before trial.

(5) That the court erred in refusing the motion of defendant's attorney to strike out all of the testimony of the plaintiff, Hunt, with reference to the timber, after the witness had admitted that he knew nothing about it of his own knowledge; the error being that such testimony was confessedly pure hearsay.

(6) Because the court erred in interrupting the testimony of one of the defendant's most important witnesses (Grant) to make his ruling on the question of permitting the case to go to the jury, and, in so doing, in using the following language:

"I have had the stenographer to read me the testimony in this case, and it appears from the testimony that Mr. Sanderson talked to Mr. Pearce after this timber was cut and before it was moved. The complaint alleges that the defendants willfully and wantonly cut and removed certain timber from the lands of the plaintiff; and, in my judgment, there is sufficient testimony to go to the jury. The case of *Beaudrot v. Railway*, 69 S. C. 160, 48 S. E. 106, holds that it is a question for the jury when a man goes on another man's land without making the

proper effort to find out where the lines are. Therefore, under the facts of the case, if they removed the logs from there after they had knowledge that they were cutting the timber of some one else, I think that would carry the question to the jury." The error being that, while this was not a portion of the charge, it was tantamount to an expression of opinion as to the facts; the language used being such that, if it had been used in the charge, it would have constituted a charge on the facts, and would have been reversible error.

(7) Because the charge of the court, it is respectfully submitted, when taken as a whole (this exception being intended to apply to the entire charge), was misleading to the jury, in that, while most of the statements of the law, regarded separately, and as isolated statements, might be correct, still, taken all together, would leave upon the mind of the hearer the impression that the court was of opinion that the conduct of the defendant was reckless and wanton; the error being that the uncontradicted testimony of the only witnesses who testified as to the trespass leaves no foundation whatever for the conclusion that there was either willfulness or wantonness or recklessness, or anything else making it competent for the jury to consider the question of punitive damages.

Octavus Cohen and Octavus R. Cohen, both of Charleston, for appellant. Lewis G. Fultz, of Moncks Corner, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful acts of the defendant. The complaint alleges that the plaintiff at the times hereinafter mentioned was owner of all the pine timber of certain dimensions on the tract of land therein described; that on or about the 1st day of January, 1911, the defendant entered upon the said tract of land, and willfully, wantonly, and maliciously cut and removed therefrom the greater part of plaintiff's timber, to his damage, \$500 as his actual damages, and \$2,000 as punitive damages.

The following statement appears in the record:

"The answer [which for certain reasons counsel have agreed shall not be set out here] admitted the cutting of a certain amount of timber, valued at \$111, but denied that the cutting was done willfully, maliciously, or wantonly, and also set up the correspondence which appears later in this case between the plaintiff and the defendant, in the effort to support its contention that the cutting was a mere inadvertence, and also in the effort to limit its damage."

Before the trial of the case the defendant's attorneys offered to allow judgment in favor of the plaintiff for \$111, and costs, which tender was refused.

The jury rendered a verdict in favor of the plaintiff for \$600, and the defendant appealed upon exceptions, which will be reported.

[1, 2] First exception: When the offer was refused, it was deemed to have been withdrawn, and could not be given in evidence. Code Civ. Proc. § 424. Therefore it would have been erroneous for his honor the presiding judge to have considered it upon the motion for a nonsuit. Furthermore, testimony was afterwards introduced both by the plaintiff and the defendant tending to show that the plaintiff was entitled to damages, and that the motion for nonsuit was properly refused. Where an order refusing a motion for nonsuit was erroneous, but testimony was afterwards introduced tending to sustain the allegations of the complaint, the Supreme Court will not reverse such order. *Hicks v. Railroad*, 63 S. C. 559, 41 S. E. 753.

[3] Second exception: In addition to the reason assigned by his honor, the presiding judge, it appears from the testimony that the defendant willfully converted the timber which it had cut to its own use, after ascertaining the fact that it belonged to the plaintiff.

[4] Third exception: Even conceding that Hunt's testimony was erroneously admitted, in the first instance, testimony was subsequently introduced tending to show that there was a basis for his opinion as to the value of the timber. Where a fact is first proved by incompetent testimony, and afterwards by proper evidence, the error in admitting the first evidence is harmless. *Garlick v. Railroad*, 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874.

Fourth exception: There is nothing in the case tending to show how much of the verdict was for actual damages, and what part thereof was for punitive damages.

Fifth exception: What has already been said disposes of this exception.

[5] Sixth exception: If a judge, in refusing a motion for nonsuit, indicates his opinion on the facts, it is not in violation of section 26, art. 5, of the Constitution, which provides that "judges shall not charge juries in respect to matters of fact, but shall declare the law."

[6] Seventh exception: Waiving the objection that the exception is too general, we are unable to discover any facts tending to sustain the proposition for which the appellant contends.

Eighth exception: What was said in disposing of the seventh exception is applicable to this exception.

Judgment affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 73)

GRAINGER v. GREENVILLE, S. & A. RY. CO. (No. 9090.)

(Supreme Court of South Carolina. May 4, 1915.)

1. MASTER AND SERVANT ⇨278 — UNSAFE PLACE—NEGLIGENCE—EVIDENCE.

Evidence of failure of the master to provide a safe place to work makes out a prima facie case of negligence; any excuse for the failure being matter of defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

2. MASTER AND SERVANT ⇨286 — UNSAFE PLACE—NEGLIGENCE—QUESTION FOR JURY.

Whether the evidence in a servant's action for injury rebutted the prima facie case of negligence of the master in not furnishing a safe place to work held a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇨286.]

3. MASTER AND SERVANT ⇨208—ASSUMPTION OF RISK—UNSAFE PLACE.

The servant does not assume the risk of the failure of the master to discharge its duty of furnishing a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. ⇨208.]

4. MASTER AND SERVANT ⇨278—INJURY TO SERVANT—EVIDENCE.

Evidence, in an action for death of a servant by the falling of a sand bank while he was digging back under it, held to warrant the jury inferring a conscious failure of the master to observe due care for the safety of the workmen, permitting allowance of punitive damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

Gary, C. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

Action by J. B. Grainger, administrator of Abell Grainger, deceased, against the Greenville, Spartanburg & Anderson Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gaston & Hamilton, of Chester, and Haynsworth & Haynsworth, of Greenville, for appellant. McCullough, Martin & Blythe, of Greenville, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained through the wrongful acts of the defendant in causing the death of plaintiff's intestate. The third and fourth paragraphs of the complaint are as follows:

"That on Friday, November 22, 1912, Abell Grainger, who was a minor, 19 years of age, and inexperienced in the work in which he was engaged, was in the employ of defendant company, as a laborer on a construction gang, a few miles from the city of Greenville. He had been engaged in this work for about two weeks, and before that time plaintiff had had no experience in such work: the gang during the time said Grainger had been in its employ had been engaged in general construction and building work, excavating, filling, etc. Said Abell Grainger was working under Mr. Musselwhite, who

was foreman of the gang, and had the right and power to direct and control his services, and the services of the gang, and all work and acts herein referred to were done under the orders and directions of said Musselwhite, and all instructions and orders herein referred to were given by said Musselwhite and by defendant company, through its representatives, officers, and duly authorized agents.

"On Thursday, November 21, 1912, said Abell Grainger, along with the gang, was put to work by defendant company, at the work of carrying and removing soft stone, or gravel, from a pit in a cut on defendant's line of road, which was new and unusual work for both him and the gang, he having never done such work before.

"That the overhanging roof of the pit, was composed of soft and seamy strata of soil, gravel, etc., and that it had been further rendered seamy and unsafe by the blasting and other work that had been done there by the defendant company, by the percolation of water, etc., rendering the place dangerous, but that the danger was latent and not known to said Grainger, although the defendant knew, or by proper inspection or by the exercise of proper care and diligence should have known, and could have easily avoided said dangers.

"While engaged in said work a large amount of earth caved and fell in upon said Abell Grainger and his fellow workmen, and crushed and injured him, so that a few days thereafter he died."

In the fifth paragraph of the complaint, the proximate causes of the injury are alleged, one of which is that the defendant negligently, recklessly, and wantonly failed to provide a safe place for Abell Grainger to work. After denying certain allegations of the complaint, the defendant set up the following defenses: (1) Negligence of a fellow servant; (2) contributory negligence; and (3) assumption of risk. The jury rendered a verdict in favor of the plaintiff, for \$3,000 (but did not state how much thereof was for actual, or what part was for punitive damages), and the defendant appealed.

The exceptions numbered 1, 2, 3, 4, 5, and 6 are overruled, for the reason that, even if there was error, it was not prejudicial.

[1] The next question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing defendant's motion for the direction of a verdict, on the ground that there was no testimony tending to sustain the cause of action, based on negligence. There was testimony tending to sustain the allegations in paragraph 4 of the complaint as to the dangerous condition of the place where Grainger was at work when injured. When there is testimony to the effect that there was a failure, on the part of the master, to provide a safe place for the servant to work, it makes out a prima facie case of negligence against the master; and, if there are reasons why the master should not be held liable for his failure to discharge this primary duty to the servant, he must rely upon them as a defense.

"The allegation on the part of a servant that he has sustained an injury while in the service of the master, by reason of the neglect of a duty which the latter owes to the former, unquestionably states a cause of action, for, as said

above, the omission of such duty affords at least prima facie evidence of negligence, and while it is true that such prima facie showing may be rebutted by evidence, tending to show that such omission of duty on the part of the master was not owing to his want of care and diligence, but was due to other causes which he could not control, yet until such prima facie showing is rebutted, it will be conclusive. For instance, the master may show that he did not know, and could not, by the use of due care and diligence, have ascertained, that there was any such defect in the machinery or other appliances furnished the servant as would be likely to cause the injury complained of; but until this is shown, the failure to perform an acknowledged duty stands unexcused, and renders the master responsible. It seems to us, therefore, that want of knowledge on the part of the master, of the defect in the machinery, being a matter of excuse for the failure on his part to perform an acknowledged duty, constitutes matter of defense, and is not an element in the cause of action." *Branch v. Railway*, 85 S. O. 405, 14 S. E. 808.

These principles were subsequently approved, in the following cases: *Mickle v. Congaree Const. Co.*, 41 S. C. 399, 19 S. E. 725; *Farley v. Charleston Basket & Veneer Co.*, 51 S. O. 222, 28 S. E. 193, 401; *Hicks v. Railway*, 63 S. C. 559, 41 S. E. 753; *Richey v. Railway*, 69 S. C. 387, 48 S. E. 285; *Willis v. Cherokee Falls Mfg. Co.*, 72 S. C. 126, 51 S. E. 538; *Green v. Railway*, 72 S. C. 398, 52 S. E. 45, 5 Ann. Cas. 165; *Trimmer v. Railway*, 81 S. C. 211, 62 S. E. 209; *Strauss v. Railway*, 94 S. C. 324, 77 S. E. 1117; *Stanton v. Corporation*, 97 S. C. 403, 81 S. E. 660.

[2] It will thus be seen that his honor, the presiding judge, could not have ruled that the prima facie evidence of negligence was rebutted by the testimony upon which the defendant relied to sustain its defense without invading the province of the jury.

[3] The next question to be determined is whether there was error on the part of his honor, the presiding judge, in refusing the motion for the direction of a verdict for the defendant, on the ground that the only inference to be drawn from the testimony was that Grainger assumed the risks incident to his employment. There was testimony to the effect that the injury was caused by the failure of the defendant to provide a safe place to work, which was one of the primary duties resting upon the master. It is unnecessary to cite authorities to sustain the proposition that the failure of the master to discharge this primary duty is not one of the risks assumed by the servant.

The last question presented by the exceptions is whether his honor, the presiding judge, erred in refusing the defendant's motion for the direction of a verdict, on the ground that there was no testimony tending to show that the plaintiff was entitled to punitive damages. There is no testimony tending to show that the defendant had actual knowledge of the dangerous condition of the place where the intestate was injured; nor did the witnesses upon whose testimony the plaintiff relied give the defendant, or the foreman of the gang, any information

as to the condition of the soil where Grainger was at work; nor were their passing remarks sufficient to put the defendant upon inquiry, which, if pursued with due diligence, would have led to knowledge as to the dangerous condition of the soil.

I think, therefore, there should be a new trial.

HYDRICK, J. [4] I think the judgment should be affirmed. The deceased was shown to be a young man, 19 years of age, of good health, habits, and character. A verdict for \$3,000 for his death can hardly be said to include punitive damages. But if it did, there was evidence to sustain such a verdict. The workmen were ordered to dig back under a bank, a work obviously dangerous. If there had been no testimony tending to show that the attention of the foreman was drawn to the danger of the situation, his failure to take proper precautions for the safety of the workmen might be attributed to inadvertence or negligence only. But the mind of the foreman evidently adverted to the probability of the overhanging bank falling upon the workmen, as shown by the fact that he put some workmen above to dig off the overhanging bank as the workmen below undermined it, and ordered them to the other side of the cut just before the accident. Besides this, within an hour of the time the bank fell on Grainger, the foreman's attention was called to the danger to the workmen by two different persons. Mrs. Odgen asked him if they were not in danger. He replied with a shrug, "I am obeying orders." And Will Ashmore, an employé of defendant engaged with another squad of laborers working near by, passed by where deceased was at work, and said to one of the deceased's collaborators, in the presence and hearing of the foreman, "I would not work in that hole for \$1.25 a day," whereupon the foreman told Ashmore to go on; that he (the foreman) was bossing that job. I think this testimony warranted a reasonable inference of a conscious failure to observe due care for the safety of the workmen under the bank. In several cases this court has held that if a tort is committed in such manner under such circumstances that the jury may find that a person of ordinary reason and prudence would have been conscious of it as such, punitive damages may be recovered. *Tolleson v. R. Co.*, 88 S. C. 7, 70 S. E. 311; *Eberle v. Railway*, 98 S. C. 89, 79 S. E. 793.

The judgment is therefore affirmed.

WATTS and FRASER, JJ., concur.

GAGE, J. I am of the opinion that the court was right to submit the issues to a jury.

I do not think there was any evidence of willfulness. But I think that cannot affect the result, for the amount of the recovery ex-

cludes the idea that the jury computed punitive damages.

I think the judgment must be affirmed.

WATTS, J. I concur with HYDRICK, J., that judgment should be affirmed.

FRASER, J. I concur with HYDRICK, J.

(101 N. C. 59)

CANNON v. LOCKHART MILLS. (No. 9088.)

(Supreme Court of South Carolina. May 4, 1915.)

1. MASTER AND SERVANT ⇨115—INJURY TO SERVANT—LIABILITY.

A water-closet in use by employes will ordinarily be kept with a door free to open; and where the closet is out of repair, and the floors are torn up so as to make entry into it dangerous, ordinary care requires a temporary fastening of the door.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 205, 206; Dec. Dig. ⇨115.]

2. MASTER AND SERVANT ⇨286—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

Whether an employer repairing a water-closet in use by employes, and in so doing making its use dangerous, was negligent in failing to properly fasten the door to prevent employes ignorant of the facts from entering, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1060; Dec. Dig. ⇨286.]

3. NEGLIGENCE ⇨62—PROXIMATE CAUSE.

Where, in the sequence of events between the original default and the injury, an independent cause intervenes, which is of itself sufficient as the cause of the injury, the independent cause is ordinarily the proximate cause, and the original default is the remote cause, especially where the intervening cause is the act of some person entirely unrelated to the original actor, but a careless person is liable for all the natural and probable consequences of his conduct.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. ⇨62.]

4. MASTER AND SERVANT ⇨276—INJURY TO SERVANT—NEGLIGENCE OF MASTER—PROXIMATE CAUSE.

An employer, in making repairs to a water-closet used by employes, tore up the floor so as to make its use dangerous, and fastened the door shut with a picker stick. An employe went to the closet and pulled out the stick, and a few minutes later a coemploye entered the closet and was injured. *Held*, that a finding that the negligence of the master in failing to properly fasten the door was the proximate cause of the accident was justified.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. ⇨276.]

Appeal from Common Pleas Circuit Court of Union County; S. W. G. Shipp, Judge.

Action by W. A. Cannon against the Lockhart Mills. From a judgment for plaintiff, defendant appeals. Affirmed.

Carson & Boyd, of Spartanburg, for appellant. John K. Hamblin and Wallace & Barron, all of Union, for respondent.

GAGE, J. Action by a servant against master for injuries to the person. Verdict for \$1,000 actual damages. Appeal by defendant.

History: The defendant owns and operates a cotton mill on Broad river. The plaintiff was "a common laborer and operative" therein. In the mill building there are water-closets for the use of operatives. The floor of one of these closets had been taken up to make some repairs. The master mechanic of the mill had, the evening before the transaction in issue, fastened the door leading out of the main building into the closet, and the fastening was made with a picker stick. The next morning thereafter, the plaintiff entered the mill at 6:15 o'clock, or thereabout, to start a day's work. On the same morning, and just before the plaintiff's entry into the closet, a fellow servant, Robert Brazington by name, had pulled out the picker stick and entered the closet. Then the plaintiff entered the closet, fell into the opening, and sustained injuries to his person. Lights were turned on in the mill room and closet about 6:30 in the morning. This accident happened about that time.

There are two exceptions, and they make two issues. The issues are: (1) Was there any testimony from which negligence of the master is inferable? (2) Does the testimony conclusively show that the negligence complained of was solely that of a fellow servant to plaintiff? The second issue is predicated on the first, so that the prime and controlling issue is the existence of testimony tending to show that the master omitted a duty owing to the plaintiff. Yet, though that fact be established, the defendant is not liable for that default, unless that default was a proximate cause to work the mischief. Both issues involve a consideration of the testimony, and that only.

The testimony of all the witnesses shows this: That some time before this accident the door had a lock on it for a fastening; that the day before the accident carpenters had torn up the floor in the closet; that J. W. Brazington, master mechanic, had thrust across the door for a fastening a picker stick, and had forced the end of the stick betwixt the brick wall and an iron pipe running up the wall parallel to the side of the door; that a picker stick is some three feet long, two inches wide, and a half inch thick; that the stick was intended to temporarily secure the door from entrance; that, on the day before the accident, the plaintiff was not in the mill; that on the morning in question, but a few minutes before plaintiff's entry, Robert Brazington, a fel-

low servant, in order to enter the closet, pulled out the picker stick, threw it on the floor, and left it there.

[1] It will surely be conceded on all hands that a water-closet for general use in a crowded mill will ordinarily be kept with a door free to open. It will also be conceded that if the closet be out of repair, and the floors torn up so as to make entry into it hazardous, ordinary care calls for a temporary fastening of the door; that is, something to suggest that the door ought not to be opened then. Those two issues would be submitted to a jury; but the duty in each case is manifest.

[2] The next and controlling issue of fact is: Was the picker stick a reasonably secure fastening? That question was submitted to the jury, and its verdict is conclusive against the defendant. It is sufficient to say that the court was warranted under the testimony, and under the very sense of the case, to submit that question to the jury. There might well be two reasonable opinions about whether the fastening by a picker stick was the way to temporarily close the entrance to the closet.

The defendant's first exception, therefore, is not tenable. The second issue is more difficult.

[3, 4] The negligent fastening of a picker stick was made one day while the plaintiff was not in the mill. The next morning Robert Brazington, another operative, pulled out the picker stick and entered the closet, but threw the picker stick aside, so that the closet door was put unfastened. The act of Brazington was undeniably a cause operating in time next before the accident to open the way to the accident. And, if it was the sole proximate cause, the defendant is not liable therefor, because Brazington and the plaintiff were strictly and admittedly fellow servants. But if the negligence of the defendant company, represented by its master mechanic, who put in the fastening, combined with the negligence of Robert Brazington to bring on the accident, then the defendant is liable for the injury. *Pinckney v. Railroad*, 89 S. C. 529, 72 S. E. 394.

The difficulty in the case is this: Are the two causes so connected and related in time, circumstance, and sequence as to make them one cause? The issue we have in mind is well stated thus:

"Where, in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Insurance Co. v. Tweed*, 7 Wall. 44, 52 [19 L. Ed. 65]. This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor. Nevertheless, a careless person is liable for all the natural and probable consequences of his conduct. If the misconduct is of a character which, according to the usual expe-

rience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man." *Railway v. Calhoun*, 213 U. S. 7, 29 Sup. Ct. 321, 53 L. Ed. 671.

The defendant relies on this case to acquit it. But it rather convicts the defendant. Thereout comes this issue: Was the use of a picker stick, found by the jury to be a negligent act, an act of such a character as would, according to the usual experience of mankind, be calculated to invite or induce the intervention of some subsequent cause? Concretely and circumstantially stated, was it likely that Brazington, or some other operative, would come along seeking of right and of habit the closet, and remove a picker stick so put across the door? Upon that issue there might be two opinions; and it was the province of the jury to decide which was the reasonable one.

The other case relied upon by the defendant, *Cole v. German Sav. & L. Soc.*, 124 Fed. 113, 59 C. C. A. 593, also reported in 63 L. R. A. 416, is persuasive; but the two causes in that case were not so allied as the two causes in the case at bar.

Our opinion, then, is that the second exception is not good, and the judgment below must be affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 48)

McLENDON v. CITY OF COLUMBIA.
(No. 9089.)

(Supreme Court of South Carolina. May 3, 1915.)

1. DEATH — 31 — ACTIONS — SURVIVORSHIP.

By the act of 1892 (Civ. Code 1912, § 3053) a city was made liable for injuries to persons from a defect in a bridge or street. By the act of 1903 (Civ. Code 1912, § 1974) the action was made to survive if death resulted therefrom. This act also provided by reference that the action was to be enforced as by the provisions of Lord Campbell's Act. The Code of 1912, embodying the act of 1903, did not correctly set forth the references to Lord Campbell's Act, but made reference to matters foreign to the subject. An administrator brought suit against the city for the instantaneous death of his intestate, on the theory that the provisions of Lord Campbell's Act applied. *Held*, that section 1974 of the Civil Code of 1912, when read with the erroneous references eliminated, authorized the action.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 35, 37–46, 48; Dec. Dig. — 31.]

2. STATUTES — 202 — CONSTRUCTION — REFERENCES TO OTHER STATUTES.

Since the references to sections 1475 and 2280 and chapter 93 (§§ 3904–4015) in Civ. Code 1912, § 1974, providing for the survival of an action for injury and death through a defect in a street or bridge, are to matters entirely for-

eign to the subject of the enactment and are obviously erroneously inserted, the section is to be read as though such references were not included therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 280; Dec. Dig. ¶202.]

Appeal from Common Pleas Circuit Court of Richland County; C. J. Ramage, Special Judge.

Action by Millen H. McLendon, as administrator of Annie C. McLendon, against the City of Columbia. From orders overruling defendant's demurrer and overruling an objection to the jurisdiction, defendant appeals. Affirmed.

C. S. Monteith and W. H. Cobb, both of Columbia, for appellant. Edward L. Craig and Melton & Belser, all of Columbia, for respondent.

GAGE, J. The appeal is from two orders of the circuit court. The administration of justice would have been promoted had the appellant abided a final judgment on the merits, for then all the issues now made, and others which may be hereafter made, could be settled by one appeal, and no party have suffered.

The plaintiff sues the city of Columbia for the instant death of his wife, under his overturned auto, upon a defective highway of the city. To a complaint, which alleged the wrong, the defendant demurred. The demurrer will be reported, as will the order made thereon.

The cause proceeded immediately to trial, but thereto the defendant "objected to the jurisdiction of the court upon the ground that the court had no jurisdiction of the subject-matter." The grounds of objection and the order made thereon and denying the motion will also be reported. There was a mistrial; and the appeal here, as above stated, is from the two orders made by the court.

History: The plaintiff, in company with his wife, was driving his auto along Main street, in the city of Columbia, towards the south. At or near the intersection of Main and Whaley streets, a small stream crosses Main street obliquely, and over the stream there was flung a narrow cement bridge. The plaintiff had just crossed over the bridge, and his machine went into a side ditch on the right, turned turtle upon and immediately killed the wife. Therefor the plaintiff sued as the administrator of his wife's estate.

[1] The right to sue for the alleged wrong is referable to many statutes of the state; and a decision of the cause requires a detailed, and it may be a fatiguing, consideration of the statutes and the decisions about them.

By the act of 1892 (21 Stat. 91 [Code of Laws 1912, § 3053]) a city was made liable for injuries to persons which resulted from a defect in a bridge or a street.

By the act of 1903 (24 Stat. 67 [Code of

Laws 1912, § 1074]), if death resulted from such an injury, then the action was made to survive to the personal representative of the person so killed.

By the statute of 1903 the action was to be enforced as by the provisions of Lord Campbell's Act. By the act of 1892 and its amendment of 1895 (21 Stats. 18; 24 Stat. 945 [Code 1912, § 3963]) a cause of action for an injury to the person of the deceased, in this case Annie C. McLendon, survived to the personal representative of such person, in this case the plaintiff, her husband. This is the statute law, and all of it, by which the rights and remedies of the plaintiff are prescribed.

The defendant has made two exceptions—one about the order overruling the demurrer, and that he has subdivided into four parts; and one about the order overruling the plea to jurisdictions of the subject-matter. Thereby the appellant makes only two questions. He contends: (1) That section 1974 of the Code of Laws of 1912 is the sole warrant for the action, and its words do not sustain the action. (2) That section 3963 of the Code of Laws 1912 governs the case; and by it the plaintiff has only that cause of action which Annie C. McLendon would have had had she lingered and not died immediately, which the appellant calls a survival action; and on it the plaintiff has not sued.

The confusion in the case arises out of the enactment of amendments to three capital statutes, so that the whole collected body of the law thereabout is not so in harmony as it would have been had it been embraced at the outstart in one act.

The three capital enactments are: (1) Lord Campbell's Act, 1859 (12 Stats. 825); (2) the act to allow remedies to and against the representatives of deceased persons for injuries to land, 1892 (21 Stats. 18); (3) the act to make municipal corporations liable to persons who receive bodily hurt on its streets through defects therein, 1892 (21 Stats. 91). Into each of these statutes, unrelated at the start, amendments have been thrust, in different years and for different purposes, so that each is now somewhat related to the other, and the relation is apparently hostile.

The third of these statutes, enacted in 1892, is that which created the primary right in the citizen and the corresponding wrong of the municipality; and we shall hereinafter refer to it as the act of primary right. By it the citizen might ride on smooth highways unhurt; and by it, for defective highways the consequence of municipal negligence which cause hurt to the citizen, the municipality is made liable. That statute, however, gave a right of action only to a person who received bodily injury. It did not give a right of action to anybody in the event the person so injured died; and, unless some other statute supplied that right, it did not ex-

ist, for the wrong was esteemed to die with the person. At that time (1892), and at the time of the transaction here (in 1913), Lord Campbell's Act was of force. The language of that act is sufficiently comprehensive to permit the plaintiff to maintain this new action.

The statute which gives the primary right to the plaintiff is not the same as that which was construed in *All v. Barnwell*, 29 S. C. 161, 7 S. E. 58. By Lord Campbell's Act, and by the act of primary right, the right of action is made to depend on negligence, not so with the act construed at 29 S. C. 161, 7 S. E. 58. But, if Lord Campbell's Act did not comprehend this case, the act of 1903 (24 Stat. 67) did so expressly. That statute was an amendment of the act of primary right. That statute was passed to change the rule announced in *All v. Barnwell*. It had not then nor since been held that Lord Campbell's Act did not embrace a case arising under the act of primary right.

But the appellant stoutly contends that Lord Campbell's Act cannot govern the case, though the General Assembly has so ordained by the act of 1903. The argument is: (1) That Lord Campbell's Act creates a new action in him who sues for the death (section 3955, and *Ex parte Mayo*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 600), while the act here, which gives the primary right, only provides that the right of action (a) for the injury and (b) for the death shall survive to the personal representative; and (2) that Lord Campbell's Act permits the jury to award punitive damages, while the act which gives the primary right here limits the recovery to actual damages. It is true the act of primary right declares that the right of action shall "survive"; but the whole statute, especially that part which makes applicable Lord Campbell's Act, makes it plain that, for the death of the person, certain other persons might sue and recover damages sustained by them.

In the instant case there could literally be no survival of action, for the woman instantly killed had no action. We must look to the plain purposes of the whole statute, rather than to strict verbal construction of particular words of it. The action here sued on is a new action, and the plaintiff has so esteemed it. He has sought to "enforce" his primary right by the procedure laid down in Lord Campbell's Act, which is "applicable to such actions."

And that brings us to the issue stated just above as (2). It is true Lord Campbell's Act allows punitive damages. That was foreign matter thrust in 1901 into the act of 1859, and to change the rule announced in 1898 in *Garrick v. Railroad*, 53 S. C. 449, 31 S. E. 334, 69 Am. St. Rep. 874. And inasmuch as the allowance of punitive damages was one of the "provisions" of Lord Campbell's Act in 1903, when it was made "applicable" to the act of primary right, it is plain that

such "provision" about punitive damages alters and amends the act of primary right wherein only actual damages were allowable.

In the case at bar, however, there is no demand for punitive damages. It is not alleged that the act of the municipality was willful.

[2] But the appellant yet contends that the statute of 1903, that which amended the act of primary right and makes "applicable" to the case Lord Campbell's Act, is not now a part of the statute law of the state, and that because it is not written in totidem verbis in the codification of 1912, at section 1974. That is the contention stated as (1) in the outstart of this opinion, when reference was made to the exceptions.

It is true that section 1974 of the Code of 1912 does not contain all the words of the act of amendment of 1903. The act of amendment did not recite and repeat the primary act or Lord Campbell's Act. It invokes those statutes by reference to them as numbered parts of the codification of 1902; and the numbered parts are pertinent. But the codification of 1912, when it invokes the same two statutes (Lord Campbell's Act and the primary act), by section and chapter of that Code itself, refers to sections and chapter which contain matter foreign to the subject.

The appellant's contention is that the section must mean that which it declares, and, if that meaning is not true, then its true meaning cannot be supplied aliunde. But so far as the section and chapter therein referred are concerned, to wit, sections 1475 and 2280 and chapter XCIII, the reference means nothing; and the section may therefore be read without the reference. Plainly the insertion of the numerals 1475 and 2280 and the character XCIII is a blunder. There is no need to inquire how it happened. The sense would be the same had blank spaces been put in the place of the numerals and character. It will not be contended, on any hand, that the General Assembly intended to make the reference which appears in the section. If, therefore, section 1974 (Code of 1912) be read with the foreign matter eliminated, it will stand thus: Whenever the death of any person shall be caused by any injury through a defect in or failure to repair a highway, causeway, public way, street or bridge, under such circumstances and conditions as would have entitled the party to recover damages if death had not ensued, then in every such case the right of action for such injury and death shall survive to and may be enforced by the personal representative of such person in the same manner as is now provided by this Code.

The Code of 1912 provides at section 3053 and chapter XCII a congruous right and remedy for the death of such person by such instrumentality. We think, therefore, that the plaintiff has a plain right of action, without any reference to how the blunder in sec-

tion 1974 occurred. The parol testimony offered to show how it did occur was irrelevant, as well as incompetent.

The best evidence before us of what is the statute law on the subject is the printed volume. There is no other evidence at hand, and it contains all the law necessary to sustain the action. Finally the appellant cites yet another statute to sustain his contention that the cause of action set up in the complaint is not a new action, but an old action made to survive her in whom it first inhered. That is the act of 1905 (24 Stats. 945), embodied in the Code of 1912 at section 3963. That statute is but an amendment, thrust into the act of 1892 (21 Stats. 18). The act of 1892 had reference only to trespasses upon real estate; and it provided that wrongs thereon should survive to or against the owner or the trespasser as the case might be. The amendment of 1905 included "any and all injuries to the person."

The statute, as amended, is discussed in *Bennett v. Railway*, 97 S. C. 28, 81 S. E. 189, and thereunder, if the deceased here had suffered before her death, the personal representative might have sued by a survival action therefor, and then sued by a new action for her death.

Thus we have considered and decided all the real issues made, not by name, but in essence; and our conclusion is that the orders of the circuit court be affirmed. It is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 184)

FENNELL INFIRMARY v. SOUTHERN RY. CO. (No. 9097.)

(Supreme Court of South Carolina. May 5, 1915.)

1. APPEAL AND ERROR § 1008—REVIEW—QUESTIONS OF FACT.

In an action against a railroad company to recover an amount unlawfully collected as demurrage, and a statutory penalty for refusing to deliver goods without the payment of such demurrage, the findings of fact by the circuit judge were not reviewable by the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.]

2. CARRIERS § 100—FREIGHT CHARGES—DEMURRAGE.

Where one of the rules of a railroad company provided that 48 hours' free time would be allowed for loading and unloading on all commodities, and the company had led a consignee to believe that freight would not be due until a car was delivered on a siding, the consignee had 48 hours, after the car was placed on such siding in a proper position for unloading, within which to unload the car and pay the freight charges, and, where the freight charges were paid and the car was unloaded within 48 hours, demurrage was improperly collected.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 427-433; Dec. Dig. § 100.]

3. COMMERCE § 8—INTERSTATE COMMERCE—APPLICATION OF STATE LAWS.

Civil Code 1912, § 2571, providing that upon payment or tender of the amounts due on any shipment which has arrived at its destination a carrier shall deliver the freight to the consignee and that any failure or refusal to comply therewith shall subject each carrier so failing or refusing to a penalty of \$50 for every such failure or refusal, was superseded and annulled as to interstate shipments by the act to regulate commerce and the acts amendatory thereof, and the statutory penalty was not recoverable for refusing to deliver an interstate shipment until demurrage unlawfully charged was paid.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. § 8.]

Appeal from Common Pleas Circuit Court of York County; J. W. DeVore, Judge.

Action by the Fennell Infirmary against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, unless plaintiff remits a part of the recovery.

B. L. Abney, of Columbia, and Spencer, Spencer & White, of Rock Hill, for appellant. Dunlap, Dunlap & Hollis, of Rock Hill, for respondent.

GARY, C. J. This is an action to recover the sum of \$6, alleged to have been unlawfully collected by the defendant for demurrage, and a penalty of \$50, for failure to pay said claim within the time prescribed by statute.

After alleging the corporate existence of the defendant, the allegations of the complaint are as follows:

"That on the — day of —, 1913, a car load of coal, and consigned to the plaintiff, was received by the defendant at Rock Hill, said county and state. That upon receipt of notice, by the plaintiff from the defendant, of the arrival of said car, the plaintiff paid the amount of the freight charges demanded by the defendant, and directed the defendant's agent at Rock Hill, S. C., to have the said car placed on the track siding at, or near, the Fennell Infirmary's building, in said city of Rock Hill, for the purpose of having said car unloaded. That said agent agreed to, and did, place said car on said siding, as directed, but, contrary to the statutory rules and regulations in such matters prescribed, said defendant, through its agents and servants, shortly thereafter, removed said car from said siding, without allowing said plaintiff sufficient time within which to unload the same. That on the 20th day of October, 1913, as a prerequisite to replacing said car on said siding for the purpose of unloading the same, defendant demanded of the plaintiff the sum of \$6 as demurrage on said car. That plaintiff, although protesting that said charge was exorbitant, unjust, and unlawful, paid said demurrage, and thereupon marked upon the demurrage receipt, the following: 'Paid under protest.' That the refusal to deliver said car of coal, when the freight was paid therefor, and the requirement to pay the additional sum of \$6, was contrary to, and in excess of, the rate stipulated in the bill of lading, to be charged for the hauling and delivery of said car of coal. That the collection by the defendant of the said sum of \$6 was unjust and in violation of the rules of the railroad commissioners and of the statutes of the

state of South Carolina. That demand for the return of the said sum of \$6 has been made on the agent of the said defendant, and the same refused; and that the said defendant is justly indebted to the plaintiff in the sum of \$6. That by reason of the failure of the defendant to deliver to the plaintiff the said car of coal, after the freight charges had been paid therefor, and the requirement to pay the additional sum of \$6, an excessive rate over that specified in the bill of lading, the defendant has become liable for the payment to the plaintiff of a penalty in the sum of \$50."

The defendant denied the allegations of the complaint, and set up a defense, the allegations of which are substantially as follows: That on the 10th day of October, 1913, a car load of coal, consigned to Fennell Infirmary, arrived at Rock Hill, S. C., from Appalachian, in the state of Virginia. That, immediately upon the arrival of the said car of coal, defendant sent to the plaintiff notice of the arrival of the said car, and of the amount of freight due thereon. That the amount of freight due upon said shipment was not paid until the 20th day of October, 1913, and that immediately upon the payment of said freight charges defendant placed the said car of coal for convenient unloading. That said shipment of coal, being made from Appalachian, in the state of Virginia, to Rock Hill, in the state of South Carolina, was an interstate shipment, and as such was subject to all the rules and regulations governing such shipments, and fixing the charge due thereon, laid down and promulgated by the Interstate Commerce Commission, which said commission has exclusive jurisdiction over such shipments. That, in this connection, the shipment mentioned above was peculiarly subject to the rules and regulations laid down by the Interstate Commerce Commission, and filed with said Commission in accordance with the law, contained in demurrage and storage rules applicable on interstate traffic, at stations on the Southern Railway, and known as I. C. C. No. A-5114; and that, under the rules and regulations laid down therein and of force thereunder, there became due on the shipment mentioned above, on account of the delay in the payment of the freight charges thereon, the sum of \$6 demurrage, levied and assessed in accordance with said rules and regulations.

The first question that will be determined is whether the plaintiff is entitled to recover the sum of \$6, alleged to be due for demurrage.

W. W. Fennell testified as follows:

"I am the owner of the Fennell Infirmary. I direct its affairs. On October 10, 1913, I received notice by mail that a car load of coal assigned to plaintiff was at Southern Depot. Sam Camp told me the car was there. I told him to have it placed at the crossing. Camp is yard conductor. The car was placed at the crossing, near Capt. Marshall's. In previous shipments of coal the company had placed cars on the same track. I have received other coal from the company in car load lots. I received from the company, to the best of my

knowledge, in each case notice of arrival. In each case, I asked them to place the car at the usual place. After the car was placed, I would pay the freight. The car was not placed where I could unload it, until the 20th of October. It was placed in the late afternoon of October 10th, and the next morning it had been moved some distance above the crossing, where I could not unload it. On the 20th it was placed at the crossing, and Capt. Marshall was instructed to unload it. On October 20th, I paid the freight and \$6 demurrage. I paid the demurrage under protest."

The notice mentioned in the defendant's answer contained the statement that the freight consigned to the plaintiff had arrived, and was ready for delivery to him from shipper station, and that demurrage and storage would be assessed at the expiration of the free time, provided by the rules of the company.

Under the head of "Demurrage Rules," it is provided by section "a" of rule No. 2 that: "Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities."

The findings of fact by the magistrate as stated in his return are as follows:

"From the testimony, I held as a matter of fact that the railway company had adopted as a rule the delivery of cars to the plaintiff, on the siding at or near the Fennell Infirmary. I held as a matter of fact that the car was so delivered, but was allowed to remain at the delivery point a time too short for the plaintiff to begin unloading. That by reason of the custom adopted by the plaintiff, and the defendant company, the delay for which demurrage was charged was not the fault of the plaintiff, but was the fault of the defendant company; the defendant company having led the plaintiff to believe that the freight would not be due, until the car was delivered on the siding."

His honor, the presiding judge, in affirming the judgment of the magistrate, said:

"After having heard the testimony read, I am of the opinion that the facts proven were sufficient to warrant the finding of the magistrate's verdict, and shows that the charge of \$6 demurrage by the defendant-appellant was unlawful, as at no time until October 20, 1913, was car placed by defendant for unloading, and demurrage could not be charged until after car was placed."

[1] The findings of fact by the circuit judge are not reviewable by this court.

There was no objection to any of the testimony that was introduced either on the part of the plaintiff or defendant.

[2] Under the rules of the company, demurrage could not be assessed against the consignee until the expiration of 48 hours after notice that the freight had arrived and was ready for delivery. The consignee was entitled to 48 hours within which to pay the freight charges and to unload the car, after it had been placed in proper position for unloading. The findings of fact by the magistrate and circuit judge show that the freight charges were paid and the car unloaded within 48 hours after the car was placed and remained in proper position for unloading, during the time required by the rules of the

company. The exceptions raising this question are overruled.

[3] The next assignment of error that will be considered is as follows:

"Because the presiding judge erred in affirming the judgment below, and giving effect to section 2571 of the Code of Laws of 1912 of the state of South Carolina, which said section and other statutory laws of the state are superseded and annulled by the act to regulate commerce and the acts amendatory thereof, in pursuance of the commerce clause of the Constitution of the United States, and that he should have held that the whole question should be determined by the federal laws and the rules and regulations filed with and approved by the interstate commerce regulations filed with and approved by the Interstate Commerce Commission by virtue of the authority given by the said act."

The authorities cited in the argument of the appellant's attorneys show that this exception must be sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, unless the plaintiff shall remit the penalty within 20 days after the remittitur is sent down.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 111)

STATE v. JONES. (No. 9095.)

(Supreme Court of South Carolina. May 5, 1915.)

1. CRIMINAL LAW \Leftrightarrow 833—TRIAL—INSTRUCTION—LANGUAGE OF REQUEST.

Where a requested charge embodied a sound proposition of law, the court sufficiently performed his duty to present it to the jury if he did so substantially in his own language, as he is not bound to follow the language of the request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2015; Dec. Dig. \Leftrightarrow 833.]

2. HOMICIDE \Leftrightarrow 304—TRIAL—INSTRUCTION—ACCIDENTAL KILLING.

In a prosecution for homicide, evidence held insufficient to make requisite an instruction as to the law of accidental killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 636; Dec. Dig. \Leftrightarrow 304.]

3. HOMICIDE \Leftrightarrow 125—ACCIDENTAL KILLING.

Where facts and circumstances showed that the defendant intended to hurt deceased, even though not intending to kill him, if death ensued it was not an accidental killing, but the assailant was guilty of murder or manslaughter, according to the nature of the instrument used and the manner of using it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 189, 190; Dec. Dig. \Leftrightarrow 125.]

4. HOMICIDE \Leftrightarrow 62—MANSLAUGHTER—UNINTENTIONAL KILLING.

Where a man engaged in the commission of an unlawful act kills another, it is manslaughter, although he may not have intended the death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 85; Dec. Dig. \Leftrightarrow 62.]

Hydrick, J., dissenting.

Appeal from General Sessions Circuit Court of Marlboro County; R. W. Memminger, Judge.

Jesse Jones was convicted of manslaughter, and he appeals. Affirmed.

J. W. Le Grand, of Bennettsville, for appellant. J. Monroe Spears, of Darlington, for the State.

WATTS, J. The defendant was indicted for murder and convicted of manslaughter at the March term of the court, 1914, for Marlboro county, and sentenced by his honor, Judge Memminger, at hard labor for the period of three years, a motion for a new trial having been overruled. Defendant appeals, and alleges error on the part of the judge in not charging the jury as to the law of self-defense as embodied in defendant's request to charge, and in refusing to charge defendant's request to charge as to accidental killing. Defendant complains of further error in judge's charge as to the law of mutual combat.

[1-4] We have read the judge's charge as a whole, and find that he covered every phase of the law of the case fully. In his own language he told the jury what was murder, manslaughter, and self-defense. His charge was fair and impartial, and the jury could not have misunderstood it, and it was in no wise prejudicial to the defendant. He fully told them in his own language what the law of self-defense was. A judge is not bound to charge in the exact language of a request made; it is sufficient if he does so substantially in his own language, even though the request embodies a sound proposition of law applicable to the case as to the defendant's request as to the law of accidental killing, there were no facts disclosed in evidence to warrant an inference that it was accidental. The defendant and deceased got into an altercation and then in a fight, which resulted in the death of the deceased from a blow inflicted by the defendant. The defendant testified in his own behalf as to how the difficulty began and as to how the fight commenced, claiming that the deceased was the aggressor from the beginning, and assaulted him, the defendant. "That he grabbed me in the back and struck me in the back, and I grabbed around the post to hold away from him, and got into the house and got rid of him, and he jerked me back, and I had the post, and that post pulled out, and me and him both fell, and I fell backwards, and the post was on top of me. And when me and him got off of the ground he was pulling something out of his pocket. I did not know what it was, and I said, 'Josh, don't you shoot me!' and he said, 'You son of a bitch, I will get you to-night,' and I saw something coming out of his pocket, and I took the post and I jooged him that way. I did not intend to hurt him badly, but I jooged to get rid of him. If I could have jooged him enough so I could have run, I would have. I knew he was a good man. He was

the best man; always was." This does not show an accidental killing. The defendant voluntarily and knowingly intended to hurt the person of the deceased even though if he did not intend to kill him, yet if death ensue and he unlawfully struck, he is guilty of murder or manslaughter according to the circumstances of the nature of the instrument used and the manner of using it as calculated to produce death or great bodily harm or not. If the facts and circumstances show either that it was done with mischievous intent, or that it is a dangerous act and will result in serious harm, or there is a strong probability that it will, it cannot be an accidental killing. The text-books show this to be law and quotation of authority is unnecessary. In light of all the facts and circumstances and surroundings developed in the case, there was no evidence from which the jury could infer that the killing was an accident. It was either felonious or excusable on the ground of self-defense. His honor was correct in telling the jury that "where a man engaged in the commission of an unlawful act kills another, the law calls that manslaughter, even though he may not have intended to kill another."

We fail to see that there is any error in the trial in the circuit court as made by the exceptions, and all exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER and GAGE, JJ., concur.

HYDRICK, J. (dissenting). I think the evidence warranted an inference that the killing was unintentional and accidental, and therefore the trial judge erred in refusing to instruct the jury, as requested:

"That the plea of accidental killing is not an affirmative defense, and therefore does not impose any burden of proof upon the defendant, and when such plea is made, the state cannot ask for a conviction, unless it proves that the killing was done with criminal intent."

The refusal of the requested instruction, followed by the charge as to some phases of accidental killing, was clearly prejudicial. Upon that phase of the case, the court did instruct the jury as follows:

"As where a man engaged in the commission of an unlawful act kills another, the law calls that manslaughter, even although he may not have intended to kill another. That is what is known as involuntary manslaughter. So the law says where two men agree to go and have a fight—that is, to violate the law, to do an unlawful act—and as a result of that fight one of them kills the other, even although he did not intend to kill him, in the fight strikes a blow he did not intend to be a deathblow, but nevertheless became a deathblow, and was a blow resulting from the commission of an unlawful act, then the law makes that a case of manslaughter and unlawful killing of a human being, but done without malice, expressed or implied."

From the foregoing instruction, following the refusal of that prayed for, the jury may have inferred that the burden of proof as

to the plea of accidental killing was upon defendant, as they were told it was as to the plea of self-defense. If there was any evidence which warranted a reasonable inference that the killing was unintentional and accidental, the refusal of the requested instruction was error. *State v. Morgan*, 40 S. C. 345, 18 S. E. 937; *State v. Lee*, 58 S. C. 335, 36 S. E. 706; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661; *State v. Ferguson*, 91 S. C. 235, 74 S. E. 502.

The undisputed evidence showed that defendant and deceased were brothers; that on the day of the fatal encounter deceased and his father went together in a buggy to the house of Lizzie Little, where defendant was, to see him on business; that when they got there, defendant was eating supper, and, being invited, deceased ate with him; that they were perfectly friendly and chatted in a friendly way during the meal and afterwards, until deceased took offense and became greatly and unreasonably enraged at a most trivial remark made by defendant; that deceased was drinking, and, when in liquor, he was quick to take offense, quarrelsome, and dangerous; that he was the older, stronger, and better man of the two; that he threatened to whip defendant, and attempted to do so with a buggy whip, but was prevented by his father. The evidence warranted the inference that deceased was the aggressor throughout, and persisted, against the entreaties of his father, in trying to bring on an encounter which defendant tried to avoid; that, in trying to avoid the difficulty, defendant left deceased and his father at their buggy, to which they had gone preparatory to leaving, and was going back to the house, when deceased followed him, and overtook him near the porch, and caught hold of him from behind; that defendant caught hold of the porch post—said to have been a scantling—to keep deceased from pulling him down, and the post gave way and both fell backwards; that when they got up, deceased drew something out of his hip pocket, which defendant thought was a pistol, it being nearly dark, but it turned out to be a pair of wire cutters; that defendant said to deceased, "Don't shoot me," and deceased replied, "You son of a bitch, I will get you to-night." Defendant testified:

"I saw something coming out of his pocket, and I took the post, and I jugged him that way. I did not intend to hurt him badly, but I jugged him to get rid of him. If I could have jugged him enough so I could have run, I would have."

The evidence was that the blow did not break the skin on deceased's head, and that he lived some time after the blow, and talked to his father on their way home, but it is not stated how long he lived. The father testified that after the difficulty, defendant said to deceased, "If you had not went to shoot me, I would not have knocked you." It should be said that it is also inferable from the evidence that defendant was at the porch and

went to meet deceased as he approached him, and so voluntarily entered into the combat. I think the testimony clearly warranted the inference that the fatal effect of the blow was unintentional and accidental, in the legal sense of the word. Whether that was the correct inference was, of course, a question for the jury. No doubt the correct rule is that, even in self-defense, the means or force employed must not be unreasonably disproportioned to the attack. A slight blow will not justify an enormous battery. But the nature of the weapon used and the kind of blow given with it must be considered in the light of the circumstances of the defendant at the time. He may not have time or opportunity to deliberate upon and select the means of defense, or to make nice calculation to gauge the proper quantum of force necessary to repel the assault. Even when we have time for mature deliberation, our actions often result differently from what we intend. Numerous cases are found in the books where a slight blow or moderate chastisement resulted in death. Such cases are held to be accidental, when there was no intent to kill, and the instrument employed and the chastisement inflicted not unreasonable under the circumstances. But for the proof that deceased drew the wire cutters out of his hip pocket, which defendant took to be a pistol, it might well be said that the blow struck with the post was unreasonably disproportioned to the assault made upon him. But not so if he honestly and reasonably believed that he was in imminent danger of being shot, or even struck with the pliers, especially if, as he swore, his intention was not to kill, but merely to stop the assault. While it is true that the use of a deadly weapon raises a presumption of malice, yet it is only a presumption of fact, which may be rebutted. In each of the cases above cited from our own decisions, where the killing was claimed to be accidental, and it was held that that issue either had been or should have been submitted to the jury, under proper instructions, a deadly weapon was used, either a pistol or gun. The fact that a deadly weapon was used, therefore, does not necessarily deprive a defendant of the right to have that issue passed upon by the jury. Of course, if there is no evidence which would warrant a finding of accidental killing, the issue should not be submitted. But here the defendant swore that he did not intend to kill his brother, or even to hurt him badly, but intended to strike him only hard enough to stop the assault upon himself. The trial judge must have thought the evidence warranted a finding of accidental killing of some sort, for otherwise he would not have given the instruction upon that subject above quoted, which applies only to such killings in pursuance of an unlawful enterprise, or in mutual combat, which the law does not ex-

cuse. While there was evidence which warranted the finding that the combat was mutual, that was not the only view of it, for it equally, if not more than equally, warranted the finding that defendant did everything that he could in reason to avoid the difficulty, and struck only after he had been attacked without any provocation.

Therefore I think a new trial should be granted.

(101 S. C. 125)

VANCE v. FERGUSON. (No. 9098.)

(Supreme Court of South Carolina. May 5, 1915.)

1. FORCIBLE ENTRY AND DETAINER \S 24 — COMPLAINT—SUFFICIENCY.

A complaint alleging that plaintiff was the owner of a burial lot and had buried her husband and a child thereon, that defendant made an unlawful entry thereon, with force, and that defendant had continued to exclude plaintiff from the control of the lot, stated a case of forcible entry and detainer, under Civ. Code 1912, \S 4064, providing that no person shall make any entry into any lots and tenements but in case where entry is given by law, and then not with a strong hand, but only in a peaceable manner, and section 4068 providing that, if any person be put out of any lands or tenements in forcible manner, he shall have an action against the disseisor, though it may have also stated an ordinary case of trespass; the answer having admitted the entry but denied that it was with force.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. $\S\S$ 107-111, 114-120, 146; Dec. Dig. \S 24.]

2. FORCIBLE ENTRY AND DETAINER \S 9 — STATUTORY PROVISIONS—CONSTRUCTION.

A person having a deed to a burial lot in the usual form and sufficient to convey a fee-simple estate, upon which lot she had buried her husband and a child, could sue for the forcible entry and detainer thereof, under Civ. Code 1912, \S 4068, as, even though her right was only an easement, she was entitled to enjoy it free from molestation as if she held in fee, and she had the only possession that it was possible to have of a cemetery lot.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. $\S\S$ 37-51; Dec. Dig. \S 9.]

3. FORCIBLE ENTRY AND DETAINER \S 9 — POSSESSION TO SUPPORT ACTION.

If a *pedis possessio* was necessary to support such action, plaintiff had such possession, where the keeper of the cemetery was present at the time of defendant's forcible entry and protested against it, as his possession was that of plaintiff.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. $\S\S$ 37-51; Dec. Dig. \S 9.]

4. PLEADING \S 369 — ELECTION — COMPELLING ELECTION.

Where a complaint stated a case of forcible entry and detainer, and also an ordinary case of trespass, defendant's proper remedy was to have demanded of plaintiff, before or at the trial, to know the case on which he relied.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 1199-1209; Dec. Dig. \S 309.]

5. EVIDENCE \S 183—BEST AND SECONDARY EVIDENCE—ADMISSIBILITY.

The best evidence of a deed was the paper itself, and the record thereof in the office of

the register of mesne conveyances should not have been admitted without some proof aside from the record that such deed had existed but could not be found.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. ¶183.]

6. FORCIBLE ENTRY AND DETAINER ¶8 — SUFFICIENCY OF POSSESSION TO SUPPORT ACTION.

One in possession of a burial lot, suing for defendant's forcible entry and detainer thereof, was entitled to stand on her possession without proof of title.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 35, 36; Dec. Dig. ¶8.]

7. FORCIBLE ENTRY AND DETAINER ¶29 — EVIDENCE OF TITLE — COMMON SOURCE OF TITLE.

Where, in an action for forcible entry and detainer of a burial lot, the parties claimed under the same cemetery company, it was irrelevant how such company got title.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 134-140, 147; Dec. Dig. ¶29.]

8. FORCIBLE ENTRY AND DETAINER ¶29 — EVIDENCE—ADMISSIBILITY.

In an action for forcible entry and detainer of a burial lot, evidence that when a gravedigger objected to digging a grave on the lot for defendant's use, stating that the lot was plaintiff's, defendant profanely announced his determination to have the grave dug there, was admissible to show that the entry was with force, though the words were not uttered to plaintiff, as the entry with force could be proved by any witness who saw the exercise of the force.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 134-140, 147; Dec. Dig. ¶29.]

9. TRIAL ¶187— WITNESSES ¶317 — EVIDENCE—INVASION OF PROVINCE BY JURY.

Where a witness testified that he had seen a certain deed, named the witnesses on the deed, and gave some account of its contents, his testimony on cross-examination that he could not read went only to his credibility and not to his competency, and the court invaded the province of the jury by telling them to disregard his testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 414-419; Dec. Dig. ¶187; Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. ¶317.]

10. FORCIBLE ENTRY AND DETAINER ¶12 — DEFENSES—TITLE OF DEFENDANT.

Defendant could not excuse his forcible entry on land in plaintiff's possession by proof of title in himself, since his remedy was through the law and not by a forcible entry.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 57-63; Dec. Dig. ¶12.]

11. FORCIBLE ENTRY AND DETAINER ¶30 — DAMAGES—EXEMPLARY AND TREBLE DAMAGES.

Under Civ. Code 1912, § 4069, providing relative to actions for forcible entry and detainer that if the party aggrieved recover in such action, and it be found by verdict that defendant entered with force, plaintiff shall recover treble damages, plaintiff could not recover exemplary damages and then have such damages trebled; and where the court told the jury that they might allow exemplary damages, and upon the return of the verdict directed them to

treble the amount found, the verdict was excessive.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 141-145, 149-152; Dec. Dig. ¶30.]

12. APPEAL AND ERROR ¶1140 — FORCIBLE ENTRY AND DETAINER—AFFIRMANCE ON RE-MISSION.

Where the evidence made a case for exemplary damages, the judgment would be affirmed, if plaintiff would remit all of the verdict above the single damages returned by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. ¶1140.]

Appeal from Common Pleas Circuit Court of Richland County; A. W. Holman, Special Judge.

Action by Alice V. Vance against Carolina A. Ferguson. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted, unless plaintiff remits part of the recovery.

Jas. S. Verner, of Columbia, for appellant. F. Wm. Cappelmann and Jas. B. Murphy, both of Columbia, for respondent.

GAGE, J. The plaintiff claims to have sued under sections 4064-4072 of the Civil Code, and particularly under sections 4064, 4068, and 4069. The entire chapter relates to the offense of and the remedy for "forcible entry and detainer."

The subject-matter of dispute is a burial lot in Randolph Cemetery in the city of Columbia, wherein the plaintiff has buried her dead, and onto which the defendant is alleged to have forcibly entered, for the purpose and performance also to bury his dead. The parties are negroes, as were most of the witnesses. The jury returned a verdict for \$400 "single damages" for the plaintiff; and by the court's direction, pursuant to section 4069, the jury trebled that and found, all told, \$1,200 for the plaintiff. Subsequently, and on motion, the court reduced the recovery to \$800 damages because the verdict was esteemed to be excessive.

The defendant has appealed upon 15 assignments of error. These exceptions have been reduced by the argument to 6; yet there are only 4 issues to be decided, and these we shall discuss in their order, without a statement of them here.

[1] 1. The appellant makes serious contention at the threshold that the complaint states only an ordinary case of trespass, and not also a case under the statute.

The complaint alleges that the plaintiff is owner of the lot and has buried her husband and a child therein; that the defendant made unlawful entry therein, not in a peaceable manner, but with force and a strong hand; that the defendant has continued to exclude the plaintiff from the control and use of the lot. The answer admitted the entry for purposes of burial of the defendant's dead and the actual burial. It denied that the entry

was "with force and arms as alleged," but was in "a quiet and peaceable manner"; and that the defendant yet holds the lot.

The issue, therefore, was plainly made that the entry was not peaceable, but by force; and that the plaintiff was practically "put out." The statute was made to govern such a case. Before the enactment of the statute, in England and here, if a stranger with no right should enter and hold possession of the lands of another, that other might in turn enter and retake possession, and that without any legal process, but by force of his own hands.

"But this was found very prejudicial to the public peace, and it was thought necessary by several states to restrain all persons from the use of such violent methods, even of doing themselves justice." 4 Blackstone, p. 148.

So here, if the defendant entered with force and held the lot and buried his dead there, the plaintiff had no right to retake the lot by like force, but was remitted to the remedies prescribed by law.

Section 4064 of the Code defines the offense of forcible entry; and sections 4068 and 4069 provide a civil remedy for such wrongs.

There was testimony tending to show that the defendant entered the lot in issue with a strong hand. The keeper of the cemetery told the defendant he did not want to dig a grave on the lot for the defendant's use, for he was told the lot was plaintiff's. The defendant answered, "Well, I will be damned if I ain't going to have it dug if you cannot dig it." And the grave was dug and interment made in it.

It is not worth while to ascertain the legal effect of the fact if the defendant "put out peaceably" the plaintiff, and "afterwards held her out with strong hand." The allegation and proof is that force was used to enter and hold, and we shall confine the inquiry to that transaction.

[2] The defendant stoutly contends: (1) That a cemetery lot does not fall within the statute; and (2) the plaintiff's right to sue depends upon her actual possession of the lot. The plaintiff held her lot by a deed, "in the usual form and sufficient to convey to the guarantee a fee simple estate in the lot described." The statute is broad enough to protect such a holding. It prohibits the forcible entry into lands and tenements. If the plaintiff's right is only an easement, yet that does not limit her right to enjoy it free from molestation, the same as if she held in fee. *Hertle v. Riddle*, 127 Ky. 623, 106 S. W. 282, 15 L. R. A. (N. S.) 796, 128 Am. St. Rep. 364. But it was held in a late case in this state that, under a deed like the plaintiff's, she becomes the owner of the soil, qualified, it is true, by a possible change in the status, as was the event in that case.

"When a cemetery association . . . sells particular lots in a cemetery, the purchaser becomes the owner of the soil, and manifestly his right to its possession protects interments made by him from disturbance." *Ex parte McCall*, 68 S. C. 491, 47 S. E. 974.

[3] The plaintiff has the only possession that it is possible to have of a cemetery lot. There could be no *pedis possessio* in the very nature of the case; but, if such a possession be necessary, then it was present in the case at bar, for the keeper of the cemetery was present at the forcible entry and protested against it. His possession was that of the plaintiff. 19 Cyc. 1115.

In a criminal prosecution for forcible entry, there might be need of stricter proof both of the possession and the entry; but the pleadings and proof here bring this case within the letter of the civil remedy prescribed by the statute law. Most of the cases in this state on the subject of forcible entry have arisen on the criminal side of the court. They are reported as follows: *State v. Speir*, 1 Brev. 119; *State v. Cargill*, 2 Brev. 114; *State v. Bennett*, Harp. 503, 18 Am. Dec. 663; *State v. Bates*, 87 S. C. 531, 70 S. E. 170; *De Laine v. Alderman*, 31 S. C. 267, 9 S. E. 950.

Before proceeding to discuss the next and last issue, and reverting to the character of the action made by the pleadings, it may be that the complaint stated also an ordinary case of trespass, for it alleged the act of entry was willful; and the plaintiff claimed, under the judge's charge, exemplary damages therefor. And, for such acts as were proven, trespass lies.

[4] The defendant's proper remedy was to have demanded of the plaintiff, before or at the trial, to know under what flag he fought. We shall again revert to the feature of trespass when we come to consider the verdict.

2. The second issue made by the exceptions has reference to the admission and the exclusion of testimony. There was a contended illegal admission in two instances, and a contended illegal exclusion in one instance.

[5] The plaintiff did not have or did she offer in evidence the deed from the Elmwood Cemetery Company to the Randolph Cemetery Company, plaintiff's grantor. She offered in place of it the book from the office of register of mesne conveyances, whereon the original had been spread according to law. There was no proof, aside from that record itself, that such a deed had aforesaid existed and was lost. The proof of the deed's existence by the record of it alone does not bring the case within the rule announced in *State v. Croker*, 49 S. C. 242, 27 S. E. 49. The record of a deed does not prove the existence of the deed, unless its existence cannot be better shown, for the best evidence of the deed is the paper itself, and the secondary evidence of it, to wit, the record, is only allowable when the best cannot be had. There ought therefore to have been some proof, aside from the record, that such a deed had existed but could not be found.

[6, 7] But the proof of such a deed was not necessary for two reasons: (1) The plaintiff was entitled to stand on her possession, without proof of title; and (2) the defendant

undertook, without right, as shall hereinafter appear, to justify his conduct by a deed from the Randolph Cemetery Company, a common source with the plaintiff; and it was therefore irrelevant how the Randolph Cemetery Company got title.

[8] The next contended incompetent evidence was the allowance of Clark's testimony about the defendant's words quoted above. Clark was the gravedigger, and it was to him defendant expressed the determination to dig a grave there or be damned. It matters not that the words were not uttered to the plaintiff. The issue was, Did the defendant enter with force? and that could be proved by any witness who saw the exercise of force.

[9] 3. The court next excluded the testimony of a negro, named Tom Green, who undertook to testify to a deed from the Randolph Cemetery Company to his mother, for he, as her heir at law, had conveyed to defendant. Such exclusion is challenged on two grounds: First, that the testimony was competent; and, second, that by its exclusion the court judged of the facts of the case. Green testified that he had seen a deed from the Randolph Cemetery Company to his mother, and he named the witnesses on it, and he gave some account of its contents. But on cross-examination, true to his racial instincts, he testified that he could not read. The court thereupon ruled his testimony incompetent, and instructed the jury to pay no heed to it. The circumstance that he contradicted himself did not exclude him as a competent witness. It went to his credibility before the jury, and not before the court. And, when the court told the jury to disregard what Green said, it invaded another province than its own and one reserved alone for the jury.

[10] But it was not allowable for the defendant to excuse his forcible entry by proof of title in himself. If he had title, and the plaintiff would not let him in, his way to get in was through the law, and not by forcible entry. *State v. Bennett*, supra.

The statute was enacted to require people to settle their disputes about land, not by their own force, but by the peaceable process of the law. Proof that the forcible entry was justified by the wrongdoer's title would circumvent and defeat the beneficial objects of the statute. It would enable a man to violate the law and justify the act.

[11, 12] 4. The last and most serious issue is the amount of the verdict and the elements of it. The statute provides:

"If the party aggrieved recover in such action, and it be found by verdict * * * that the party defendant entered with force into the lands and tenements, * * * the plaintiff shall recover treble damages." Section 4069.

The preceding section gave "an action" to the plaintiff; and the recovery therein is damages of course. When such damage has been ascertained, the statute trebles it.

But in the instant case the court charged the jury the meaning of exemplary damages, and told the jury such damages might be awarded in this case in the event willfulness was made out. The court then instructed the jury to express its verdict as "single damages." When, therefore, the jury found \$100 single damages, there is warrant to conclude that it contained both actual and exemplary damages. Indeed, the testimony, the instruction, and the amount of the verdict excludes any other conclusion. If that be so, then the court, thereafter instructed the jury to treble that, which was to mount treble damages upon exemplary damages. Plainly the plaintiff may not have that. We think, nevertheless, the verdict for \$400 may stand, if the plaintiff so elects. If the plaintiff shall so choose, the defendant cannot complain thereat, for the proof made a case for exemplary damages, whether termed that or termed treble damages, but not for both, as computed.

Our judgment, therefore, is that there shall be a new trial, and the judgment shall be set aside, unless the plaintiff shall remit on the record, within 20 days after the filing of this opinion, all of the verdict over and above \$400; such remission to be reckoned from the date of the judgment.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 40)

CAVE et al. v. CAVE et al. (No. 9086.)
(Supreme Court of South Carolina. April 3, 1915.)

1. APPEAL AND ERROR ¶823—ARGUING EXCEPTIONS TOGETHER.

The practice of arguing exceptions together which depend upon the same basic point of law is to be commended as simplifying the consideration of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3204; Dec. Dig. ¶823.]

2. MARRIAGE ¶47—EVIDENCE—DECLARATION OF PARTIES.

The declarations of a man and woman concerning their marriage are admissible in evidence after their death, even though the legitimacy of issue depends on the decision.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 75; Dec. Dig. ¶47.]

3. MARRIAGE ¶48—EVIDENCE—REPUTE.

Testimony of common repute was admissible in evidence to prove the existence of a marriage, even though the legitimacy of issue depended on the decision.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 76; Dec. Dig. ¶48.]

4. EVIDENCE ¶67—PRESUMPTION—CONTINUANCE OF CONCUBINAGE.

The condition of concubinage once shown to exist is presumed to continue, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. ¶67.]

5. PARTITION ¶63—BURDEN OF PROOF.

Where the plaintiffs, children of a decedent, sued as his heirs for a partition, the bur-

den was on them to prove that they were heirs, and the fact that defendants denied the allegation of the complaint that the plaintiffs were seized in fee did not throw upon defendants the burden of proving that plaintiffs were illegitimate.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 183-185; Dec. Dig. ¶63.]

6. MARRIAGE ¶60—AGREEMENT TO KEEP SECRET—EFFECT.

The fact that parties agree to keep a marriage secret has no effect to invalidate it, but the fact of secrecy may be evidence against the existence of the marriage itself.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-80; Dec. Dig. ¶50.]

7. PARTITION ¶63—ISSUES—WEIGHT OF EVIDENCE.

Where plaintiffs, children of a decedent, brought suit in partition as his heirs, defendants were not bound to prove the illegitimacy of the plaintiffs beyond a reasonable doubt.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 183-185; Dec. Dig. ¶63.]

8. JUDGMENT ¶706—RES JUDICATA—PERSONS CONCLUDED—PERSONS NOT PARTIES—EVIDENCE.

Plaintiffs in partition were not concluded by the record of a prior partition suit over the same land, to which they were not parties, nor was such record admissible in evidence against them to show that defendants were the only heirs of their father, and hence that plaintiffs, also his children, were presumably illegitimate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ¶708.]

9. BASTARDS ¶3—PRESUMPTION—COHABITATION OF PARENTS.

In a partition suit by children of a decedent by a second wife against his children by a first wife, where the plaintiffs proved that their parents had occupied the same house and tilled the same soil for 30 years, and had six children born to them, which bore their name, presumption arose that such children were legitimate, which shifted upon defendants the burden of proving the contrary.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. ¶3.]

Appeal from Common Pleas Circuit Court of Barnwell County; W. B. Gruber, Special Judge.

Action by Henrietta Cave and others against Evan Cave and others. Judgment for defendants, and plaintiffs appeal. New trial ordered.

Jas. E. Davis and Thos. M. Boulware, both of Barnwell, for appellants. J. O. Patterson, Jr., and Bates & Simms, all of Barnwell, for respondents.

GAGE, J. The action is for partition of 400 or 500 acres of land lying at and near Kline station, Barnwell county. One Evan Cave, a negro and once a slave, died in 1901, seized of the land. He had aforesaid cohabited at different periods with two women; one Cassie before and after the war of the 60's; and one Eliza after that war and after the death of Cassie. Both were his wives; no issue is made about that. By Cassie Evan had five children and by Eliza he had six children.

In 1902 the children by the first marriage

and the wife of the second marriage procured the land to be partitioned amongst themselves, one-third to Eliza the wife, and two-thirds to the children of Evan and Cassie. The partition was had by action in the circuit court, but the children of Evan and Eliza were not parties thereto, and are confessedly not concluded by that record. Those children brought this action in 1912 or 1913, and made parties the second wife and all the children by both marriages. The pivotal issue for trial was this: Were Evan and Eliza husband and wife before the birth of their children, or any of them, so that such children became heirs of Evan at his death, and entitled to inherit a part of his estate? It is not denied that Evan and Eliza lived and labored uninterruptedly together at one place, that is, they occupied the same house and tilled the soil from the early 70's until the death of Evan, in 1901, and that the plaintiffs are their children, and that some time in the middle 90's, after the birth of the plaintiffs, a colored preacher named Robinson performed for them a marriage ceremony; and it is claimed by the plaintiffs that Evan and Eliza were husband and wife long before that, and some time in the middle 70's, and before the plaintiffs were ever born. The issue has been twice tried by a jury. In October, 1913, the jury found for the plaintiffs, but the presiding judge set the verdict aside, the record does not disclose upon what ground. In 1914 the jury found for the defendants, and from judgment thereon appeal is had here by the plaintiffs.

There are a multitude of exceptions. They cover 10½ printed pages; while the two arguments for the plaintiffs, very commendably, cover together only 8 printed pages.

[1] The exceptions are altogether too voluminous. One of the appellant's counsel, with great good sense, has argued the first 18 exceptions together, and has made only pointed reference to the twentieth and twenty-first exceptions. The other of appellant's counsel has expressly argued only the twenty-sixth exception. This procedure greatly simplifies a consideration of the case, and is much to be commended.

Without multiplicity of words, counsel on both sides have laid bare the real issues between them, and have cited the record and the authorities to sustain their contentions. We shall not take up the exceptions as they are written; for counsel have not done that. We shall consider the real questions which the briefs have made.

The arguments of the appellants make eight questions:

(1) Was it competent to admit in testimony for the defendants the declarations of Evan and Eliza about the character of their association, and also testimony tending to show the general repute of that association? (First to eighteenth exceptions, both inclusive.)

(2) Was it in conformity to law for the

court to charge the jury that, if it "believed from the evidence that Evan and Eliza began living together in a state of concubinage, or that the original compact between them was illicit, then the law presumes that it continued of that character until it is changed by the lawful understanding and consent of the parties into the relation of marriage"? (Twenty-sixth exception.)

(3) Was it right to charge the jury that the ordinary rule of law is that the plaintiff must prove his case by a preponderance of the testimony, without at the same time instructing the jury that the defendants had the burden put upon them to prove a defense by a preponderance of the testimony? (Nineteenth exception.)

(4) Was it right to charge the jury that an agreement to keep the fact of marriage a secret would not invalidate the marriage, but the fact of secrecy may be evidence against the fact of marriage? (Twenty-fourth exception.)

(5) Was it right to refuse to charge the jury that the defendants were bound to establish the fact of illegitimacy beyond a reasonable doubt?

(6) Was the record of the suit for partition had in 1902 between Eliza and the children by Cassie prima facie true against the plaintiffs, so that the plaintiffs had cast upon them in this action the burden to overcome that record? (Twentieth exception.)

(7) Was it right to refuse to charge the jury that, if the testimony on the issue of legitimacy shall be evenly balanced, the verdict should be in favor of legitimacy? (Twenty-second exception.)

(8) Was it right to charge the jury that the burden was on the plaintiffs to prove the fact of legitimacy? (Twenty-first exception.)

On some of these there was no serious contention, so we shall not much regard them. The brunt of the argument was directed to the first, second, third, sixth, and eighth issues.

[2, 3] We think the court was clearly right to hear testimony to prove the declaration of Evan and Eliza about the marriage, and to hear testimony about the repute of the marriage. *Allen v. Hall*, 2 Nott & McC. 114, 10 Am. Dec. 578. The issue of marriage is not coterminous with that of illegitimacy. A person may be the illegitimate child of one of two married people, or he may be the illegitimate child of two unmarried people. Had it been conceded in this cause that Evan and Eliza were married at the outstart, and thereafter bore children, then it may be that public policy would close the mouth of either to make a declaration against the legitimacy of their reputed child. The cases cited by appellant's counsel sustain that view; they do not hold that, where legitimacy is dependent upon a questioned marriage, the fact of marriage may not be proved or disproved by the declaration of the parties. And upon like principle the fact of marriage, even

though legitimacy depends upon it, may be proved by common repute.

The court was right on the second issue.

[4] A condition proven to exist is presumed as a fact to so continue until another condition is proven to exist. *Greenleaf on Ev. § 41*. So here, if the proof lead the jury to believe that Evan and Eliza at the outstart began to live in concubinage, then the presumption of fact is that they so continued until a different mode of life is proven by the plaintiffs. See *Fryer v. Fryer*, Rich. Eq. Cas. 98; *Stringfellow v. Scott*, Rich. Eq. Cas. 100, note.

[5] On the third issue the appellants do not deny that the court was right to instruct the jury that a plaintiff must prove his case by a preponderance of the testimony; for that is true. The contention is that the court ought to have gone further, and instructed the jury that the defendants were obliged to prove by a like preponderance a special defense which has been pleaded, to wit, illegitimacy. The answer plead no such defense; it merely denied the allegation of the complaint which was that the plaintiffs were seised in fee of the lands in controversy. The plaintiffs had to prove the allegations of the complaint by the greater weight of the testimony. Besides, if the plaintiffs desired a fuller instruction thereabout, then they should have requested it.

[6] No argument is made against the correctness of the fourth issue; the court's instruction in that instance was plainly right.

[7] There is no warrant to hold on the fifth issue that the defendants were bound to prove the illegitimacy of the plaintiffs beyond a reasonable doubt. Such is not the law. The appellants rely on a Maryland case where a mother, confessedly married and living with her husband, sought to bastardize one of her own offspring. *Scanlan v. Walsh*, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

[8] About the sixth issue there is more difficulty. The respondents' counsel states in his brief that the partition record was introduced by the plaintiffs as part of their case, and they, having introduced it are bound by it. But the defendants plead the record as a defense. The "case" does by inference show that the plaintiffs introduced the record, but only to prove three plats which were in it, and that the plaintiffs were not parties to it. The court refers in the charge to the introduction of the record. But at the outstart of the trial plaintiffs' counsel said:

"We take it [the court] will advise the jury * * * the sole question is as to whether or not the parties in this action were made parties to the former proceedings, and, if they were not, whether they are entitled to a share in the partition of this land."

And the court distinctly charged the jury that the plaintiffs were not bound by the partition suit unless they were parties to it.

An inspection of the record showed they were not parties. Brief reference must here be made to that suit. One Farrel had a mortgage on the land from Evan. The late Col. Robert Aldrich and Mr. Joseph Brown undertake to divide the land betwixt Eliza, as the widow of Evan, and the children of Evan by Cassie, and therein to provide for the apportionment of the Farrel mortgage debt betwixt the said wife and children. The only parties to the action were Farrel and Eliza and the children of Evan and Cassie. Some of the children of Evan and Eliza may have been in the office of the attorneys at a conference; but some of them were infants, and there is no proof that they were in court or had any adequate knowledge of what was being done. The issue as to who were the heirs at law of Evan was never litigated, except in the manner suggested, by a pro forma hearing and decree. The plaintiffs here never had a day in court at that partition. Plainly those who were not parties to a cause are not bound by the judgment therein. *McEachen v. Cochran*, 1 McCord 338; *Kennedy v. Simson*, Harp. 370; *Hardin v. Clark*, 32 S. C. 480, 11 S. E. 304. "A judgment is the final determination of the rights of the parties to the action." Code.

It is true the court instructed the jury that the plaintiffs were not bound by the judgment because they were not parties to the action. But in a subsequent and fuller part of the charge the court said:

"So far as the record is concerned, the presumption is in favor of the statements contained in that record, and when that is introduced in evidence here, and it *shows that the parties in that case who are claimed to be the heirs at law of Evan Oave were his only heirs at law, it rests upon the plaintiffs in this case to come in and show that that is not correct.*" (The italics are added.)

The record then was declared by the court to prove that the children of Evan and Cassie were the only heirs at law of Evan; and the plaintiffs were required to overcome that proof. The court gave force and effect to the statements in the record against those who were not parties to it. We are of the opinion that was not the law.

[9] The eighth and last issue we shall consider is close akin to the sixth. The court practically cast upon the plaintiffs, in the first instance, the burden of proving that they were heirs at law of Evan. When the plaintiffs proved that Evan and Eliza occupied the same house and tilled the same soil for 30 years, and that they had six children born to them, which bore their name, the presumption arose that these children were legitimate. *Vaughan v. Rhodes*, 2 McCord 227, 13 Am. Dec. 713. Thereupon the burden was shifted upon the defendants to prove that to be false which seemed to be true. The last sentence of the charge led the jury to understand that, when the defendants had proved the partition record, then the plain-

tiffs were required to prove by the "preponderance of the evidence that [Evan and Eliza] cohabited together and had children as the result of that cohabitation, and they were in a condition to contract matrimony, and they had these children as a result of that cohabitation." That is not the law. The burden was on the defendants to prove by a preponderance of the testimony that the plaintiffs, who seemed to be lawful children, were, in fact, bastards.

We are therefore of the opinion that upon the last two grounds considered the plaintiffs are entitled to a new trial; and it is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 186)

IN RE PERCIVAL'S ESTATE.

Ex parte PURCELL et al.

(No. 9110.)

(Supreme Court of South Carolina. May 20, 1915.)

DISCOVERY \Leftrightarrow 86 — EXHUMING OF DEAD BODIES—ORDERS.

Where the facts raised a presumption that the relation between one of the petitioners for the exhuming of the body of deceased and deceased was that of parent and child, and the petitioners asked for the exhuming of the body to enable them, by means of identification marks thereon, to show heirship, and thereby defeat proceedings to escheat the estate of deceased, the court properly ordered that the body of deceased should be exhumed.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 110-112; Dec. Dig. \Leftrightarrow 86.]

Appeal from Common Pleas Circuit Court of Charleston County; T. S. Sease, Judge.

Proceedings in escheat by the State, on the relation of the Board of Commissioners of the Sinking Fund of the State, through R. M. McCown, Secretary of State, as agent of the board and as escheator, against the estate of Belle Percival, otherwise known as Anne Louise Purcell (Purcell), deceased, in which Bridgett Purcell and others filed a petition by way of traverse, and also filed a petition for the exhuming of the body of deceased to enable them, by means of identification marks on the body, to show that they were he heirs at law. There were affidavits supporting the last petition, and from an order authorizing the exhuming of the body on conditions imposed, the Board of Commissioners and Patrick Purcell, an alleged heir, appeal. Affirmed.

Barron, McKay, Frierson & Moffatt, of Columbia, and Mordecai & Gadsden & Rut-

ledge and F. F. Herndon, all of Charleston, for appellants. Ficken & Erckmann, James Allan, and Thos. S. McMillan, all of Charleston, for respondents.

GAGE, J. The exigencies of the cause prevents a recital of its history and a full statement of the issues which have been made. So much of that as shall be necessary may be set out by the reporter. The appeal is from an order of the circuit court which directed the exhumation of a dead body interred in Magnolia Cemetery, at Charleston, in the last months of 1914. The object of the disinterment is to see if the body sustains certain marks which may certainly identify it as that of one who was the alleged child of Bridgett Purcell, of the Dominion of Canada.

All those who have been instructed in and who believe the Bible, believe that the living body is made in the image of God, that it is his temple, and that the "Spirit of God dwelleth in it." If that be so, then the dead body, even, ought to be and is regarded with grave concern. When it has been put away, "earth to earth," it ought not to be lightly disturbed. For that reason, an order directing its exhumation ought not to be made except upon the most serious consideration. And it matters not whether it be the body of one called saint or called sinner, if we dare to pretend to a knowledge of that character. The serious import of the order, then, makes it one which ought to be, and is in many cases, subject to appeal. While the dead body ought not to be, and is not, subject to the control and gaze of all or many individuals, it ought to be subject to the examination of her who bore it. The petitioner here claims to be the mother of her who is dead. If that be so, then she ought to have the right and privilege to undo the grave and see its inhabitant. If the testimony makes out her contention prima facie, then we think the petitioner is entitled to the order.

In the instant case the circumstances tending to prove the fact need not be recited. It is sufficient to say they show such a connection betwixt the child who is alleged to have begun life in Canada and the woman who died and was buried in Charleston as to raise the presumption that they are one and the same.

The genuineness of the witnesses who swore has not been challenged by proof, nor has that which they swore to been controverted in like manner.

We are therefore of the opinion that the order of the circuit court was properly granted, and must be, and is, affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(78 W. Va. 296)

WEEKLY et al. v. WAGNER et al.

(Supreme Court of Appeals of West Virginia. April 20, 1915.)

(Syllabus by the Court.)

1. ACKNOWLEDGMENT §25 — MARRIED WOMEN—SALE OF REALTY.

A married woman can bind her land for sale only by a writing which she duly acknowledges as the statute requires.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 133-148; Dec. Dig. §25.]

2. ACKNOWLEDGMENT §44 — BY MARRIED WOMEN.

Where a married woman by a written option executed only by her signature and seal, agrees to convey her land to another in case he elects to take the same within a stipulated time, her acknowledgment of the same made before a notary after the time fixed for such election has expired, will not, without more, revive and legalize the agreement and an election made under it within the time.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 232, 233; Dec. Dig. §44.]

Appeal from Circuit Court, Harrison County.

Suit by W. P. Weekly and others against John Wagner and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Taney Harrison, of Clarksburg, for appellants. Davis, Swartz & Templeman, of Clarksburg, for appellees.

ROBINSON, P. John Wagner and Anna Wagner, his wife, joint owners of a parcel of land, entered into a written agreement with W. P. Weekly, dated October 12, 1912, to sell and convey the parcel to him, or to whomsoever he might direct, for a consideration named. The agreement was a limited option. By its terms Weekly was granted until midnight of October 28, 1912, to elect to take the property under the terms stated. If he did not so elect within the time, the agreement was to be null and void.

The writing was executed only by the signatures and seals of the Wagners. It was not further executed by the acknowledgment of Mrs. Wagner, a married woman. Therefore it bound John Wagner but not his wife.

Weekly together with one Farnsworth, to whom he had set over his rights under the agreement, called on the Wagners and gave verbal notice of an election to take the property. This was done before midnight of October 28, 1912. The next day a notary called on Mrs. Wagner, exhibited to her the writing, and asked her if she had signed it. She replied that she had. He did not disclose to her his official character. Her husband was not present at the time. Later, the notary duly certified on the agreement that John Wagner and Anna Wagner had on October 29, 1912, acknowledged the same before him in his county.

There are other matters presented in the case and dwelt upon in argument, but in view

of the decision we have reached it is unnecessary to give time and space to them.

[1] Mrs. Wagner owned an undivided one-half interest in the land. That she could not divest herself of title thereto otherwise than by a deed or contract acknowledged in the manner prescribed by statute is conceded by counsel. *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354; *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257; *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918; *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572; *Moore v. Ligon*, 22 W. Va. 292. "A married woman cannot divest herself of title by even a written contract, unless it has been acknowledged by her in the manner prescribed by law; nor can she bind herself by an executory contract of sale, without duly acknowledging it." *Simpson v. Belcher*, 61 W. Va. 157, 159, 56 S. E. 211, 212. So, at the time of the election by Weekly and Farnsworth to take the property under the executory contract of Mrs. Wagner, a married woman, she was not bound by the contract. The contract not being binding as to her, the election under it could be no more binding than the contract itself. That election must get any force that it may have from the contract authorizing it. The contract having had no legal force, the election had none. As to Mrs. Wagner the whole transaction was a thing dead in law from the date of the writing to midnight of October 28, 1912. The other parties, Weekly and Farnsworth, could base no legal right against her on it or anything done under it. In law there was no contract as to Mrs. Wagner, and no election to take her land.

[2] All this being true, did the acknowledgment made by Mrs. Wagner after the stipulated time for election had expired, avail anything? Did it revive the lifeless contract and the futile election under it? We hold that it did not. In reason, how could it? The acknowledgment was not in such terms as to make a new contract. Neither in terms nor in effect did it say that Mrs. Wagner meant to give legal life to that which was legally dead. She merely acknowledged a paper that could then have no effect by its own terms. The acknowledgment could not make it binding for an election to take under it, for the time in which there could be an election under it had expired. It required both a binding option and an election under the same to bind Mrs. Wagner. We have neither in the case. For when the election was made, the writing was not binding on her, and when the acknowledgment of the writing was made by her, the time for election under it had passed. Weekly and Farnsworth never undertook to bind Mrs. Wagner to the agreement until a time when by the very terms of the paper it was futile to do so, the day stipulated for election having passed. At no time was there a legal meeting of the minds of the parties on the terms of the agreement. An agreement by one that

another may have his property if the latter elects to take it before a previous midnight, is surely legally ineffective.

The argument that the acknowledgment by Mrs. Wagner was a confirmation or ratification of the invalid contract and election, is not sound. A court of equity in this suit for specific performance as against her, cannot well say that by the mere act of acknowledging a paper dead even by its own terms she meant to divest herself of title to her land. The implication is indeed remote. Nor is it consistent with the strictness required in the passing of the title of a married woman.

The specific performance prayed for by Weekly and Farnsworth was properly denied and their bill rightly dismissed. They asked no separate enforcement against John Wagner, even if it would have been just and equitable in the discretion belonging to a court of equity in such a case as this to have granted enforcement as to him alone. We affirm the decree.

LYNCH, J., absent.

(76 W. Va. 331)

HORNOR v. LIFE.

BUTCHER v. LIFE et al.

(Supreme Court of Appeals of West Virginia.
April 20, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 356—APPEAL FROM ONE DECREE—EFFECT ON OTHER DECREES.

An appeal in a cause, within time as to one decree therein, does not bring up for review other decrees which were appealable, but as to which the time fixed by law for appeal has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1926, 1927; Dec. Dig. \S 356.]

2. EQUITY \S 419—DECREE PRO CONFESSO—CORRECTION OF ERRORS—MOTION.

The motion sanctioned by Code 1913, ch. 134, sec. 5 (sec. 4979), is simply for the purpose of correcting error apparent on the record, as upon appeal or writ of error. It can not avail to open the cause to let in a defense that was not put in issue and litigated.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 972-985; Dec. Dig. \S 419.]

3. APPEAL AND ERROR \S 1026—HARMLESS ERROR—NONPREJUDICIAL RULINGS.

On appellate process a party can not take advantage of an error that does not prejudice his rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4029, 4030; Dec. Dig. \S 1026.]

Appeal from Circuit Court, Lewis County.

Suits by C. A. Hornor against Noah Life, administrator, etc., and by Isaac F. Butcher against Noah Life, administrator, etc., and others. From an order denying a motion to reverse decree of sale, Isaac F. Butcher appeals. Affirmed.

C. C. Higginbotham, of Buckhannon, for appellant. Linn, Brannon & Lively, of Glenville, C. L. Smith, of Charleston, and Brannon & Stathers and W. G. Stathers, all of Weston, for appellees.

ROBINSON, P. A suit was brought against Isaac Butcher in his life time, to subject his lands to the payment of judgments which had been rendered against him. Pending the suit he died, and by a bill of revivor and supplement the cause was converted into a general creditors' suit to sell the lands of the decedent for the payment of the liens and debts outstanding against the same. The widow, heirs, and other proper parties were brought in. The cause proceeded to a decree adjudging the liens and debts and directing a sale of the lands.

The bill of revivor and supplement exhibited the will of the decedent. By the will the testator, among other things, had devised to his widow a part of his lands by the following meager description: "One hundred acres of land off the lower end of my farm embracing the house and building." The will said nothing about this devise being in lieu of dower. The land devised was of course involved in the suit for the enforcement of liens. Pending the suit upon the bill of revivor and supplement which brought in the widow and heirs, the widow conveyed the one hundred acres devised to her, to Isaac F. Butcher, one of the heirs, by the same meager description used in the will. Though both the grantor and the grantee were parties to the cause involving the land of which Isaac Butcher died seized and possessed, neither of them took any step therein to save the one hundred acres from a sale by decree. The bill was taken for confessed as to them. Later, Isaac F. Butcher proved before the commissioner to whom the cause had been referred, a large debt in his favor against the estate of the decedent, which was carried into and provided for in the decree directing a sale of the lands. Though the widow devisee had conveyed a part of these very lands to him, neither she nor he said one word in the cause against a decree for the sale of the one hundred acres. On the other hand, Isaac F. Butcher appeared in the cause and took a decree for his debt against the land that had been conveyed to him by the widow.

More than three years after the pronouncement and entry of the decree of sale, Isaac F. Butcher filed his bill to review the cause for error. Therein he set up the conveyance of the one hundred acres, made by the widow to him, alleged that this land had been devised to the widow in lieu of dower, and assigned that because it was so devised, the decree of sale was erroneous in embracing the same. Further, he undertook to assert that even if the one hundred acres was not devised in lieu of dower, the decree of sale was errone-

ous because, in the proceedings leading to its entry, dower in the lands of the decedent had not been assigned to the widow. Upon demurrer to the bill of review, the court was of opinion that the demurrer was well taken. Plainly the bill of review was filed beyond the time allowed by law. Thereupon the plaintiff therein asked to amend in an immaterial and irrelevant particular, which request was overruled. Then he sought to have his bill of review treated as a motion under Code 1913, ch. 134, sec. 5 (sec. 4979). The court would not so consider it, but sustained the demurrer and dismissed the bill of review.

Thereafter, Isaac F. Butcher proceeded by motion under the statute mentioned above, and within the time allowed therein, to obtain a review of the decree of sale for the alleged errors he had formerly relied on in the bill of review. Some proceedings were had under this motion, which need not be here recited. The motion, upon final hearing of the same, was denied. The court perhaps went further in its order made in the disposition of this motion than was pertinent in the premises. It was of opinion that the description of the land in the devise and deed was so indefinite as to be invalid. But all that we shall not detail. The matter can have no bearing on proper decision herein. The same may be said of a subsequent motion made for a change or amendment of the order of which we have last spoken.

[1] Upon the appeal allowed to Isaac F. Butcher, he attacks as erroneous the decree of sale in the original cause, entered March 18, 1899; the decree dismissing the bill of review and refusing to treat the same as a motion under the statute, entered October 30, 1903; and the order denying the statutory motion to reverse the decree of sale for error, entered November 29, 1912. Each of these is a final decree or order in the particular proceeding to which it relates. Each was appealable. But the appeal herein, which was allowed within the statutory period only as to the order or decree of November 29, 1912, does not bring under review the other decrees. As to each of them, no appeal was taken within the time fixed by law. They are beyond review. Let us again iterate an established rule:

"An appeal in a cause, though within time as to some decrees, cannot bring up for review any appealable decree as to which the time fixed by law for appeal has expired." *Morrison v. Leach*, 84 S. E. 177.

The appeal brings before us only the order or decree of November 29, 1912. Did the court by that order improperly deny the motion made by Isaac F. Butcher to reverse the decree of sale for error? We have noticed the alleged grounds on which the motion was based. They can not avail.

Though Isaac F. Butcher was a party defendant to the cause, proving a debt in his favor as against the lands, he made no is-

sue that the one hundred acres had been devised to the widow in lieu of dower. Nor did the widow, his grantor of the one hundred acres, who was also a party to the cause, raise any such issue. They both confessed the scope of the bill that the land devised to the widow and now claimed by Isaac F. Butcher was subject to be charged with the liens and debts of the decedent, for which it was afterwards ordered sold. This claim of Isaac F. Butcher that it was not so subject, made as a basis of the motion to reverse for error, was never mentioned in the suit. The court was not asked to decide upon any such claim, and made no decision in regard to the same. The court was not informed by any pleading or in any other way that such claim existed. Nor was it the province of the court to inquire outside the record as to such a matter. How can it be urged that the court erred, when it was not called upon to decide, and did not decide? As the parties allowed the record to be made, no error appears in charging the one hundred acres with the liens and debts of the decedent. The bill sought so to charge it. The widow did not claim it in lieu of dower. Her grantee did not inform the court that he made claim to the same. Both stood by and confessed the bill which asserted that the lands should be sold for liens and debts. On the face of the will exhibited in the cause, the one hundred acres was chargeable as they confessed it to be. What error was there in taking the matter as they confessed it? What else could the court do?

[2] The motion overruled by the order of November 29, 1912, was one simply to reverse the decree to which it related for any error for which an appellate court might reverse the decree. Code 1913, ch. 134, sec. 5 (sec. 4979). It could not be made the implement of opening the cause to let in something that was not litigated therein. No such motion can be made to pertain to something not theretofore involved in the issues and litigated in the cause. It may have been the fault of the appellant that the decree of sale did not involve a litigation of his claim to the one hundred acres, but he could not cure that fault by the use of the statutory motion which he employed. The language of Judge Sanders in *Ferrell v. Camden*, 57 W. Va. 401, 50 S. E. 733, is pertinent:

"This motion is only for the purpose of correcting an erroneous decree, and not to enable the defendants to open up the case for the purpose of making defense."

[3] But, says the appellant, the decree of sale was erroneous in that dower was not assigned to the widow, and the motion reached such error. True, it may have been error to sell the land for the liens and debts of the decedent without first assigning dower to the widow. But how is the appellant Isaac F. Butcher prejudiced by that? One can not on appellate process take advantage of an

error that does not prejudice his rights. We need not cite authority for this proposition. The failure to assign dower to the widow was favorable to Isaac F. Butcher as a complaining creditor in the cause. Moreover, his contention that dower should have been assigned to the widow is directly inconsistent with his claim that the one hundred acres was devised her in lieu of dower.

As we have seen, the motion to reverse the decree of sale was properly denied as to both grounds on which it was based. Though the order denying the motion embodies some immaterial considerations, the absence of these immaterial considerations, or the grant of the amendment of the order, sought below by appellant, would have given his motion no better standing. The finding of absolute want of ground for the motion to reverse the decree of sale, precludes and forecloses consideration of such matters. The order will be affirmed.

LYNCH, J., absent.

(76 W. Va. 203)

STODDARD et al. v. JARRETT et al.
(Supreme Court of Appeals of West Virginia.
April 20, 1915.)

(Syllabus by the Court.)

1. BUILDING AND LOAN ASSOCIATIONS \Leftrightarrow 33
—MONEY ADVANCED ON UNMATURED STOCK
—CONTRACT TO REPAY—USURY.

A contract with a building and loan association for the repayment of money advanced upon unmatured stock, which provides for payment of the premium bid for the loan, not in a lump sum, but in monthly installments for a definite time, is not usurious.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 43-47, 49-59; Dec. Dig. \Leftrightarrow 33.]

2. EQUITY \Leftrightarrow 181—ANSWER—TIME FOR FILING.

Defendant may file his answer at any time before final decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 417; Dec. Dig. \Leftrightarrow 181.]

3. EQUITY \Leftrightarrow 410—COMMISSIONER'S REPORT—EXCEPTIONS—TIME FOR TAKING.

It is no abuse of discretion to permit exceptions to be taken to a commissioner's report before it is acted on by the court, although several terms have passed since its filing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905-919; Dec. Dig. \Leftrightarrow 410.]

Appeal from Circuit Court, Taylor County.

Suit by Josiah C. Stoddard and others, receivers, etc., against Linnie Jarrett and others. From a decree for defendants, plaintiffs appeal. Reversed and remanded.

Warder & Robinson, of Grafton, and Forrest W. Brown, of Charles Town, for appellants. John L. Hechmer, of Grafton, for appellees.

WILLIAMS, J. Plaintiffs, receivers of the Washington National Building & Loan Association, have appealed from a decree of the

circuit court of Taylor county, rendered in their favor on the 28th of October, 1913, on the ground that the amount of money decreed them is less than they are entitled to. The suit was brought in 1907 by the aforesaid building and loan association to enforce the lien of a trust deed executed by Linnie Jarrett and Absalom Jarrett, her husband, to Josiah C. Stoddard and Addison G. Du Bois, trustees, dated March 1, 1898, upon certain real estate in the city of Grafton, in trust to secure the payment of a conditional bond of same date for \$4,000, made by the grantors to said building and loan association. Mrs. Jarrett had subscribed for 20 shares of stock in the association, and had obtained an advancement of \$2,000. The conditions of the bond were that she would repay to the association, its successors and assigns, in the manner provided by its charter and by-laws, the sum borrowed, as follows: First, 60 cents per share each month, as dues; second, 50 cents per share each month, as interest on the money loaned; and, third, 50 cents per share a month as premium bid by her for the loan. She also bound herself to pay such fines, charges, and assessments as may be imposed under the charter, by-laws, and regulations of the association, and all taxes, insurance premiums, and assessments on the real estate given as security for the faithful performance of her obligations. Payments were to continue until such time as said shares of stock should be fully paid up. The bond, as well as a by-law of the association, provided that no payment on account of stock or premiums should be exacted for a longer period than 84 months, but that, if the stock did not mature in that time, then 6 per centum per annum should be paid, in monthly installments, on the money advanced on the stock until it matured, at which time all payments were to cease, and the deed of trust securing the bond canceled. The bond and by-laws also provided that if default be made and permitted to continue for three months, without paying all interest, premiums and monthly dues on stock, and fines for the nonpayment thereof, then credit on the advancement was to cease, and the advancement, with interest thereon, the monthly dues, and fines were to be considered as presently due and payable. The terms of the trust deed conformed to the conditions and provisions of the bond.

Mrs. Jarrett subscribed for 20 shares of stock in 1893, and on the 1st of March, 1898, was granted the aforesaid loan. She paid the monthly interest, premiums, and dues on the stock until October, 1900, when she defaulted.

The cause was referred to a commissioner to ascertain and report the balance due plaintiff. He completed his report on the 15th, and filed it on the 27th of April, 1908, showing a balance due the said building and loan association on that date of \$1,021.70.

No further proceedings were had in the cause until the 26th of April, 1911, at which time plaintiff moved for a final decree. Mrs. Jarrett and her husband appeared, tendered their joint answer and exceptions to the commissioner's report, and were permitted to file same, over the objections of plaintiff; and the cause was continued, with permission to both plaintiff and defendants to take further proof. In the meantime, the business of said association had been committed by the corporation court of Alexandria, Va., and by the United States Circuit Court for the Northern District of West Virginia, to Josiah C. Stoddard and Douglas Stuart, receivers, with authority to sue to collect its assets. They filed their petition in this cause and were substituted as plaintiffs.

This cause was finally heard on the 28th of October, 1913, on the commissioner's report and exceptions thereto, and the court restated the account as follows, viz.:

Amount of loan.....	\$2,000 00
Credits.	
Amount of dues paid.....	\$1,008 00
Interest on dues at 6 per cent. for 3½ years (average time between November 1, 1893, and October 31, 1900)	214 20
Amount of premiums paid.....	320 00
Interest on premiums at 6 per cent. from February 1, 1898, to October 31, 1900	28 05
Balance due as of Oct. 31, 1900.....	\$1,570 25
Interest on same at 6 per cent. from October 31, 1900, to October 27, 1913	\$429 75
	335 20
Balance due plaintiffs from defendants, October 27, 1913.....	\$764 95

—and decreed accordingly.

[1] It thus appears that the court not only gave Mrs. Jarrett full credit for all monthly dues she had paid on stock subscription, from the time she became a subscriber until she defaulted, but also allowed her interest on the same, and on the premiums paid, at 6 per cent. per annum. The transaction was treated as one between ordinary debtor and creditor, and Mrs. Jarrett given credit for the monthly dues and premiums paid, as if they were partial payments, apparently on the theory that the contract was usurious. But it was not usurious. The length of time beyond which the monthly premiums bid for the loan were not to be paid, being fixed at not more than 84 months, by the by-laws and the terms of the bond, relieved the contract from the charge of usury. There was no uncertainty as to the maximum amount of premium the borrower would be required to pay for the loan; it could be ascertained by a simple calculation. Such a contract by a building and loan association is not in violation of section 26, c. 54, Code 1913 (sec. 2025), and is not usurious. This point has been decided in numerous cases, and needs not to be elaborated in this opinion. See the following cases: Thompson v.

Nat'l Mutual B. & L. Ass'n, 57 W. Va. 551, 50 S. E. 756; Burkheimer v. Same, 59 W. Va. 209, 53 S. E. 372, 4 L. R. A. (N. S.) 1047; Tabaney v. Wash. Nat'l B. & L. Ass'n, 59 W. Va. 296, 53 S. E. 791; and Brown, Trustee, v. Rockey, 60 W. Va. 268, 54 S. E. 343.

The ultimate success of a building and loan association depends upon each stockholder paying his dues, and a member who has secured an advancement from the association upon his stock will not be permitted to gain an advantage over the others by defaulting in his payments. The court stated the account on an improper basis, which gives Mrs. Jarrett an advantage over other stockholders who continued to pay their monthly dues to the association. Her exceptions to the commissioner's report should have been overruled, and none having been taken thereto by plaintiffs, the report should have been confirmed, and a decree rendered in favor of plaintiffs for the amount therein found, including interest to the date of the decree. Plaintiffs' debt was the first lien. A second lien was decreed upon the property in favor of Melville Peck, as to which there is no complaint.

[2, 3] It was not error to permit defendants to file their answer, although the case had been pending for four years. They could file their answer any time before final decree. Section 53, c. 125, Code (sec. 4807). Nor was it an abuse of discretion to permit exceptions to be taken to the commissioner's report, after many terms of court had intervened between its filing and the date of the exceptions. The statute authorizes the granting of such permission, at any time after the report is filed, and before it is acted on. Section 7, c. 129, Code (sec. 4852).

The decree will be reversed, in so far only as it ascertains the amount of plaintiffs' lien, as of October 27, 1913, to be \$764.95, and in all other respects it will be affirmed; and this court will enter a decree changing the amount of plaintiffs' lien, as of October 27, 1913, to \$1,366.19, which sum is ascertained by calculating the interest on \$964.83, the balance found by the commissioner, as of November 21, 1906, from that time to the date of the final decree. And the cause will be remanded for further proceedings. Plaintiffs are entitled to costs.

ROBINSON and LYNCH, JJ., absent.

(16 Ga. App. 237)

SHEFFIELD v. STATE. (No. 6308.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. HOMICIDE \Leftrightarrow 33—VOLUNTARY MANSLAUGHTER—DEFENSE OF BROTHER—"OTHER EQUIVALENT CIRCUMSTANCES."

To authorize a conviction of voluntary manslaughter, there must be some actual assault upon the person killed, or an attempt by the

person killed, to commit a serious personal injury on the person killing, or other equivalent circumstances (italics ours), to justify the excitement of passion and to exclude all idea of deliberation or malice, either expressed or implied. Pen. Code 1910, \S 65. As brothers have the right of mutual protection under the law, an actual assault by the person killed upon the brother of the person killing, or an attempt by the person killed to commit a serious personal injury upon the brother of the person killing, is included within the above provision, "or other equivalent circumstances." Warnack v. State, 3 Ga. App. 590, 60 S. E. 288; Armistead v. State, 18 Ga. 704 (3).

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 54; Dec. Dig. \Leftrightarrow 33.

For other definitions, see Words and Phrases, First and Second Series, Other.]

2. HOMICIDE \Leftrightarrow 255 — VOLUNTARY MANSLAUGHTER—EVIDENCE.

The jury might well have found the defendant guilty of murder, but, there being some evidence from which they could infer that the defendant, while in a sudden heat of passion, aroused by seeing his brother and the deceased quarreling, and by the sudden and accidental discharge of a pistol in the hands of the deceased, shot and killed the deceased, their verdict of voluntary manslaughter is authorized by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S\S$ 539-541; Dec. Dig. \Leftrightarrow 255.]

3. DENIAL OF NEW TRIAL APPROVED.

No error of law is complained of, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Laurens County; W. W. Larsen, Judge.

Harvey Sheffield was convicted of voluntary manslaughter, and brings error. Affirmed.

Geo. B. Davis and S. P. New, both of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 334)

HAYES et al. v. STATE. (No. 6460.)

(Court of Appeals of Georgia. May 10, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \Leftrightarrow 1156—APPEAL—DISCRETIONARY RULING—DENIAL OF NEW TRIAL—CONFLICTING AFFIDAVITS.

The discretion of a trial judge in refusing a new trial on the ground of newly discovered evidence will not be controlled unless manifestly abused. Tilley v. Cox, 119 Ga. 867-872, 47 S. E. 219. Where a motion for a new trial is based upon alleged newly discovered evidence, and affidavits are introduced, sustaining and disputing this ground of the motion, "the trial judge is the trier of the facts, and it is his province to determine the credibility of the conflicting facts and contradictory witnesses. A reviewing court will not in any such case control his discretion as to the comparative credibility of the witnesses who testified in support of the motion and those who swore to the contrary." Fouraker v. State, 4 Ga. App. 692, 62 S. E. 116.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 3067-3071; Dec. Dig. \Leftrightarrow 1156.]

2. CRIMINAL LAW — 942—NEW TRIAL—NEWLY DISCOVERED IMPEACHING EVIDENCE.

It is well settled that evidence that a witness for the state made declarations since the trial, that his testimony given upon the trial was false is not cause for a new trial, even though the declarations be made under oath (Clark v. State, 117 Ga. 254, 43 S. E. 853; Jordan v. State, 124 Ga. 417, 52 S. E. 768); and newly discovered evidence which merely goes to the credit of a witness, even though he be the sole witness upon whose evidence the verdict was returned, is not cause for a new trial (Hunt v. State, 81 Ga. 140 [5], 7 S. E. 142).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. 942.]

3. CRIMINAL LAW — 939, 945—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The accused was convicted, under section 781 of the Penal Code of 1910, of the specific charge of cutting and maliciously injuring the wire fence of J. F. Stokes, Jr., which was described as the wire fence around a certain field. The alleged newly discovered evidence tended to establish the fact that another and different fence from the one charged in the accusation was the fence actually cut, and without considering in this immediate connection the counter showing, which tended to establish that the identical fence described in the accusation was in fact the fence actually cut, it appears that by the exercise of ordinary diligence, the accused or their counsel could probably have ascertained, by an inspection of the premises between the date when the affidavit was sworn out on December 21, 1914, and the trial of the case on January 18, 1915, what wire fence had in fact been cut and partially destroyed by some person or persons. Then, too, in view of the countershowing made in behalf of the state, it does not appear that the alleged newly discovered evidence would be likely to produce a different result on a second trial, especially since all the alleged admissions by the state's witness since the trial as to the falsity of his evidence given on the trial are emphatically disputed by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2327, 2336; Dec. Dig. 939, 945.]

4. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict returned, and the court did not err in overruling the motion for a new trial.

Error from City Court of Hazlehurst; Jas. R. Grant, Judge.

B. F. Hayes and others were convicted of cutting and maliciously injuring a wire fence, and bring error. Affirmed.

Gordon Knox, of Hazlehurst, for plaintiffs in error. J. Mark Wilcox, Sol., of Hazlehurst, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 267)

MORGAN v. STATE. (No. 6243.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. HOMICIDE — 309 — EVIDENCE — INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

Under the conflicting evidence and the defendant's statement, the jury would have been

authorized to find a verdict of murder, or of voluntary manslaughter, or justifiable homicide. This being true, the trial judge did not err in charging the law of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. 309.]

2. CRIMINAL LAW — 814 — INSTRUCTIONS — EVIDENCE.

The court did not err in refusing to give the requested charges, as set out in paragraphs 2, 3, 4, and 5 of the amendment to the motion for a new trial. While these requests contain correct statements of law, under the evidence these were not involved as issues in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. 814.]

3. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict; no error of law appears; and the judgment of the court overruling the motion for a new trial is affirmed.

Russell, C. J., dissenting.

Error from Superior Court, McDuffie County; C. B. Conyers, Judge.

Cicero Morgan was convicted of crime, and brings error. Affirmed.

John T. West, of Thomson, for plaintiff in error. A. L. Franklin, Sol. Gen., of Augusta, and J. B. Burnside, of Thomson, for the State.

BROYLES, J. Affirmed.

RUSSELL, C. J. (dissenting). In my opinion the circumstances in proof were ample, when taken in connection with the statement of the defendant, to have required the trial judge to give the jury; and I think the omission to do this necessarily crippled the defendant in his defense, and weakened the effect of the testimony offered in his behalf. To say the least of it, there is conflict in the evidence as to whether the defendant knew of the relations between his wife and the deceased. There is no evidence to show that he sanctioned these illicit relations. And, though the defendant and his wife were separated, he stated that, when the deceased threatened to shoot into the room (as testified to by several witnesses), he was pleasantly chatting with his wife. Even if the couple were separated, the marriage had not been abrogated by law, and the jury were so likely to be misled by the mass of testimony upon this point that they should have been instructed that it is within the power of spouses who have been separated to resume at pleasure the conjugal relation. I think, therefore, the judgment refusing a new trial should be reversed.

(16 Ga. App. 280)

BOOKER v. STATE. (No. 6295.)

(Court of Appeals of Georgia. May 4, 1915.)

*(Syllabus by the Court.)***1. HOMICIDE — §309 — VOLUNTARY MANSLAUGHTER—INSTRUCTIONS—EVIDENCE.**

The evidence as a whole authorized the charge covering the law of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.]

2. CRIMINAL LAW — §825—INSTRUCTIONS—REQUESTS—MANSLAUGHTER.

The court did not err in omitting, in connection with the instructions touching the law of manslaughter, to charge that "provocation by words, threats, menaces, etc., shall in no case be sufficient to free the person killing from the guilt and crime of murder," especially in the absence of a written request that this part of section 65 of the Penal Code of 1910 be so given in charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.]

3. CRIMINAL LAW — §1059 — APPEAL — INSTRUCTIONS—EXCEPTIONS.

Failure to give an additional charge cannot be taken advantage of by exception to a correct charge actually given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.]

4. SUFFICIENCY OF EVIDENCE.

There was ample evidence to authorize the verdict, and there is no substantial merit in the various specific assignments of error.

Error from Superior Court, McDuffie County; C. B. Conyers, Judge.

Robert Booker was convicted of crime, and brings error. Affirmed.

M. L. Felts, of Warrenton, for plaintiff in error. A. L. Franklin, Sol. Gen., of Augusta, and Jno. M. Graham, of Atlanta, for the State.

WADE, J. The first and second grounds of the amendment to the motion for a new trial complain that the court erred in giving in charge to the jury section 65 of the Penal Code, relative to voluntary manslaughter (except the part relating to provocation by words, threats, menaces, etc., which was omitted), and instructing them further that if they found the defendant guilty of manslaughter what the form of their verdict should be; the alleged error being that the evidence as a whole did not warrant any reference whatever to the law of voluntary manslaughter.

[1, 4] The killing occurred on Sunday at a negro camp ground, where, one witness declares, there were present more than a thousand people. Making due allowance for exaggeration, it is evident there were a large number of negroes at this meeting, some drawn there no doubt by religious fervor, some by their gregarious instincts alone, and still others by the opportunities always offered at such gatherings to stir up trouble, settle old grudges, and render themselves, by

noise and swagger or even by violence and brutality, not only detestable to every law-abiding person present, but heroic and admirable in the opinion of the large and ignorant majority. Among others, who like Satan "came also among them" (Job I, 6), were the slayer and his victim; and from some of the testimony, as well as from the statement of the accused, it appears they were both charged with Satanic impulses when they arrived on the scene, for it is evident, from the statement of the accused, that he had with sufficient cause cherished a grudge against the deceased for about two years; and, from the conduct of the deceased as depicted by some of the witnesses, it may be inferred that he was filled to overflowing with black rage against the defendant, even before they encountered each other on this day so fatal to him. One of the witnesses for the state (who testified that he was a trustee of the church where the homicide occurred, and was an "officer" and "marshal" there on that day) stated that he saw the defendant a few minutes before the shooting, and that he was down at the "preacher's tent," and left Will Hall, the deceased, "down there talking to the presiding elder and the bishop," and that soon after Hall came out and passed by the witness, and a few minutes later the fatal encounter between him and the deceased occurred. To reconcile the conference between the deceased and his bishop and the presiding elder in the "preacher's tent" with the violent language and conduct ascribed to him by some of the witnesses so short a time thereafter is a task too difficult for the Caucasian mind. Out of the great number of those present, many, doubtless, witnessed some part of the tragedy which marked that day in the way that, unfortunately, so many religious gatherings of people of their race are distinguished, and many witnesses testified at the trial to what they saw or failed to see, so that the evidence as a whole is on some points confusion worse confounded.

Without attempting to even briefly review the conflicting statements as to the fatal encounter, it is enough to say that there was testimony in behalf of the state from which the jury could have legitimately inferred that the deceased was walking away from the accused at the time the fatal shot was fired, and was making no effort whatever to inflict upon him any serious bodily injury, much less to commit a felony upon his person. On the other hand, there was some testimony which tended to justify the defendant altogether, and some which tended to show that the slayer and his victim engaged in mutual combat, urged thereto by a sudden and violent impulse of passion, and that the killing was free from any mixture of deliberation whatever. The testimony of a witness for the defense showed that the deceased came up to the defendant, abused

and cursed him vilely, and told the latter that he had a pistol "but was afraid to use it," and, when the defendant replied that he was not afraid to use it, "they both started for their pistols, and Rob [the defendant] got his out first and shot him." The deceased "never did get his out until after Rob had done shot him, and after he shot him he had it in his hand." This witness further stated that both started to get their pistols out, but the defendant got his first, as he had his coat on his arm "and brought his pistol out from under his arm"; that the shirt of the deceased was open in the front, and his pistol "was down in his shirt bosom," as she saw the handle, and it appeared as if he "got his hand hung," and therefore did not get his weapon out as quickly as the defendant but "he had it in his hand when he fell." There was testimony from other witnesses for the defense, which tended to corroborate this statement, and more than one testified that the deceased partially turned as the defendant fired, and this accounted for the fact that the ball from the defendant's pistol entered the back of the deceased, near his back bone. Another witness said that when the shooting occurred the two parties were standing face to face; that the deceased was shot in the back because "when Rob raised his pistol he [the deceased] whirled." Several of the witnesses corroborated the statement, already referred to, that, at the time Booker shot Hall, Hall was trying to get his pistol out, and that the defendant, as they expressed it, simply "beat him to it."

This testimony, narrated above, might rather indicate that the defendant shot to prevent the deceased from taking his life, and in so doing was acting under the fears of a reasonable man; but, according to some of the evidence, immediately after the shooting the defendant, in response to an inquiry why he had killed the deceased, said: "I got tired of that man running over me. He had been running over me for three years, and I got tired of it." And from the abuse which several witnesses say the deceased heaped upon the head of the defendant, coupled with the taunts which reflected upon his personal courage, it may be readily determined, not only that the defendant intended to engage in a combat with the deceased, but also that this abuse excited his passion to the point where it became irresistible, and absolutely controlled his conduct. The defendant in his statement recounted one gun fight and several past clashes between himself and the deceased, and told how the deceased had cursed, abused, and threatened him more than once, and had only a short time before the killing (apparently earlier in the same day) "fussed" with the defendant's wife and "stepped on her foot," and he further asserted that the deceased, at the time of the killing, advanced upon him, and he retreated and admonished

the deceased "to stand back and talk to" him; that the deceased said: "You got a pistol, ain't you? * * * I don't care if you have, you God damned son of a bitch; all you good for is to tell a lot of God damned lies"—and ran his hand into his bosom, trying to get his pistol. Whereupon the defendant pulled his pistol from under his coat which he had on his arm, and fired.

The action of the deceased on the occasion of the homicide, in putting his hand on his pistol in his bosom, taken in connection with his abusive language and his attitude towards the defendant at that time, though not sufficient to justify the homicide, might be regarded as an invitation to the defendant to engage in a combat with deadly weapons, and thereby render the homicide manslaughter. In the case of *Young v. State*, 10 Ga. App. 116, 72 S. E. 935, it was said:

"Where a baseball player and an umpire become involved in a quarrel over a point in the game, and while the umpire is advancing towards the player with his hand in his pocket the player pulls a pistol and kills the umpire, a verdict finding the player guilty of voluntary manslaughter is not contrary to law, nor without evidence to support it."

See, also, *Fallon v. State*, 5 Ga. App. 659, 63 S. E. 806; *Anderson v. State*, 14 Ga. App. 607, 81 S. E. 802; *Malone v. State*, 49 Ga. 217.

Taking into consideration the statement of the accused as to the previous trouble between himself and the deceased, and the alleged conduct of the latter towards him and his wife, his passions may have been thereby aroused to the danger point, and whether there had been enough "cooling time" thereafter, being a question for the jury, it may be that he was still under the influence of passion which became irresistible when the deceased accused him of cowardice, and "dared" him to draw his pistol, and attempted to draw his own pistol. It is clearly manifest therefore that the judge committed no error in charging the law of manslaughter, nor was the verdict contrary to law or without evidence to support it, as there was ample testimony from which the jury could determine that the killing came strictly under the definition of voluntary manslaughter.

It was entirely within the prerogative of the jury (Acts 1899, p. 41; Penal Code of 1910, § 65) to say that a period of time, no matter how long, was too short for reason to have reasserted its dominion under the circumstances of provocation shown in this particular case. In the case of *Hightower v. State*, 14 Ga. App. 248, 80 S. E. 684, Russell, C. J., speaking for the court, said:

"There are sometimes circumstances which justly arouse an indignation which glows more ruddily with the passage of time (a passion which is not really 'irresistible,' as defined by law, until it passes from red to white heat), and by every rule of reason, as well as by the legislative enactment of 1899, the sufficiency of 'cooling time' should be submitted to the jury; for the jury is composed of men of various minds, and generally includes those whose expe-

rences have been attuned to different touches upon the varied chords of human feeling."

Especially is this true, where, as in the case now under consideration, the deceased used language at the time of the homicide not only sufficient to arouse passion, but calculated to add to and inflame a passion already aroused by previous circumstances of provocation. Another case which seems to be in point is that of *Land v. State*, 11 Ga. App. 761, 76 S. E. 78. See, also, *Battle v. State*, 133 Ga. 185, 85 S. E. 382, and citations.

[2] In the third ground of the amendment to the motion for a new trial it is complained that the judge erred in failing to charge, in connection with the instruction given as to the law of voluntary manslaughter, that "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder," or, in other words, that the judge erred in omitting these words when giving in charge to the jury section 65 of the Penal Code. This is a somewhat unusual complaint. Generally error is assigned in cases of this character because the trial judge gave in charge this part of section 65 without proper qualification, and it is somewhat refreshing to pass upon an exception based not on the inclusion, but the exclusion, of this part of that section. It appears to be so difficult to instruct the jury, to the satisfaction of counsel for the accused, as to provocation by words, threats, menaces, etc., or so that no proper exception can be urged against such instruction, that this court said in *Holland v. State*, 3 Ga. App. 467, 60 S. E. 205, that:

"This phase of criminal law as codified is couched in such inapt language that in most cases the trial judge may safely run his pen through these words, when charging the manslaughter section."

Again, in *Garner v. State*, 6 Ga. App. 788, 65 S. E. 842, it is said:

"It is not usually a proper charge that 'provocation by words, threats, menaces or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder.' This is especially true where there is a theory of the evidence on which the jury might find that the person killing acted in apparent self-defense, on account of a reasonable fear aroused in his mind by threats, menaces, etc., taken in connection with other facts in the case."

See, in this connection, *Cumming v. State*, 99 Ga. 662, 37 S. E. 177. Usually when this part of section 65 is charged exception is taken, and in the case under consideration exception is taken because it was not charged. Without meaning to be flippant, the exception taken to the failure to charge these words suggests the thought that perhaps counsel may have reasoned that "it's a poor rule that won't work both ways"; but, in defiance of the maxim, we must hold that this rule will only work one way—in this in-

stance, at least. It may be said further, in regard to this exception, that there was no timely request in writing to charge the law relative to provocation by words, threats, etc., and since, under former rulings of this court, it is ordinarily best for a trial judge to "draw his pen" through these particular words in the statute, it is evident that no valid assignment of error can be based upon the failure of the judge to give instructions in regard thereto, without such a written request.

[3] The forth and last ground of the amendment to the motion for a new trial alleges that the court erred in charging that:

"If the guilt of the accused is shown to the satisfaction of the jury, they are authorized to convict him, regardless of any good character on his part; but the jury are authorized to consider his good character, if it has been shown."

The error complained of is that this charge fails to instruct the jury as to the amount of consideration which proof of good character should have at their hands. The exception does not complain that the charge given was incorrect or misleading, and we may not consider an exception taken to a correct charge merely because the judge failed to give some additional charge on the subject, where no proper written request was made. However, the point raised by this exception appears to be controlled by the following cases: *Maddox v. State* 9 Ga. App. 448 (1), 71 S. E. 498; *Mosley v. State*, 11 Ga. App. 303 (1), 75 S. E. 144; *Keys v. State*, 112 Ga. 392 (5), 37 S. E. 762, 81 Am. St. Rep. 63; *Scott v. State*, 137 Ga. 337 (3), 73 S. E. 575. Judgment affirmed.

(16 Ga. App. 290)

DIXON v. STATE. (No. 6352.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 304 — EVIDENCE — JUDICIAL NOTICE — CORPORATE CHARTER.

This court will take judicial cognizance that the Georgia & Florida Railway Company is a corporation chartered under the laws of this state. *Trueheart v. State*, 13 Ga. App. 681 (4), 79 S. E. 755.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. — 304.]

2. EMBEZZLEMENT — 44 — SUFFICIENCY OF EVIDENCE.

The evidence fully authorized the verdict; no errors of law appear; and the trial judge did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. — 44.]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

C. Dixon was convicted of embezzlement, and brings error. Affirmed.

T. N. Brown, of Swainsboro, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, for the State.

BROYLES, J. [2] The accused, C. Dixon, was tried and convicted of the offense of embezzlement; the indictment alleging that he, while acting as agent at Graymont, Ga., for the "Georgia & Florida Railway Company, a corporation, under and by virtue of the laws of Georgia," fraudulently embezzled, stole, secreted, and carried away, with intent to steal the same, money of the said railroad corporation to the value of \$423.86, which had been intrusted to him as agent of the corporation. Upon the trial the state proved all the material allegations of the indictment, and introduced, without objection, the signed admission of the accused that his accounts, at the time of the auditing thereof, were "short" \$423.86. The defendant, in his statement at the trial, admitted the shortage, and endeavored to show that he had not misappropriated these funds, but that he had lost the money. Counsel for plaintiff in error contends that, inasmuch as there must exist a specific intent to fraudulently convert to the use of a bailee the property intrusted to him, the accused should not be convicted for mere culpable negligence. In the Rucker Case, 12 Ga. App. 632, 77 S. E. 1129, relied upon by plaintiff in error as authority, a set of harness was left with the defendant for repair, and upon the question of conversion, or loss through negligence, the facts were remarkably close. Here, however, if we eliminate the statement of the defendant, which the jury evidently failed to credit, the evidence demanded the verdict. Especially is this true when it was shown without contradiction that the rules of the corporation required the defendant to remit to the bank at Millen, Ga., whenever his collections amounted to \$20 or more; that the last remittance made by him was on February 20, 1912, about \$50, when, according to his books, he should have remitted more than \$150, and that, under the above rules, he should not have kept on hand more than \$10 in change.

"There cannot, of course, be embezzlement, where there is no intent to defraud; but there are cases where one uses the money of another, which he has no right to use, and thereby he appropriates it to his own use, from which a fraudulent intent will be inferred, and the act be branded as embezzlement." *Orr v. State*, 6 Ga. App. 629, 65 S. E. 582, citing *Metropolitan Life Ins. Co. v. Miller*, 114 Ky. 754, 71 S. W. 921.

[1] The contention that the corporate existence of the Georgia & Alabama Railway was not proved was raised for the first time in the brief of counsel for the plaintiff in error in this court, and therefore is without merit. Besides, this court will take judicial cognizance that the Georgia & Florida Railway Company is a corporation chartered under the laws of this state. *Trueheart v. State*, 13 Ga. App. 661(4), 79 S. E. 755.

The evidence fully authorized the verdict; it does not appear that there was error of

law upon the trial; and the judge did not err in overruling the motion for a new trial. Judgment affirmed.

(16 Ga. App. 328)

RANDOLPH v. STATE. (No. 6439.)

(Court of Appeals of Georgia. May 10, 1915.)

(Syllabus by the Court.)

1. LARCENY — 60 — INDICTMENT — ALLEGATION OF JOINT OWNERSHIP — PROOF.

Where one is charged with the larceny of certain seed cotton, and the indictment alleges joint ownership in two persons named, proof that one of these persons was the landlord and the other was his cropper, but that all advances to aid in making the crop, which were made to the cropper in the year in which the seed cotton was raised, had been fully paid, and that the landlord and the cropper were each entitled to an undivided half interest in the cotton, which was in the possession of the cropper, would sufficiently sustain the allegation of joint ownership, for while the legal title is vested by law in the landlord until "he has received his part of the crops so raised, and is fully paid for all advances made to the cropper in the year said crops were raised to aid in making said crops" (Civil Code 1910, § 3705), the cropper has such an interest therein as will sustain an allegation as to his part or joint ownership of the stolen property.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 156-158; Dec. Dig. 60.]

2. LARCENY — 55 — SUFFICIENCY OF EVIDENCE.

The evidence was wholly circumstantial and did not exclude every other reasonable hypothesis than that of the guilt of the accused.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. 55.]

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Jim Randolph was convicted of larceny, and brings error. Reversed.

W. C. Davis, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

WADE, J. [1] 1. In a prosecution for larceny, the value of the stolen property must not only be alleged and proved, but the ownership thereof must be laid (if known) in some person or persons (*Buffington v. State*, 124 Ga. 24, 52 S. E. 19), or, if the owner be unknown, this fact must also be alleged (*Springfield v. State*, 25 Ga. 476; *Thomas v. State*, 96 Ga. 311, 22 S. E. 956); and an indictment in which the ownership of the goods alleged to have been stolen is laid in a partnership, without alleging the names of the partners composing the firm, is fatally defective (*Buffington v. State*, supra). A special property coupled with lawful possession has been held sufficient to support an allegation of ownership (*Robinson v. State*, 1 Ga. 563); and, where property is fraudulently taken and carried away from the possession of one holding it as a pledgee for security, the pledgee has such a special property in the pledge as authorizes a conviction under a charge of stealing property belonging to

him (*Henry v. State*, 110 Ga. 750, 36 S. E. 55, 78 Am. St. Rep. 137). It is well settled that ownership may be laid in a gratuitous bailee (*Wimbish v. State*, 89 Ga. 294, 15 S. E. 325), and also that a carrier has such an interest in goods in its custody for transportation as to support the allegation of its ownership in an indictment for larceny or burglary (*Hall v. State*, 7 Ga. App. 115, 66 S. E. 390), and the ownership may be laid in the person having lawful possession of the property, though he holds it as the agent or bailee of another (*Bradley v. State*, 2 Ga. App. 622, 58 S. E. 1064). It is said in 25 Cyc. 91, that:

"Any legal interest in the goods, although less than the absolute title, will support an allegation of ownership. But there must be an actual legal interest, not a mere claim or expectation of interest. * * * The ostensible ownership is, however, enough to justify the description. So far as the thief is concerned, he cannot question the title of the apparent owner."

Under the law of Georgia (Civil Code, § 3705), whenever the relation of landlord and cropper exists, the title to the crops grown and raised upon the lands of the landlord by the cropper is vested in the landlord until he has received his part of the crops so raised, and is fully paid for all advances, made to the cropper in the year they were raised, to aid in making the crops. Nevertheless, the cropper has an interest in the crop raised by him, though it be not such an interest as he could assert in an action of trover, or against his landlord, except in a certain limited way, for section 3707 of the Civil Code declares that:

"The title to the crop, subject to the interest of the cropper therein, and the possession of the land, remain in the owner."

It has been held that the cropper "has a property interest in the growing crop," which he may mortgage. *Fountain v. Fountain*, 7 Ga. App. 361, 66 S. E. 1020. And see same case, 10 Ga. App. 753, 73 S. E. 1096. Also, it is well settled that the cropper may foreclose his laborer's lien against the landlord for his part of the crop after rent and advances are paid (*McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359; *Lewis v. Owens*, 124 Ga. 228, 52 S. E. 333; *Garrick v. Jones*, 2 Ga. App. 382, 58 S. E. 543), from which it is clearly deducible that the cropper has a limited interest in the crop raised by him on the premises of his landlord. And we hold such interest to be sufficient to sustain an allegation of joint ownership with his landlord, where the testimony shows, as appears in this case, that all advances due by the cropper to the landlord had been fully paid off, and the remaining cotton yet in the possession of the cropper, including that alleged to have been stolen, belonged jointly and equally to the landlord and the cropper.

[2] 2. The evidence for the state showed that on or about December 25, 1914, about 100 pounds of seed cotton was lost, or disappeared, from a cotton basket, which had been

left in the field rented from some one else by Dan Morman, and in the possession of his cropper, Ennis Johnson, who worked with him on halves. The cotton was taken at night, and on the following day tracks were discovered, leading from the cotton basket, in the field, directly towards the house of the defendant. The landlord and the cropper, who owned the cotton, went to the house of the accused, accompanied by Mr. Keen, a white neighbor, the defendant's shoes were carefully examined, and it was found that "his shoe bottom and the sole of his shoe was broken and made a track identically the same as the ones that were there that we traced towards Jim Randolph's house; the shoe was kinder run down too," and the "left shoe was turned over further than the right one." The defendant was requested to place his feet with the worn shoes thereon in the tracks, and readily did so, when it was seen that his shoes fitted the tracks exactly. The tracks, however, did not come to the defendant's house, but stopped at a point about 75 or 100 yards distant therefrom. The defendant stated at the time that he knew nothing about the tracks, though he admitted that the shoes he had on, and which were compared with the tracks, were the only shoes he possessed, and he said, when told that some cotton was missing, that he did not have any cotton, but there was found in his house a pile of cotton which he then said belonged to his father-in-law, Ben Wilson. The evidence showed that the defendant's house was only about a quarter of a mile from the place in the field where the basket was located from which the cotton was stolen, and it further showed that his father-in-law, Ben Wilson, was farming, but his farm was about a mile distant from the house of the defendant, and that there were "400, 500, or 600 pounds" of seed cotton discovered in the house. It further appeared, from the "indications," that the missing cotton had been taken out of the basket, and "the tracks led towards the defendant's house; there were locks of cotton, and the tracks that led back towards the defendant's house." Wilson, the father-in-law, of the defendant, testified that the house where he lived was closer to the point where the witnesses for the state said they "stopped tracking" than the defendant's house was. He testified that he did not see any tracks, but he saw where the party investigating the matter stopped tracing tracks. He further testified that he knew nothing as to any cotton that the accused may have had in his house, but he himself had some there; that as he picked it he put it there; that there was a bale of cotton in that house at the time which belonged to him; that he permitted the defendant to occupy one large room in this house belonging to him, and kept his cotton in a smaller room in the same house, and that he had cotton in this room before the defendant moved into the house, and that the house he occupied himself was

only about 20 steps from the defendant's house. On cross-examination he admitted that he did not remember exactly how much cotton he had in the small room of the house occupied by the defendant, and that he did not "know whether Jim [the defendant] could have put 100 pounds in there and me not know of it."

There was testimony tending to show that the defendant was at church four miles away about 10 or 11 o'clock, and left at that hour, and went off in the direction of his home. And the accused himself stated that he did not start home from church until about 2 o'clock, as he remained after services to talk to his presiding elder, the witness who testified he left at 10 or 11 o'clock. This last evidence is, however, immaterial, since there is nothing to show when the cotton was stolen, and, even according to the defendant's statement, he had ample time after 2 o'clock to reach home and carry the cotton to his house before the night was entirely gone. There was also evidence to show the bad state of the feeling entertained by the landlord Morman and his cropper Johnson towards the accused, and Morman testified that, when the tracks going away from the basket of cotton were compared with the tracks made by the accused, the latter remarked that "old shoes would condemn you sometimes;" but whether this remark was made facetiously, or to indicate a fear that his old shoes might unjustly bring suspicion upon him, does not appear, and there is nothing to suggest that this remark was intended as a partial confession, or to make it necessarily an incriminatory admission. The evidence disclosed that around the basket in the field there were other tracks, which a witness said had been made by the cotton pickers; and this witness further explained that the only persons picking cotton in the field were Ennis Johnson and a woman, and that Ennis wore a very large shoe, about a No. 11 or 12, whereas the evidence showed that the tracks leading from the basket to the defendant's house were apparently made by "about" a No. 9 shoe, and the defendant claimed in his statement that he wore a No. 7 shoe, but there was no testimony to substantiate his statement. The evidence disclosed further that it was not necessary for the accused to come through the field by the basket from which the cotton was stolen, to reach his house in returning from the church which he claimed he had attended on the night the cotton was stolen, but, on the contrary, it appeared that another route was more direct.

However, when we come to review the entire case, it will be seen that the only facts connecting the accused with the commission of the alleged crime were the tracks identified as his leading from the basket in the direction of the house, and some locks of cotton which appeared to have dropped along the way. No part of the cotton found in his

house was identified by any witness as all or a part of the stolen cotton, nor did any witness dispute the testimony of Wilson to the effect that all the cotton in the house of the accused was the property of Wilson, or that he had as much cotton belonging to him as was found in that house. It is true Wilson said he could not of his own knowledge assert whether the accused had placed in that room any cotton besides his own, but this admission on his part did not establish that there was in the defendant's house one pound of cotton not claimed by Wilson or not belonging to him. The evidence relating to the tracks tended very strongly to establish that they were made by shoes belonging to the accused, and probably on the night when the crime was committed; but as held in the Cummings Case, 110 Ga. 293, 35 S. E. 117, where tracks were relied on to connect the accused with the crime, and tracks were seen near the place of the crime, which must have been made on the night it was committed, and "corresponded in minute particulars with shoes belonging to the accused, this, without more, was not sufficient to show, to the exclusion of every other reasonable hypothesis, that he committed the crime." In the case of Wade v. State, 84 S. E. 593, in which a conviction for arson was sustained, the conviction depended largely upon proof of tracks leading to the burned barn, and away from the barn back to the house of the accused; but there were various other circumstances in that case, in addition to the fact that strong threats were shown to have been made by the accused against the owner of the burned barn, and there was clear evidence of a desire for revenge on his part for some real or imaginary injury.

It is true, that, where one steals the property of another, the acquisition of the property or his prospective use or enjoyment thereof furnishes a sufficient motive, if it be shown, for instance, that he was in the possession of the stolen property soon after the theft, or under circumstances indicating an intent to appropriate it to his own use; but, on the other hand (violent as the presumption may sometimes be), all men are presumed to be honest until the contrary is shown, and we cannot assume that the defendant had a motive for taking cotton belonging to another, until we show that he actually did take it, or was fraudulently in possession of it, or some similar facts and circumstances appear. The defendant's denial that he had any cotton before he ascertained that a search was imminent looks suspicious; but, on the other hand, what more natural than his assertion that he had no cotton, when he had just been acquainted with the fact that seed cotton belonging to his known enemies (according to some of the proof) was missing, and that they and the white man with them were in search of the thief. His denial may have been made in good faith, and may have been intended to

mean only that he personally had no cotton in the house occupied by him, or it may be that he did not at the time recall that his father-in-law had cotton in the small room attached to that part of the house occupied by him, or, as already suggested, he may have feared to admit that there was any cotton in the house, even though he was perfectly innocent, and may have resorted to a lie in the hope that no search would be made of the premises. Likewise, the embarrassment which one witness testified the defendant displayed, when they approached his house the morning after they discovered the crime, may be suggestive of guilt; or, on the other hand, it may have arisen because of natural apprehension excited in his mind from observing the approach of several men, two of whom were his enemies, and have been aroused by a lively fear of danger to himself when the loss of cotton belonging to his enemies was mentioned to him and it was suggested that the party was in search of the thief. There was also some evidence as to the defendant's good character, and there is nothing to prevent the reasonable supposition that he may have gone out of his direct route in returning from church and in fact may have passed by the cotton basket, and even idly and thoughtlessly picked up a handful of cotton and carelessly dropped it as he walked along from there to his house. A hundred other conjectures might be made, but enough is suggested above to indicate that the circumstantial evidence was not sufficient to exclude every other reasonable hypothesis than that of the guilt of the accused; and while it is true the jury are the judges in questions of fact, yet, nevertheless, we cannot evade the duty resting upon us to set aside a verdict which fails to come strictly up to the requirements of law, and it is clear to us that the requirements of law as to circumstantial evidence were not met by the circumstances in proof in this case. The defendant may be guilty, but this does not concern us, for if he be not legally guilty, or, in other words, guilty under the rules of law prescribed for the protection, not only of society at large, but of the individual as well, his conviction would be unauthorized.

The trial judge erred in overruling the motion for a new trial.

Judgment reversed.

(16 Ga. App. 286)

MITCHELL v. STATE. (No. 6296.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

VERDICT AND DENIAL OF NEW TRIAL APPROVED.

There was ample evidence to authorize the verdict, and, no error of law being complained of, the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Johnson County; W. W. Larsen, Judge.

Proceeding between James Mitchell and the State. From the judgment, Mitchell brings error. Affirmed.

Faircloth & Claxton, of Wrightsville, and James K. Hines, of Atlanta, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 296)

PARSONS v. STATE. (No. 6448.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW §1160—APPEAL—CONFLICTING EVIDENCE.

No error of law is complained of, and there is absolutely nothing in the record that indicates that the accused did not have a fair and impartial trial, and while, under some of the testimony, the jury might reasonably have inferred that the lumber which the defendant was charged with stealing was taken under a bona fide claim of right and with no criminal intent, the jury took the opposite view; and since there was evidence upon which to base their finding, and the trial judge, who heard all the testimony and observed the demeanor of the witnesses on the stand, as well as that of the accused himself while making his statement, was satisfied with the guilt of the accused and approved the verdict, we may not arbitrarily interfere with his judgment overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8084; Dec. Dig. §1160.]

Error from City Court of Tifton; R. Eve, Judge.

Tevus Parsons, Sr., was convicted of crime, and brings error. Affirmed.

B. C. Williford and R. D. Smith, both of Tifton, for plaintiff in error. J. S. Ridgill, Sol., of Tifton, for defendant in error.

WADE, J. Judgment affirmed.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(16 Ga. App. 268)

BROWN v. STATE. (No. 6270.)
(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §252 — ACCUSATION IN CITY COURT—AFFIDAVIT—NECESSITY.

The act establishing the city court of St. Marys (Acts 1908, p. 227 et seq.) provides that defendants in criminal cases may be tried in that court on written accusations setting forth plainly the offense charged, founded on an affidavit made by the prosecutor before the judge of that court or some other officer authorized to issue warrants. It did not affirmatively appear in this case that the accusation was founded upon such an affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.]

2. CRIMINAL LAW §252 — PLEADING AND PROOF—VARIANCE—CITY COURT.

An accusation in a city court must be founded upon an affidavit definitely charging some offense against the law, and the proof offered must conform to the affidavit, as well as to the accusation resting thereon. "The accusation must follow the affidavit, and the proof must follow and conform to both." *Shealey v. State*, 16 Ga. App. —, 84 S. E. 839.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.]

3. TRESPASS §87—ACCUSATION—REQUISITES—OWNERSHIP OF LAND.

An indictment or accusation charging one with a violation of section 226 of the Penal Code of 1910, which penalizes the cutting or removing of timber or tanbark from uninclosed lands under certain conditions, should set out in whom the ownership of the lands, either partial or complete, is vested, as the statutory offense is in the nature of a trespass.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 176-181; Dec. Dig. § 87.]

4. COURTS §217—APPEAL—CONSTITUTIONAL QUESTION—WHEN CERTIFIED.

Where a constitutional question is raised, but its solution is not necessary to the determination of the case under consideration, the question will not be certified to the Supreme Court by this court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 536-538; Dec. Dig. § 217.]

5. CRIMINAL LAW §252 — ACCUSATION IN CITY COURT—AFFIDAVIT.

The court erred in overruling the demurrer to the accusation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.]

Error from City Court of St. Marys; Emmett McElreath, Judge.

E. A. Brown was convicted of a misdemeanor, and brings error. Reversed.

R. D. Meador, of Brunswick, for plaintiff in error. S. C. Townsend, Sol., of St. Marys, and J. H. Thomas, Sol. Gen., of Jesup, for the State.

WADE, J. E. A. Brown was tried in the city court of St. Marys under an accusation charging him with a violation of section 226 of the Penal Code of 1910, which makes it a misdemeanor—

"for any person, company, firm, or corporation to enter or cut or remove from any uninclosed

lands in this state any timber or tanbark on such lands, unless such person, firm, company, or corporation shall, before so doing, have on record, in the county where such land lies, a deed of conveyance to the same, prima facie showing title to such lands, or shall have a written contract from some person, company, or corporation, who has on record in the county where such land lies, deeds of conveyance, prima facie showing title in the person, company, or corporation entering into said contract."

The defendant interposed a demurrer to the accusation, on the ground that section 226 of the Penal Code of 1910 was null and void, because violative of the Constitution of the state of Georgia, and opposed to sound public policy; and upon the further ground that no affidavit as prescribed by law was filed in the city court of St. Marys, as a basis for the said accusation, at or before the filing of the accusation, and no warrant issued upon such affidavit was or had been filed in the said court, and it was not alleged in the said accusation who was the owner of the lands which the defendant entered.

[4] It is unnecessary to certify to the Supreme Court a question raised as to the constitutionality of section 226, supra; since, under the view we take of the case, a decision as to the constitutionality of the statute referred to is not necessary to a determination of the case under consideration (Civil Code, § 6506); nor can we certify, consider, or determine whether or not this statute is opposed to sound public policy.

[1-3] The act of 1908 establishing the city court of St. Marys (Acts of 1908, p. 227 et seq.) provides, in section 28 thereof:

"That the defendants in criminal cases in said city court of St. Marys may be tried on written accusation setting forth plainly the offense charged, founded on affidavit made by the prosecutor; said affidavit shall be made before said judge, or other officer authorized to issue warrants, and said accusation shall be signed by the prosecuting officer in said court. * * * In all criminal cases within the jurisdiction of said city court, the defendant shall not have the right to demand an indictment by the grand jury of the county of Camden."

From the record in this case it appears that the accusation under which the defendant was tried recites that it is based "upon the affidavit of S. T. Hanks" (the prosecutor), but it does not affirmatively appear when the prosecutor made the affidavit upon which the accusation was based, nor does it appear that the affidavit so made by Hanks which is referred to in the accusation was made before an officer "authorized to issue warrants," or that it was then of file in the said court, or, in fact, had ever been filed therein prior to the time of the trial. The judgment of the court, sitting as a jury, finding against a plea in abatement based upon this ground, which was also a ground of the demurrer (that the accusation was void because no affidavit made by the prosecutor as the basis for the accusation in the case had been filed in the case in said court, or was filed in said

court at or before the time of the filing of said accusation), recites, it is true, that "the solicitor of this court had in his possession at the time of the filing of said accusation various affidavits made by the prosecutor, charging the defendant with the offense of a misdemeanor, and has them now in court, and delivered to-day to the clerk"; but from these recitals it is impossible to determine whether the accusation upon which the defendant was tried followed the affidavits referred to by the trial judge, or whether proof offered to support the case in behalf of the prosecution conformed to both the accusation and the affidavits. It is said in *Shealey v. State*, 84 S. E. 839, recently decided by this court, that:

"An accusation in a city court must be based upon an affidavit charging the offense, and the proof must conform to the affidavit, as well as to the accusation. In other words, the accusation must follow the affidavit, and the proof must follow and conform to both."

In that case the conviction was set aside, it appearing that the evidence introduced to show the commission of the crime tended to show that it was committed at a time several months subsequent to the making of the affidavit upon which the accusation was based (though prior to the date on which the accusation was filed), and the pertinent suggestion was made that the person making the affidavit could not have gazed ahead into the future to determine, or even conjecture, at the time he made the affidavit, that the accused would on a date some months later commit the crime charged against him in the accusation. It is true that an accusation may be broader than the original affidavit and warrant, since the affidavit and warrant are merely for the purpose of bringing the party before the court, and the accusation must frequently be much more specific, in order to present such a valid charge as to meet the requirements of criminal pleading by putting the defendant on notice of the identical charge he is expected to meet, and thus enable him to properly prepare his defense against that charge (*Lepinsky v. State*, 7 Ga. App. 285, 288, 66 S. E. 965); but nevertheless there must be some apparent connection between the affidavit and the accusation based thereon, and it must appear, as decided in *Shealey v. State*, *supra*, that the crime charged in the accusation was at least committed prior to the date of the affidavit upon which the accusation was founded.

The act establishing the city court of St. Marys plainly requires that the written accusation must be founded on an affidavit made by the prosecutor, and that the affidavit shall be made before the judge of that court, "or other officer authorized to issue warrants." From the recitals in the judgment or finding of the court against the plea in abatement, it does not appear that the "various affidavits" made by the prosecutor, which charged the defendant simply with

the commission of a misdemeanor, had, in fact, been made before the judge of the city court of St. Marys, or before "any other officer authorized to issue warrants," but they may have been sworn to and subscribed before a commercial notary, or the clerk of the superior court of Camden county, or the clerk of some other county, or before some ordinary of the state, none of whom are officers authorized to issue warrants, though all have authority to attest certain affidavits. Nor does it appear whether these "various affidavits" made by the prosecutor were dated before or subsequent to the 15th day of October, 1914, the date on which the defendant was charged in the accusation with entering upon and cutting and removing from certain uninclosed lands certain pine logs, etc. Again, the act establishing the city court of St. Marys provides that in all criminal cases within the jurisdiction of that court, the defendant shall not have the right to demand an indictment by the grand jury of the county of Camden; so that, if an accusation based upon one or more affidavits made by the prosecutor, not attached to the accusation, and apparently not filed in the court, should be preferred against a defendant, and his demurrer or plea in abatement raising the issue that such accusation was insufficient should be decided against him, he would thus be compelled, nevertheless, to go forward to trial with perhaps no precise knowledge as to the date, the verification, or the nature and substance of the affidavit which had given rise to the accusation, since he could not demand an indictment thus, and escape trial under an accusation without any apparent foundation. Then, too, the law does not contemplate that the defendant shall be tried upon the accusation alone, but he is entitled to full information as to the affidavit against him upon which the accusation is based, and may take advantage, not only of defects appearing in the accusation, but of defects which may appear only in the affidavit; since the two must conform and the proof must follow and conform to both.

It does not definitely appear that the various affidavits in the possession of the solicitor, made by the prosecutor at some indefinite time before the trial (either before or after the accusation had been filed), had ever been actually filed with the clerk, though delivered on the day of the trial to the clerk at some place (whether in the courtroom or in his office, or elsewhere, does not appear) and by some one unnamed; nor does it appear what particular crime these various affidavits charged against the defendant, though, from the statement of the trial judge, these affidavits charged the defendant with the offense of "a misdemeanor." It may be perhaps assumed that no specific misdemeanor was charged in any one of the affidavits, but that the omnium gatherum clause ("a misdemeanor") was the only description given in

these several affidavits of the crime charged therein; and, on the other hand, since the words "a misdemeanor" are not placed in quotations in the order or finding of the trial judge, it may be that each affidavit charged some particular misdemeanor by name, and an entirely different misdemeanor from that charged in the accusation.

The better practice is undoubtedly to attach the accusation to the affidavit upon which it is based, and to file both in the court, and this appears to us to be what the local law as to the city court of St. Marys reasonably intended; since otherwise confusion might ensue where affidavits and accusations were erroneously associated and conflicts were thereby created.

[5] We think the trial judge erred in holding that the accusation which did not affirmatively appear to have been based upon an affidavit which conformed to the requirements of the organic law of the city court of St. Marys was good, but, to the contrary, the demurrer thereto should have been sustained; and, since all further proceedings were therefore nugatory, it is unnecessary to discuss any other point raised in the record, nor is it necessary to amplify the other rulings made in the headnotes.

Judgment reversed.

(16 Ga. App. 273)

KENDRICKS v. CITY OF MILLEN.
(No. 6276.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW — ORDINANCES — VIOLATION — CERTIORARI — CONSTITUTIONALITY OF STATUTE — REVIEW.

The act of 1902 providing how any person convicted in a police court may apply for and obtain the writ of certiorari (Acts 1902, p. 105) is a general law in force except in so far as section 5192 et seq. of Civil Code 1910 may conflict with it. Section 66 of the act of 1914 incorporating the city of Millen (Acts 1914, p. 1068), which declares that violators of municipal ordinances may apply for the writ of certiorari in accordance with the law governing certiorari from county courts (Pen. Code 1895, § 765), is a special law, apparently in conflict with an existing general law, and violative of article 1, § 4, par. 1, of the Constitution of Georgia; but the question as to its constitutionality is not certified by this court to the Supreme Court, for the reason that a decision of this question is not necessary to the determination of the case under consideration. Civ. Code 1910, § 6506.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2563; Dec. Dig. —1005.]

2. CRIMINAL LAW — 1076 — VIOLATION OF ORDINANCE — CERTIORARI — BOND — VALIDITY.

Where a petition for certiorari to review an alleged violation of a municipal ordinance was sanctioned, and the bond attached to the petition did not bind the defendant to personally appear and abide the judgment or sentence in his case, the bond was void. It did not comply with the provisions of the act of 1902, supra, or with sections 5192-5194 of Civil Code 1910,

or even with the provisions of section 765 of the Penal Code of 1895. Section 765 of the Penal Code of 1895 provides that an applicant for certiorari thereunder shall give bond and security as required of persons "when carrying criminal cases to the Supreme Court," and section 1104 of the Penal Code of 1910, which provides as to the bond to be given to carry a criminal case to the Supreme Court, declares that the bond shall be "conditioned for the personal appearance of such defendant to abide the final order, judgment, or sentence of said court." See, also, in this connection, *Johnson v. Hazlehurst*, 8 Ga. App. 841, 70 S. E. 253; *Cannon v. Americus*, 11 Ga. App. 95, 74 S. E. 701; *Dixon v. Waynesboro*, 10 Ga. App. 801, 74 S. E. 302; *Bush v. Boykin*, 137 Ga. 464, 73 S. E. 652.

(a) The bond given in this case simply declares that the accused and his security "acknowledge themselves jointly and severally bound to said mayor and city council aforesaid, and their successors in office, in the penal sum of fifty dollars, and all future costs that may accrue in said case, for the payment of which they bind themselves, heirs, executors, and administrators firmly by these presents," and does not provide for the personal appearance of the defendant to abide the final order, judgment, or sentence of any court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2708-2716, 3201; Dec. Dig. —1076.]

3. CRIMINAL LAW — 1182 — VIOLATION OF ORDINANCE — CERTIORARI — DISMISSAL OF PETITION — REVIEW.

Where the order of the judge of the superior court dismissing a petition for certiorari is proper and legally justified for a reason other than that assigned by him, his action will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. —1182.]

Error from Superior Court, Jenkins County; H. C. Hammond, Judge.

Charlie Kendricks was convicted of violating a city ordinance, and certiorari being dismissed, he brings error. Affirmed.

Reynolds & Rabb of Millen, for plaintiff in error. G. C. Dekle, of Millen, for defendant in error.

WADE, J. No extended discussion of the various points covered by the foregoing headnotes is considered necessary. Some express reference, however, to the act of 1902 (Acts 1902, p. 105) is deemed advisable, in view of the possible confusion sometimes arising from a hasty assumption that the act of 1909 (Acts 1909, p. 148) embodied in sections 5192, 5193, and 5194 of the Civil Code has superseded and repealed all the provisions of the aforesaid act of 1902.

[1, 2] The act of 1902, by its terms, requires that one seeking to review the judgment of a municipal court by certiorari shall as a condition precedent to the grant of the writ by the judge of the superior court, first file with the clerk of said court, or, if no clerk, with the judge of said court, except where a pauper's affidavit is provided in lieu thereof, a bond payable to the municipal corporation under which the court exists, conditioned for the personal appearance of the defendant to

abide the final order, judgment, or sentence of the court, or, if he be unable from his poverty to give the bond required, he must make affidavit to this effect, and the judge of the superior court shall thereupon, in granting the writ of certiorari, order a supersedeas, though the defendant shall not be set at liberty without giving the bond.

As clearly indicated in *Johnson v. Hazlehurst*, cited in the headnote above, and in numerous other cases decided by this court, the law providing for the filing of the required bond or an affidavit in forma pauperis is still unrepealed and of full force and effect, notwithstanding the act of 1909 (Civil Code, §§ 5192-5194) which covers in part the same subject-matter. The act of 1902, as appears, from the title thereof was:

"An act to require any person seeking a writ of certiorari to correct the judgment of a recorder's court or other police court of any town or city by whatever name known, to give bond, except under certain conditions, to provide when such writ or bond shall operate as a supersedeas, and for other purposes."

The act of 1909 is declared by its title to be:

"An act to provide for supersedeas of judgments of conviction in county courts, municipal courts, police courts, and all other inferior courts (except constitutional city courts) exercising criminal or quasi criminal jurisdiction; to provide for the giving of bail, for the filing of pauper affidavits; to declare the effect of the giving of the same, and for other purposes."

There is nothing in the act of 1909 which appears to relate to the primary steps which, under the act of 1902, must be taken by one seeking the writ of certiorari, but the whole purpose of this latter act was to provide one general method by which the supersedeas of judgments of conviction in county courts, municipal courts, police courts, and all other inferior courts (except constitutional city courts exercising criminal or quasi criminal jurisdiction) might be had; and, so far as relates to supersedeas of judgments of conviction in such courts or to the release of those under conviction in such courts by giving bail, this act entirely supersedes the act of 1902, which relates merely to recorder's courts or other police courts. The act of 1909 does not by its terms, or by any legitimate deduction that may be drawn therefrom, rescind or repeal the provision contained in the act of 1902, requiring that in appeals by certiorari from municipal or police courts the affidavit or bond made or given to obtain a supersedeas, or to release the accused from custody, shall be so made or given before the certiorari is presented to the judge of the superior court for his sanction; but it relates, as already said, solely to the manner in which supersedeas may be obtained, not only in police courts, but in other inferior courts where criminal or quasi criminal proceedings may be had, and seeks to provide a general rule. So far as the subjects included by the act of

1909 are concerned, that act undoubtedly supersedes and repeals the act of 1902, and, if there be any conflict between the two acts, the procedure provided in sections 5192-5194 of the Civil Code must be followed, and any certiorari may be dismissed where the bond or affidavit in lieu thereof fails to come up to the requirements of these sections. No conflict could exist, however, between the two acts so far as relates to a subject-matter or to a method of procedure which the act of 1909 does not attempt to deal with.

The act of 1902 declares that, in order to obtain a certiorari, a certain bond or certain affidavit must be made, and that, where such a bond or affidavit is made, the judge of the superior court to whom the petition is presented shall "in granting the writ of certiorari, order a supersedeas," and, where the bond is given, the defendant may, in addition to obtaining the supersedeas, be set at liberty. The act of 1909 embodied in sections 5192-5194 of the Civil Code makes no attempt to prescribe the conditions precedent or the essential prerequisites which must exist before a judge of a superior court is properly authorized to sanction an application for the writ, and therefore it leaves the provisions in the act of 1902 relating to these essential prerequisites, as to certiorari in cases from police courts, exactly as they were prior to the passage of the act of 1909, though undertaking to prescribe one general rule whereby a supersedeas may be obtained in any case arising either in a police court or in any other inferior court therein mentioned. If it be not necessary under any general law, or under the organic law establishing a particular court, that a bond or affidavit be given before the sanction of a certiorari, as, for instance, in the criminal city court of Atlanta (*Laws v. State*, 83 S. E. 279), a petition for certiorari might be presented to the judge of the superior court for sanction without either bond or affidavit in forma pauperis, and thereafter (if the petition were sanctioned and the writ ordered to issue), he might file the necessary bond or affidavit as provided by sections 5192, 5193, of the Civil Code, and obtain a supersedeas. The act of 1909 expressly excepts from its operation "constitutional city courts," and, since the method of procedure in the city courts are not regulated by any general law, but each court is to some extent sui generis, and the procedure in the numerous city courts is as varied in some respects as the tinted leaves of autumn, it is possible that the primary or initial steps governing the sanction of applications for certiorari in cases from the various courts of this class may differ in essential particulars; and so likewise the supersedeas of judgments of conviction in criminal cases from such courts is not controlled by the provisions of sections 5192-5194 of the Civil Code, and the Legisla-

ture may at will, and without violating article 1, § 4, par. 1, of the Constitution of this state, provide different methods by which the right of appeal by certiorari from such courts may be exercised. There is, however, a general law providing what shall be done before a petition to review by certiorari a judgment of a municipal court may be presented to the judge of the superior court (Acts 1902, p. 105), and also a general law covering the grant of a supersedeas to those convicted in police courts, county courts, and various other inferior courts named, and hence it is obvious that no special law as to any particular municipal or other court included by the terms of the general law could properly be passed by the Legislature. As we understand it, and as already indicated above, the act of 1902 is still in full force and effect, and the act of 1909 only supersedes the former act in so far as it may by its terms conflict therewith, so that the essential prerequisites provided by the act of 1902 before a certiorari from a police court should be sanctioned are still essential, and the act of 1909 only modifies the former act (if there be any conflict between them) in so far as relates to supersedeas and bail, which subject the last was intended alone to cover.

It is unnecessary to say more in affirming the court below in dismissing the petition for certiorari in this case than to call attention to the fact that the bond attached to the petition, which was attested and approved by the mayor of the city of Millen, simply binds the defendant and his surety to the mayor and council of that city "in the penal sum of \$50, and all future costs which may accrue in said case, for the payment of which they bind themselves," etc.

As was said in *Bush v. Boykin*, supra, and in *Dixon v. Waynesboro*, supra, where it nowhere appears in the record that the bond or pauper affidavit required by the act of 1902 has been filed, a certiorari should be dismissed; and in *Johnson v. Hazlehurst*, supra, the court said that the bond attached to a petition for certiorari was fatally defective

"in that the petitioner, who had been convicted in the municipal court, was not obligated thereby to appear and abide the final judgment." The act of 1909 (Civil Code, §§ 5192-5194) makes practically the precise requirement as to the form of the bond to be given as is made by the act of 1902; for section 5192, supra, provides that the bond to be given must be "conditioned that the defendant will personally appear and abide the final judgment, order, or sentence upon him in said case."

Section 765 of the Penal Code of 1895, taken together with section 1077 of that Code (section 1104 of the Penal Code of 1910), makes the same provision as to bond.

The bond given by the defendant in the case now under consideration does not require that the defendant shall personally appear and abide the final judgment, etc., in his case, but declared merely that the principal and his surety acknowledge themselves generally and specially bound in the "penal sum of \$50, and all future costs that may accrue in said case." This clearly is no such bond as is required by the act of 1902, or by section 5192, or by sections 765 and 1077 of the Penal Code of 1895, relating to bonds to be given for certiorari in cases from county courts, and hence the certiorari was properly dismissed.

[3] The proceeding being fatally defective, and being properly dismissed, it is immaterial upon what ground the judge of the superior court based his ruling. The result was correct, and was the only legal result that could have been reached in the premises, and if, because of the pressure under which such matters often are necessarily considered and passed upon by the trial courts, the presiding judge neglected to make his order of dismissal include various valid reasons appearing upon the face of the proceedings, it would be futile to send the case back in order that it might be again dismissed for the specific reason rendering it properly subject to such dismissal.

Judgment affirmed.

(16 Ga. App. 311)

TOLBERT v. STATE. (No. 5941.)

(Court of Appeals of Georgia. May 7, 1915.)

*(Syllabus by the Court.)***1. CRIMINAL LAW §1120—APPEAL—PRESENTATION FOR REVIEW—OBJECTION—EVIDENCE.**

An exception assigning error upon the introduction of testimony is valueless, unless the testimony to which objection was offered is specifically set forth, and unless this statement of the precise testimony is accompanied by a recital of the grounds of objection urged at the time of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.]

2. ASSAULT AND BATTERY §80—PROSECUTION—VARIANCE—WIFE-BEATING.

Even if (for the reason above stated) a ground of a motion for new trial alleging that the court erred in admitting "evidence of a character tending to show that the prosecutrix was beaten in a different way and in a different manner to that alleged in the bill of indictment, over the objection of counsel for the defendant," were not too vague and indefinite to present anything for the consideration of an appellate court, the evidence referred to was nevertheless admissible, because, "when the accusation charges the offense generally, the state need not rest its case on proof of a single transaction, but may prove or attempt to prove any number of transactions of the character charged in the accusation and included within its terms." *White v. State*, 9 Ga. App. 538, 71 S. E. 379.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 126; Dec. Dig. § 80.]

3. ASSAULT AND BATTERY §80—WIFE-BEATING—PLEADING AND PROOF.

While an unnecessarily minute description of a necessary fact must be proved as charged, and "no averment in an indictment can be rejected as surplusage which is descriptive either of the offense or of the manner in which it was committed" (*Henderson v. State*, 113 Ga. 1148, 39 S. E. 446; *Hall v. State*, 120 Ga. 142, 47 S. E. 519), the indictment in the present case contained both a general charge of wife-beating and an allegation that the accused committed the offense by kicking and stamping his wife's head with his feet, and the state was not confined to a single transaction, and furthermore there was testimony sustaining both the general and the specific allegations of the accusation.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 126; Dec. Dig. § 80.]

4. CRIMINAL LAW §687—REOPENING CASE—DISCRETION.

The reopening of a case for the introduction of further evidence, after the testimony has closed and before the court has charged the jury, is a matter within the sound discretion of the trial judge, and there was no abuse of discretion in the present case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1621, 1622, 1625; Dec. Dig. § 687.]

5. CRIMINAL LAW §828—INSTRUCTIONS ON REASONABLE DOUBT—REQUEST.

The court did not err in not explaining to the jury the meaning of the words "reasonable doubt." No such explanation is required, in the absence of a timely written request. *Midleton v. State*, 7 Ga. App. 3 (2), 66 S. E. 22; *Battle v. State*, 103 Ga. 53 (2), 57, 29 S. E. 491; *Barker v. State*, 1 Ga. App. 288, 57 S.

E. 989; *Euchanan v. State*, 11 Ga. App. 756, 76 S. E. 73.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.]

6. CRIMINAL LAW §828—INSTRUCTIONS ON IMPEACHMENT—REQUEST.

In the absence of an appropriate and timely written request, a court is not required to instruct the jury upon the subject of impeachment by contradictory statements, or any other method provided for the impeachment of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.]

7. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the conviction, and there was no error requiring a new trial.

Error from Superior Court, Haralson County; Price Edwards, Judge.

J. C. Tolbert was convicted of crime, and brings error. Affirmed.

Taylor Smith, of Bremen, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, and M. J. Head, of Tallapoosa, for the State.

RUSSELL, C. J. Judgment affirmed.

BOYLFOS, J., not presiding.

(16 Ga. App. 309)

BARROW v. E. TRIS NAPIER CO. (No. 5915.)

(Court of Appeals of Georgia. May 7, 1915.)

*(Syllabus by the Court.)***1. ACKNOWLEDGMENT §53—MORTGAGES §171—REGISTRATION—DEFECTIVE INSTRUMENT.**

A mortgage, attested by a notary public, who is secretary and treasurer of the corporation to which it is given, is not properly executed, and therefore not admissible for record, and a record of such a mortgage is not constructive notice to persons dealing with the mortgagor. *Betts-Evans Trading Co. v. Bass*, 2 Ga. App. 719, 59 S. E. 8.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 270-277; Dec. Dig. § 53; Mortgages, Cent. Dig. §§ 392, 394-409; Dec. Dig. § 171.]

2. JUDGMENT AND DENIAL OF NEW TRIAL DISAPPROVED.

For the reason stated above, the judgment in favor of the plaintiff in *fi. fa.* was not authorized, and the court erred in overruling the motion for a new trial.

Error from Municipal Court of Macon; Augustin Daly, Judge.

Action by the E. Tris Napier Company against Andrew Barrow. Judgment for plaintiff, and defendant brings error. Reversed.

A. T. Walden, of Macon, for plaintiff in error. R. L. Williams, Jr., and Ryals & Anderson, all of Macon, for defendant in error.

RUSSELL, C. J. Judgment reversed.

(18 Ga. App. 255)

ELDER v. WOODRUFF HARDWARE & MFG. CO. (No. 5793.)

(Court of Appeals of Georgia. May 4, 1915.)

*(Syllabus by the Court.)***1. TROVER AND CONVERSION §49 — VALUE RECOVERABLE—"HIGHEST PROVED VALUE."**

"The highest proved value" recoverable in an action of trover is the amount which the jury from a consideration of all the evidence, may find to be the highest value of the property during the period between the conversion and the trial, and not the highest estimate given by any witness as to the value during that period.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 264; Dec. Dig. § 49.]

2. TROVER AND CONVERSION §46 — VALUE RECOVERABLE.

The plaintiff in a trover suit may recover the amount which he proves to be the highest value of the property between the time of its conversion by the defendant and the trial of the cause.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 263; Dec. Dig. § 46.]

3. TROVER AND CONVERSION §66 — DIRECTION OF VERDICT—VALUE RECOVERABLE.

The evidence was in conflict as to the value of the property at the time of the alleged conversion, and therefore did not demand a verdict for one certain and fixed amount only.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 288-294; Dec. Dig. § 66.]

4. TROVER AND CONVERSION §40—MONEY VERDICT—EVIDENCE.

While there was testimony showing an admission by the defendant that the property sued for was converted by him prior to the bringing of the action, there was no evidence definitely showing its value, and therefore nothing upon which to base a money verdict.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232-244; Dec. Dig. § 40.]

5. TRIAL §139—DIRECTION OF VERDICT—EVIDENCE.

The direction of a verdict is error requiring a new trial, except where there is no conflict in the evidence, and where the evidence introduced, with all reasonable deductions or inferences therefrom, demands the verdict directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 366; Dec. Dig. § 139.]

6. TRIAL §177 — MOTIONS FOR DIRECTED VERDICT—EFFECT—WAIVER.

The fact that the defendant and the plaintiff each moves the court to direct a verdict in his favor does not amount to an agreement on the part of either to waive the submission of the case to the jury, nor does it estop the party against whom a verdict is directed from excepting to such direction. The contention on the part of either that the evidence demands a verdict for him includes prima facie the further contention that it does not demand a verdict in favor of the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.]

Error from City Court of Jefferson; Geo. O. Thomas, Judge pro hac.

Action by the Woodruff Hardware & Manufacturing Company against Paul Elder.

Judgment for plaintiff, and defendant brings error. Reversed.

Ray & Ray, of Jefferson, for plaintiff in error. Lewis C. Russell, of Winder, for defendant in error.

WADE, J. When this case was formerly here for review (9 Ga. App. 484, 71 S. E. 806), the judgment of the lower court was reversed, for the reason that a verdict in favor of the plaintiff for the full amount of the purchase price of the buggy, as fixed in the original contract between the plaintiff and Maddox, the original purchaser, was directed, although there was evidence that at the time the property was converted by the defendant (who purchased from Maddox) it was worth much less than that sum. This court said that, where a seller retains title as security for his purchase money, or where one otherwise holds title to personal property as security, and brings trover to recover the property, the amount of the indebtedness remaining due at the time of the trial fixes the maximum of his recovery; but—

"where the seller who has retained title as security for his purchase money brings trover, even against the original purchaser, his act in bringing the suit operates as a rescission of the sale; and, if he elects to take a money verdict, he cannot recover more than the value of the property at the time of the conversion, with interest or hire, or the highest proved value between the conversion and the trial, accordingly as he may elect, notwithstanding the balance due on his debt may be a larger amount."

It is said further in that decision (9 Ga. App. 486, 71 S. E. 807) that:

"As between the original seller and the original purchaser, the agreed price as stated in the contract of sale is prima facie, but not conclusive, evidence of the actual value of the property. But as between the seller and third persons the amount stated in the contract of purchase is of no such evidentiary value."

In Woodham v. Cash, 15 Ga. App. 674, 84 S. E. 142, this court held:

"In estimating the value of personalty unlawfully detained, the plaintiff may recover the highest amount which he can prove between the time of the conversion and the trial." Civil Code, § 4514. The time of the conversion referred to in this section is the time when the defendant himself converted to his own use the property sued for."

In the body of that decision it is further said:

"It appears to us, however, to be perfectly plain that the meaning of the statute is that the plaintiff may recover the highest amount which he can prove between the time when the property was converted by the defendant in the cause here proceeding and the trial of that cause; the 'highest proved value' meaning the highest value which the jury, under the proof, may fix for the property during the period between the conversion and the trial, and not the highest estimate given by any witness as to its value during that period."

[1, 2] It was explicitly held in this case, when it was here before, that the phrase "highest proved value" should be interpreted

to mean the highest amount which the jury, from consideration of all the proof, find that it was worth at any time during the period between the conversion and the trial (if during that period there was a difference in value), and does not mean "the highest estimate given by any witness as to the value during the period stated." So, therefore, since the record discloses that the plaintiff originally sold to one Maddox the property sued for, and retained title thereto in a note which stipulated a purchase price of \$100, and the suit for the recovery of the property described in the retention of title note was brought against one Elder, alleged by the plaintiff to have converted the property to his own use, and the plaintiff elected to take a money verdict, the amount of that verdict would be what the jury might find from the proof was the amount established as the highest value between the conversion by Elder and the trial, and not the amount as fixed by the original contract or the highest estimate given by any witness as to the value of the property between its conversion by the defendant in the cause then proceeding and the trial.

[3, 4] The record of the trial now under review shows that the witness Wood was the only witness who gave any evidence as to the value of any buggy whatever (the action being in trover to recover a certain buggy), and that witness testified as follows on this point:

"I suppose that the buggy was worth between \$65 and \$70. I say the buggy that Mr. Maddox had."

And also:

"I saw it [at Maddox's father's] in November.
* * * During the time from November up to Christmas that buggy was worth \$65 or \$70."

Confining ourselves, for the present, merely to the question as to proof of value, it appears that, according to the "estimate" of this witness, the buggy he testified about was worth "between" \$65 and \$70, or was worth either \$65 "or" \$70, so that no definite and fixed estimate as to value was made by this witness; but, according to his testimony, the jury would not have been constrained to find that the buggy was worth the highest amount he estimated it to be worth, to wit, \$70, but could have found that it was worth \$65 only, or some amount between \$65 and \$70. It is therefore apparent that, since more than one verdict could have been found in favor of the plaintiff under this testimony, the court erred in directing a verdict for the highest estimate placed on the property by the witness. If the verdict directed had been for the lowest amount shown by this (the sole) witness, the defendant would have had no cause for complaint on this point. If it were otherwise possible to sustain the verdict returned by direction of the court, we could remove all injurious conse-

quences which may have resulted to the defendant from this error, by directing that the judgment be reduced from \$70 to \$65 principal, and that the proper amount be also written off from the amount of the interest recovered against the defendant; but for other causes, not in our power to remove, the verdict must be set aside.

It is insisted by the plaintiff in error that there was no sufficient proof that Elder, the defendant, ever converted the particular buggy sued for, but we think the testimony of the witness Garner sufficiently established the fact that the defendant converted the buggy sued for, and which was originally sold to Maddox. Garner testified that he was working for the Woodruff Hardware & Manufacturing Company in November, 1909, and that on December 23d he went to the house of the defendant, Elder, to find this particular buggy, and, not finding Elder at home on that day, but learning that he had gone to Athens, he went back on the next day and saw him "about the buggy," and Elder then "said he had traded the buggy off. He said he had traded for the buggy [the identical buggy described in the action of trover] from Mr. Maddox. He claimed that he had traded the buggy off the day I was first over there [December 23d] while in Athens." This witness further said that he did not ask Elder about the buggy "he got from Woodruff," but "asked him about this buggy described in this note," and added further that he knew nothing about the condition of the buggy sued for on December 23, 1909, and the buggy might have been "torn up" and worthless so far as he knew. We think this testimony was sufficient to show the conversion by the defendant of the buggy sued for.

As stated above, the only witness who fixed any valuation whatever upon any buggy was the witness Wood, and his testimony did not identify the buggy, which he asserted was worth "between \$65 and \$70" or "\$65 or \$70," as being the particular buggy sued for; as he simply testified that this was the value of "the buggy that Mr. Maddox had," which he had seen at "Maddox's father's" in November. Wood further testified that he saw a buggy with a hole in the back of the top at Maddox's, and that "it was a black painted buggy, as well as I remember, but whether there were stripes I don't know; I cannot tell the color of the running gear or wheels." And he further said: "I saw a buggy in Mr. Elder's possession that had the same kind of hole in the top;" that Maddox said he "let the buggy go between December and Christmas," and that some time after that he saw a buggy that "resembled" the Maddox buggy in the possession of Elder; that the Maddox buggy had a hole in the top and the one in the possession of Elder had the same kind of a hole; that he saw Elder "down here in Jefferson one day, but

I cannot swear it was the same buggy [which Elder then had]; all I go by is the hole in the back of it;" that he could not tell the color of the running gear of the buggy, nor the "bulld" of the buggy, nor the "make."

[5] It is possible that from this evidence a jury might have determined that the buggy which the witness Wood testified he had seen in the possession of Maddox, or at the house of Maddox's father, and which he said was worth \$65 or \$70, was the identical buggy he afterwards saw Elder in possession of; but even then it would be impossible to say that the buggy referred to by Wood, or the buggy that Wood saw Elder in possession of in the town of Jefferson, was the buggy which Elder admitted to the witness Garner he had obtained from Maddox, or, in other words, was the "one red running gear rubber tire buggy" obtained by Elder from Maddox. From the testimony we may conclude that Elder, on December 23, 1909, was in possession of the particular buggy which he obtained from Maddox, and which the plaintiffs sold to Maddox, but what the value of that buggy may have been on December 23d, when, so far as the testimony discloses, the conversion was made by Elder, the evidence does not disclose. Wood testified that a certain buggy which Maddox once owned, and which in every particular resembled the buggy afterwards seen in the possession of Elder, was worth from \$65 to \$70, but whether this buggy was the buggy sued for and the buggy which Elder admitted he obtained from Maddox it is impossible to say with certainty, though we may have a strong suspicion that the two were identical. So it will be seen that there was no proof from any source whatever as to the value of the buggy sued for, and which Elder admitted he disposed of on December 23d in Athens; since the buggy shown to be worth \$65 or \$70 was not, under the testimony, necessarily that buggy. The court therefore was not authorized to direct a verdict; since only where but one verdict could be returned under the law and the evidence is it permissible that a verdict be directed.

[6] It is urged by the defendant in error that, because each party in the court below moved the court to direct a verdict, the plaintiff in error is estopped from complaining that the judge directed the verdict against him, since he himself "volunteered to take the case from the jury, so to speak, and requested the court to direct a verdict."

While there have been decisions elsewhere which support that view (*Sundling v. Willey*, 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644; *McComb v. Baskerville*, 20 S. D. 353, 106 N. W. 300), it appears to be settled in Georgia that, where both parties move the direction of a verdict, the party against whom the verdict is directed is not estopped, because of his motion, from excepting to the direction of the verdict against him.

In *Broadhurst v. Hill*, 137 Ga. 833, 841, 74 S. E. 422, 426, it was said:

"A contention that the evidence demands a verdict for one party *prima facie* includes the contention that it does not demand a verdict in favor of the other."

And in the same case it was said:

"The fact that a defendant may make a motion that a verdict be directed in his favor, which is overruled, does not, without more, waive the submission of the case to the jury, or authorize the presiding judge, on motion, to direct a verdict for the plaintiff, where the evidence, with all reasonable deductions and inferences therefrom, does not demand such a verdict."

It is true, as was said in *Lydia Pinkham Medicine Co. v. Gibbs*, 108 Ga. 138, 33 S. E. 945, that it is not error for the court to direct a verdict, where it is agreed by counsel for both sides that, under the evidence, the controlling issue in the case is "a question of law for the court to decide, and that he should accordingly direct a verdict," etc. To the same effect is the decision in *Mims v. Johnson*, 8 Ga. App. 850, 70 S. E. 139, it being agreed by counsel on both sides in that case that it was a proper case for the direction of a verdict, and the exception to the verdict directed being, not that the court directed a verdict, but merely that the verdict was erroneous because contrary to law and the evidence. The rule, however, is that the direction of a verdict is error requiring a new trial, except "where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict." Civil Code, § 5928. It cannot be said in this case that the evidence as a whole demanded a verdict in favor of the plaintiff, or that it demanded a verdict for the amounts stated in the verdict rendered, to wit, \$70 principal, and \$20.40 interest to judgment.

The presiding judge therefore erred in directing the verdict, and in thereafter overruling the motion for a new trial.

Judgment reversed.

(16 Ga. App. 335)

KING v. CITY OF HAZLEHURST.
(No. 6491.)

(Court of Appeals of Georgia. May 10, 1915.)

*(Syllabus by the Court.)***CRIMINAL LAW — 1179 — VIOLATION OF ORDINANCE — CERTIORARI — REVIEW.**

Where the only complaint made in a petition for certiorari to review the judgment of the mayor of a municipality is based on the insufficiency of the evidence, and the judge of the superior court has approved his finding, and there is some evidence upon which the finding may rest, this court cannot disturb the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. — 1179.]

Russell, C. J., dissenting.

Error from Superior Court, Jeff Davis County; J. P. Highsmith, Judge.

W. H. King was convicted of violating a municipal ordinance prohibiting the keeping on hand of intoxicating liquors for illegal sale. Certiorari was overruled, and defendant brings error. Affirmed.

P. L. Smith and Grant & Rogers, all of Hazlehurst, for plaintiff in error. Bennett & Swain, of Hazlehurst, for defendant in error.

WADE, J. The defendant was charged with the violation of a municipal ordinance prohibiting the keeping on hand of intoxicating liquors for illegal sale. He entered a plea of not guilty, but in open court admitted that at the time charged "he did receive from R. T. Williams the sum of \$1.50, and later delivered to said R. T. Williams one quart of whisky therefor, thereby admitting a prima facie case and assuming the burden of proof." The evidence of Williams showed that he gave the defendant \$1.50, and sent him after a bottle of whisky for a friend, and that the defendant thereafter brought a quart of liquor in its original package, wrapped and sealed up, to his office and delivered it to him, and he thereupon turned it over to his friend. The defendant in his statement at the trial asserted that he purchased the quart of whisky as the agent of Williams from one Will Nicey, paying to Nicey therefor the identical \$1 bill and 50-cent piece that he had received from Williams for that purpose; that he had no interest in the whisky or in the money, and did not even see the whisky, but only supposed the package contained whisky, as he was acting solely for the accommodation of Williams. Jackson, a witness for the defendant, testified that he was at the home of Will Nicey when the defendant came to Nicey's house and told Nicey that "some one had sent him to him for a package of whisky"; that "Will Nicey reached down in a suit case, which was right by him, and handed Mr. King [the defendant] out a package which looked like a quart

wrapped up. Mr. King took it and went away." Nicey's wife testified to about the same state of facts, saying that King came into the house, "spoke," and told her husband, Will Nicey, that "some one had sent him after a package," and "Will Nicey said, 'All right,' reached down into his suit case, took out a quart of whisky, handed it to him, and Mr. King took it and went out with it. * * * It was my husband's suit case and whisky. He brought it there. * * * I did not notice whether Mr. King paid him for the quart of whisky or not; I do not remember seeing him pay for it; but I know he got the liquor from him. For I saw him get it out of the suit case and hand it to Mr. King. There was about five or six more quarts left in the suit case then." One Tapley testified that he was present when the defendant came to Nicey's house, and "told Will Nicey that some one had sent him after a package. Will Nicey said, 'All right,' reached down and got a quart, or what looked like a quart wrapped up, out of a suit case, the one he brought with him there, and handed it to the defendant. The defendant took it and went away, and I did not see anything more of him that night."

The mayor, passing upon the evidence, found the defendant guilty, and the defendant sought to review this judgment by certiorari. The judge of the superior court overruled the certiorari, and affirmed the judgment of the mayor.

The only error alleged in the petition for certiorari is that the evidence did not sustain the conviction. It is contended that the evidence, as a whole, clearly showed that the accused was acting as agent for the buyer, and not for the seller, and that therefore the liquor in his possession at the time he delivered it to the witness Williams was not stored or kept by him for the purpose of illegal sale. As appears from the record, a prima facie case was admitted by the defendant, and therefore the burden rested upon him to satisfactorily explain his possession of the liquor, and his acceptance of the price therefor from Williams. This burden he endeavored to carry by the evidence of several witnesses who testified that they saw him obtain the whisky from one Will Nicey on request, but there was no testimony from any of them showing a purchase of whisky by him, or at least the evidence does not disclose that he either paid or promised to pay Nicey anything whatever for the whisky, which he obtained apparently on demand only. The defendant himself said that he paid to Nicey the money received by him from Williams for the purpose of purchasing one quart of whisky, but the mayor did not credit this statement or accept it as affirmative proof of a purchase by the defendant from Nicey; and, though authorized to believe it, even in preference to the sworn evi-

dence, he had the right to reject it entirely, and when he did so there was nothing before the court to establish any purchase from Nicey by the defendant. Of course, it is well settled, by repeated adjudications by the Supreme Court and of this court, that where one receives money and delivers whisky therefor, he may be treated as the seller, if the evidence in the case does not point out another as the seller, and it is not shown where, how, or from whom the whisky was obtained. *Paschal v. State*, 84 Ga. 326, 10 S. E. 821; *White v. State*, 93 Ga. 47 (3), 19 S. E. 49; and many other cases. The evidence in this case did disclose where and from whom the whisky was obtained, but it did not disclose how it was obtained, nor did it establish (leaving out of consideration the defendant's statement) the fact that the seller was some person other than the accused. The testimony did not disclose that the accused paid Nicey, or that it was understood between them that he was to pay, one cent for the whisky obtained on simple request or demand; so it fails to disclose "how" the whisky was obtained—whether from his own store of intoxicants which Nicey temporarily had in charge, or whether from his partner in crime, equally interested with him in the profits of the illicit sale, or whether from his agent or employé. In the absence of any testimony establishing the fact that the accused delivered money or some other thing of value to Nicey in return for the whisky, there was nothing to establish his contention that Nicey, and not himself, was the actual seller. The court was therefore authorized to find that the whisky delivered to Williams by the defendant (leaving out of consideration the defendant's statement) was so delivered for the sum of \$1.50 received by him from Williams, and, since it has been settled, by repeated adjudications, that proof of one illegal sale of whisky is sufficient evidence to establish that at least the whisky sold was kept for the purpose of illegal sale, the conviction of the accused, under the municipal ordinance prohibiting the keeping of liquor for illegal sale, was authorized. Under the evidence the court may have inferred that complicity between the accused and Nicey as to the alleged crime had been shown. If the evidence had established that the accused delivered to Nicey the exact sum received by him from Williams the conviction would not have been authorized; but the witnesses introduced by the defendant himself all asserted distinctly that they saw and heard the entire transaction between the accused and Nicey, each and all contradicted in effect the statement of the accused as to a consideration passing from him to Nicey, or, in other words, failed to confirm his assertion that he paid Nicey the \$1.50 which he himself said he had received from Williams. It is well settled, under repeated rulings of

the Supreme Court and of this court, that where one receives money from another for the purpose of obtaining whisky, and shortly thereafter delivers the whisky to him, the onus is on the person receiving the whisky to explain how, where, and from whom he got the liquor, and, if the only explanation offered is in his own statement, the jury may find him guilty; but, if his statement is corroborated by an unimpeached witness, who testifies that he did, in fact, buy the whisky from another person and pay him for it, then this burden would be successfully carried, and the jury should acquit the accused. In this case, as already pointed out, the accused was not corroborated by the testimony of any one unimpeached witness to the effect that he had purchased the whisky from Nicey, and paid the latter therefor.

In *Gaskins v. State*, 127 Ga. 51, 55 S. E. 1045, the Supreme Court said:

"When a defendant is on trial charged with illegally selling intoxicating liquor, and the evidence shows that he received money from another person, accompanied with a request to procure for the latter some intoxicating drink, and shortly thereafter returned and delivered the article as requested, the burden is on the accused to explain how, where, and from whom he obtained the liquor; and, until some other person filling the character of seller in the transaction is shown to the satisfaction of the jury, they would be authorized to treat the defense that the accused acted as the agent of the buyer as a mere subterfuge to cover up an illegal sale by himself, and to find him guilty of selling the liquor."

In *Mack v. State*, 116 Ga. 546, 42 S. E. 776, it was held:

"On the trial of one charged with having violated the law by illegally selling intoxicating liquor, proof that the accused received money from another person, accompanied with a request to procure whisky for the latter, and shortly thereafter delivered whisky to such person, puts the onus on the defendant of explaining where, how, and from whom he got the liquor (*Grant v. State*, 87 Ga. 265 [13 S. E. 554]); and, if the explanation offered by him is supported only by his own statement, the jury, if they believe it to be a mere subterfuge to cover up an illegal sale by himself, are authorized to find him guilty (*White v. State*, 93 Ga. 47 [19 S. E. 49])."

In *Highsmith v. City of Waycross*, 7 Ga. App. 611, 67 S. E. 677, this court said that if the explanation offered by the accused under circumstances like those in the present record—

"is supported only by his own statement, the jury, if they believe it to be a mere subterfuge to cover up an illegal sale by himself, are authorized to find him guilty."

The point appears to have been precisely and in so many words passed upon in the case of *Bray v. City of Commerce*, 5 Ga. App. 605, 63 S. E. 596, in which this court said:

"On the trial of one charged with a violation of a city ordinance, in having on hand intoxicating liquors for the purpose of illegal sale, proof that the accused received money from another person, accompanied by a request to procure whisky for the latter, and thereafter went off, and in a short time returned and delivered

a bottle of whisky to that person, would cast on the accused the onus of showing where, how, and from whom he got the whisky. This burden would be successfully carried by the accused if, in corroboration of his own statement, he proved by an unimpeached witness that he had, in fact, bought the whisky from another person and paid him for it. *Grant v. State*, 87 Ga. 265, 13 S. E. 554; *Mack v. State*, 118 Ga. 546, 42 S. E. 778; *Gaskins v. State*, 127 Ga. 51, 55 S. E. 1045."

It will be observed, from the rulings in *Highsmith v. City of Waycross*, supra, *Gaskins v. State*, supra, and *Mack v. State*, supra, as well as numerous other decisions of this court and of the Supreme Court, that while, of course, one accused of selling liquor, or storing liquor for the purpose of illegal sale, enters upon his trial completely clothed with the presumption of innocence, this presumption, nevertheless, is overcome, whenever the evidence discloses that he received money from another person, accompanied with a request to procure whisky for the latter, and shortly thereafter delivered whisky to that person, and the onus is then upon him to explain where, how, and from whom he got the liquor, and, if the explanation offered by him is supported only by his own statement, the jury may convict. In other words, our courts have distinctly declared what amount of evidence will deprive the accused of the legal presumption of innocence in such cases, and place upon him the burden of explaining his connection with the whisky he is charged with selling or storing, and have distinctly declared, in addition, that this burden is not successfully carried where his statement is uncorroborated by unimpeached testimony of some other person. Where his explanation is not supported by corroborating testimony, the jury, or the mayor, or the recorder of a municipality, exercising the functions of a jury, may decline to accept his statement as

the truth of the case, and find the accused guilty, and in such event the conviction may be sustained, notwithstanding his unsupported exculpatory statement. It is true, circumstances might sometimes afford the necessary corroboration of the explanation made by the accused, but whether the circumstances do or do not sufficiently corroborate the explanation is a question for the jury, or the mayor, or other judicial officer sitting as a jury; and, of course, should he disbelieve the statement of the accused altogether, proof of circumstances which tended merely to corroborate that statement would not in itself demand an acquittal. If the statement of the accused had been accepted as true by the mayor, or if his statement, taken in connection with all the surrounding circumstances, had brought the mayor to the conclusion that the defendant was simply acting as agent for the buyer, and that the explanation offered by him was not a mere subterfuge to cover an illegal sale by himself, a different result must have been reached, but we cannot set aside a judgment or verdict because a court or jury declines to accept as true the statement made by the accused on his trial, and, since there was evidence which was satisfactory to the mind of the mayor, and his judgment has been approved by the judge of the superior court, under the repeated rulings of this court the judgment must be allowed to stand.

Judgment affirmed.

RUSSELL, C. J. (dissenting). In my opinion, the corroboration of the defendant's statement furnished by the circumstances as to the manner in which the whisky was obtained, if the presumption of innocence be regarded, brings it under the ruling of this court in *Bray v. Commerce*, 5 Ga. App. 605, 63 S. E. 596.

(16 Ga. App. 300)

TOWNS v. WEST. (No. 5834.)

(Court of Appeals of Georgia. May 7, 1915.)

*(Syllabus by the Court.)***1. EVIDENCE ~~§~~ 441 — PROOF — CONTEMPORANEOUS PAROL AGREEMENT.**

Where, on the ground of fraud, it is sought to evade a written contract by proof of a different contemporaneous parol agreement, and the alleged fraud consisted only in false representations as to the contents of the written contract, and no fiduciary or confidential relation existed between the parties, and it does not appear that there was a sufficient excuse for not reading the contract, the complaining party being able to read, and having ample opportunity to read it and understand its contents, the contract as written must control and determine the relations of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. ~~§~~ 441.]

2. REFUSAL OF AMENDMENT—DISMISSAL OF PETITION.

The court properly refused to allow the amendment to the petition, and did not err in dismissing the petition, itself on demurrer.

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by C. A. Towns against A. S. West. Judgment for defendant, and plaintiff brings error. Affirmed.

Eubanks & Mebane, of Rome, for plaintiff in error. Rowell & Davis, Jas. F. Kelly, and Max Meyerhardt, all of Rome, for defendant in error.

WADE, J. C. A. Towns brought suit against A. S. West for malicious arrest and prosecution. The original petition set forth that West was the president and owner of the West Loan & Trust Company, a corporation engaged in lending money; that on November 1, 1912, West swore out a criminal warrant against the plaintiff before a justice of the peace, charging him with the crime of being a common cheat and swindler (a copy of which was annexed to the petition); that under and by virtue of said warrant a lawful constable, duly and legally authorized to serve the same, arrested the plaintiff and took him before a justice of the peace, detained him, and compelled him to make a bond for the offense charged in the warrant; that at the resulting commitment trial, the plaintiff pleaded not guilty to the charge against him, but West appeared at the trial and knowingly testified falsely against him, and he was thereupon bound over by the justice of the peace to the city court of Floyd county; that thereafter at the March term of the said city court, West carried on and followed up the said prosecution, and, with the same alleged facts as the basis of the prosecution as were urged by him in the commitment trial before the justice of the peace, drew and had drawn against petitioner, by his special counsel representing him in said

prosecution, an accusation in the said city court, charging plaintiff with the criminal offense of larceny after trust (a copy of which was attached to the petition), and that all of the allegations therein were false and West so knew; that after the said accusation had been drawn and after the said case had been called for trial in said city court, and the accused and the prosecution had announced ready for trial, and a jury had been duly stricken and a plea of not guilty signed, and the court had instructed counsel for West and for the state to proceed with proof of the allegations in said accusation, West thereupon abandoned the prosecution and failed and refused to take the stand and testify or prosecute the case further, and, there being no evidence whatever submitted in said case, the court instructed the jury to find a verdict of not guilty, which the jury accordingly did, and thereby acquitted the accused, and the case was finally determined and disposed of; that the said prosecution was instituted maliciously and wickedly and without probable cause, and was carried on in the same manner, and that West knew that the said prosecution was false and unfounded, and the same was resorted to by him for the sole purpose of collecting and extorting money from the plaintiff; that West only ceased prosecuting the plaintiff and the said prosecution ended only when the plaintiff demonstrated to West that he would not be imposed upon by the said false and malicious prosecution; that as a result of said prosecution the plaintiff was put to actual expense in the sum of \$50 for attorney's fees in making his defense, and lost 10 days work of the value of \$30, for which he sued, and he suffered great embarrassment, humiliation, and chagrin, and was brought into disrepute with his friends and neighbors, which caused him to suffer pain and humiliation, and because of these alleged wanton and malicious acts, he was entitled to punitive damages, for which he sued; that because of all the acts mentioned he was injured and damaged in the sum of \$10,000, for which he prayed judgment.

[1] The accusation attached to the petition recited that it was based upon an affidavit of A. S. West as prosecutor, which charged C. A. Towns with the offense of larceny after trust—

"for that the said C. A. Towns, * * * on the 6th day of May, 1912, with force and arms, did sell and transfer to the West Loan & Trust Company, a corporation, \$37.50 worth of earned wages, of the value of \$37.50, which said sum was alleged to be due said C. A. Towns by the Southern Railway Company, said sale and transfer being in words and figures as follows, to wit: 'Rome, Ga., May 6, 1912, Southern Railway Company to C. A. Towns, Dr. To services rendered and to be paid May 21, 1912, \$37.50. For value received, the above account, which I certify to be true and already earned by me, I hereby transfer to West Loan & Trust Company. I further appoint West Loan & Trust Company my attorney in fact

in the collection of total amounts due me by above debtor, to sign my name and receipt for me in the same manner as I myself might were I present. C. A. Towns. R. W. Hicks, Witnesses."

The accusation alleges that the said West Loan & Trust Company, after purchasing the said account for \$37.50, authorized Towns to receive and collect this sum from the Southern Railway Company for the purpose of delivering the same to the West Loan & Trust Company, for the use and benefit of the said West Loan & Trust Company, and the said Towns did, on the 21st day of May, 1912, after having been intrusted as aforesaid by the said West Loan & Trust Company for the purpose aforesaid, receive and collect the said sum of \$37.50 from the Southern Railway Company, and after so receiving that sum for the purpose of paying the same over to the said West Loan & Trust Company for its use and benefit, did in the county of Floyd, and on the day aforesaid, fraudulently convert the said sum to his own use, without the knowledge and consent of the said West Loan & Trust Company, and to its loss and damage in said sum of \$37.50, contrary to the laws of said state, etc. This accusation had indorsed upon it the name of A. S. West as prosecutor, the verdict finding the defendant not guilty, and the following order, signed by the judge of the said city court:

"The prosecutor, A. S. West, having abandoned the prosecution of this case before trial, judgment entered against A. S. West for \$57.25, costs of this case. John H. Reece, J. C. C. F. C."

Upon the call of the case for trial the plaintiff offered an amendment to his original petition. The court refused to allow the amendment, and thereafter sustained a general demurrer and dismissed the original petition. To the refusal to allow the amendment and to the order dismissing the petition, the plaintiff excepted. The demurrer to the amendment was on the ground: (1) That said amendment does not of itself or in connection with the original petition, set forth a cause of action; (2) that it appears, from the amendment that the instrument therein set forth was in the plaintiff's possession for a considerable length of time, and he had ample opportunity to read it; and (3) that it was not alleged that the plaintiff could not read, and no sufficient excuse was shown for his failure to read the instrument. The proposed amendment made the following additional allegations: That the plaintiff signed the note or writing set forth in the exhibit attached to the original petition, but signed it believing and understanding that it was only a plain promissory note, and not knowing that it was a transfer of time due to him by the Southern Railway Company, since nothing was said to him by the defendant, West, "as to said writing being anything except a prom-

issory note"; that the plaintiff went to the office where West lends money in the city of Rome, and there waited for several hours for West to come to his office, and West, on arrival, said he was in a great hurry, and told the plaintiff that he "would have to talk to him very rapidly, as he wanted to get away at once"; that the plaintiff told West he wanted to get \$35 in money at once, and West inquired whom the plaintiff could get to indorse his note for that amount, and when the plaintiff replied that he could get one Mr. Loyd, who worked for the Southern Railway Company in East Rome, West filled out a paper "in a great hurry," and handed it to the plaintiff "in a great hurry," and told him to go as fast as he could to East Rome and get said paper indorsed and come back with it to him, as he (West) had to "get away at once"; that West did not give the plaintiff time to read said note at that time, but urged upon the plaintiff the necessity of getting back to him with the note, or else he (West) would be gone and the plaintiff could not get the money on that day; that the plaintiff thereupon took the note, put it in his pocket, ran, and caught the street car that was just passing West's place of business and going to East Rome, which car required only a minute and a half or two minutes to run from that point to East Rome, and when he got off the said car at East Rome, he ran down to where the said Loyd worked in the yards of the Southern Railway Company, and, finding that Loyd was absent, but that one Hicks was in the yards, he requested Hicks to indorse his note for the said sum, and Hicks did then and there indorse the note; that the plaintiff thereupon placed the note in his pocket and "ran and caught said street car again, and got off of said car at said West's place of business"; that West still was waiting for him and took the note from him and "in a great hurry," handed him out the money, and immediately left West's place of business; that "because of said West representing to him that said writing was only a note, and asking that he secure an indorsement on said note, plaintiff believed and relied upon what West represented to him as being the truth"; that he did not know that the said note contained a transfer of "his time which was due him by the Southern Railway Company"; that had he known this to be the fact, he would not have signed the note, since the rules and regulations of that company prohibited its employes from transferring time earned in its employment; that West willfully and knowingly perpetrated a fraud upon him by representing to petitioner that said writing was a note, when in fact it was a transfer of time due by said company to petitioner, and that said West knew that petitioner thought and believed that said writing was only a promissory note; that West wrote the transfer without his knowledge and consent and

against his will, and for the express purpose of perpetrating a fraud upon him, and the insertion of the said transfer in the writing did mislead and defraud the said plaintiff; that West, for the purpose of defrauding him, did not give him time to read the note when West filled it out, and, for the purpose of keeping him from reading it, and in order to mislead him, urged him to go to East Rome as quickly as possible and secure an indorsement as quickly as possible, that upon his return West was "still in a great hurry," and did not give him a chance to read the note before it was signed, that he did not sign the note until he had returned to the office of West with the indorsement thereon, and he was induced to sign it by the false and fraudulent representations of West as to its contents, and the said representations were made for the purpose of deceiving and misleading him, and did deceive and mislead him; that he believed and relied on what West said as being the truth when he signed the said writing.

It will be observed that the transfer which appeared on the paper signed by Towns recites in plain and unambiguous language that the Southern Railway Company is indebted to him, for "services rendered and to be paid on May 21, 1912," in the sum of \$37.50. Immediately under this transfer Towns and Hicks signed their names. The inquiry naturally suggests itself why West, in filling out this order, recited therein that the Southern Railway Company owed Towns for services rendered, "and to be paid May 21, 1912, \$37.50," unless Towns apprised him of this fact; and, if he did so apprise him—why? The loan applied for was only \$35, and it appears that this sum of \$37.50 was the identical sum which the Southern Railway Company owed Towns, and that it was paid to Towns on May 21, 1912. This, however, has nothing to do with the determination of the question whether the judge properly refused to allow the proposed amendment. To get back to the real question, it appears from the original petition and from the copy of the accusation thereto attached that Towns was prosecuted for appropriating funds which he had assigned to West and thereafter collected and converted to his own use; and, taking the petition as a whole, it was clearly demurrable. The amendment simply sought to avoid the effect of the statute of frauds, and to excuse the failure of the plaintiff to take the usual and ordinary precautions required of any rational man when entering into a contract, by alleging that the defendant urged upon him the necessity for haste, and impressed him with the idea that unless he *hurriedly* told his business, *hurriedly* sought an indorser, *hurriedly* returned, and then *hurriedly* signed the note or writing (terrible exigency!), he could not get the money "that day."

The case of *McBride & Co. v. Macon Telegraph Publishing Co.*, 102 Ga. 422, 30 S. E. 999, was relied upon to support the contention that because West suggested the necessity for haste, the plaintiff was relieved from all duty to exercise ordinary caution and read the instrument he signed before affixing his signature and delivering it to West. In that case, it appeared that the plaintiff's agent took the alleged contract in his hand, "fraudulently pretended to read the said alleged contract so that it comprised the agreement that had been made between said agent and the business manager of [the] defendant company, thereby fraudulently pretending and holding out to the said defendant's manager that said paper offered for his signature in truth and in fact contained said agreement and contract really made between the parties," and the defendant's manager accepted the agent's reading as the correct reading of the contract, and signed the instrument without himself reading it, as the plaintiff's agent represented that "he was in a hurry, as he desired to catch a train about to leave the city, and wished the matter closed up before he left." The court held that, "under the particular facts and circumstances" of that case, parol evidence showing the terms of the contract alleged to have been actually entered into should have been allowed, after the proper foundation for the introduction of such proof had been laid by first offering evidence to support the contention that the manager was induced by fraud to sign the instrument sued on, which did not correctly recite the agreement to which he had given his consent; but in the same connection the court quoted with approval the following expression from *Epps v. Waring*, 93 Ga. 768, 20 S. E. 645:

"It is not the duty or business of the courts to relieve parties from their gross negligence in making their contracts."

It was held in *Truitt-Silvey Hat Co. v. Callaway*, 130 Ga. 637, 61 S. E. 481, that:

"One having the capacity and opportunity to read a written contract, and who signs it, not under any emergency, and whose signature is not obtained by any trick or artifice of the other party, cannot afterwards set up fraud in the procurement of his signature to the instrument."

And in the case of *Wood v. Cincinnati Safe & Lock Co.*, 96 Ga. 120, 22 S. E. 909, where an agent of the plaintiff secured the signature of the defendant to a contract just before the approach of a train, by representing that there was nothing whatever in the contract except the reservation of title in the plaintiff until the safe to which the contract related was paid for, it was held that the court erred in striking a plea setting up facts in conflict with the written instrument, since the approach of the train created an emergency that excused the fail-

ure to read the instrument before signing, and it was alleged that the defendant had no opportunity to read the paper. In *Thomson & Son v. Goldman & Co.*, 9 Ga. App. 349, 71 S. E. 596, this court said, that one who has been induced to sign a written contract by false and fraudulent representations as to its contents, "made by the opposite party with intent to deceive, and which did deceive, him," may set up this fraud as a defense to a suit on the note. In *Patapasco Shoe Co. v. Bankston*, 10 Ga. App. 675, 74 S. E. 60, it was said that, in order to pave the way for the introduction of parol testimony where it is sought to set aside the terms of a written contract, there must be a fraudulent misrepresentation, and also something which will relieve the party, seeking to vary the terms of the instrument, from the duty of reading it before attaching his signature thereto. This last holding might be said practically to cover the issue.

The question is: Was there such an emergency at the time the note and transfer given by Towns was in process of execution as would relieve him from the consequences of his negligence in failing to read it, or excuse him for relying upon the statement alleged to have been made by West? Cases of this character must, as a rule, depend upon their particular facts, and no general or inflexible rule can be laid down as to when the maker of a note will be excused from the consequences arising from his failure to read it before signing it. It will be noted that in all the cases referred to, and in many others passed upon by the Supreme Court and by this court, in which an attack on a written contract, by a plea setting up conflicting parol agreements or by parol testimony seeking to vary the terms thereof, was permitted, the misrepresentations made by the party perpetrating the fraud were followed almost immediately by the execution of the instrument, which failed to set forth the actual contract. In this case the plaintiff, Towns, took the instrument of writing in his possession, carried it away from the presence of West across the city, and then submitted it to another person, who apparently signed it directly under the part objected to as fraudulent, took the contract back to West, and thereafter appended his signature thereto. Without commenting on how unreasonable it appears that West should have represented that the instrument, though it contained this plain transfer, was a simple note, when he knew that the plaintiff would have the paper itself in his possession, with ample opportunity to read it, and could discover for himself its actual terms (since this question may not now be considered by us), it does not appear that the plaintiff was unable to read, or that he was incapable of understanding the simple terms and provisions of the contract,

or that any device was practiced upon him by West to prevent the fullest examination of the paper by him between the time when it was delivered to him by West and the time when he returned it to West and executed the instrument, nor does it appear that any confidential or fiduciary relations existed between West and the plaintiff, but, so far as both the petition and the amendment disclosed, they may have been absolute strangers, and at all events were dealing with each other at arm's length. The precise question as to the right of the plaintiff, under the circumstances in this case, to set up a contemporaneous parol contract to vary the terms of a plain, unambiguous contract, appears to us to have been specifically passed upon in principle by the Supreme Court in the case of *Weaver v. Roberson*, 134 Ga. 149, 67 S. E. 662, in which the court said:

"Equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party (who was able to read), and fraud of the other party which consists only in making false representations as to such contents, on which the complaining party relied as true because of confidence in the party making them, no fiduciary or confidential relation existing between the parties, and no sufficient excuse appearing why the complaining party did not read the contract."

If one may be allowed to escape the obligations and avoid the consequences of a written contract alleged by him to have been procured through fraudulent representations, it must appear that there was some real reason why he was prevented from exercising that degree of care which the law requires at his hands; and if the maker of contracts may escape therefrom by simply asserting that the other parties thereto misrepresented the effect thereof, and that on account of "hurry," they failed to read or examine the instrument before signing, no real reason for "hurry" and no actual emergency being shown, the value of any written contract might be destroyed if an unscrupulous party thereto should allege that he was somewhat "hurried" at the time he executed the instrument. Where a long and complicated contract is to be gone over and scrutinized and one party fraudulently represents to the other that it contains the exact parol agreement had between them, the party deceived, under circumstances like those recounted in the *Macon Telegraph Company Case*, supra, might be relieved from his negligence in failing to read the contract, but where the contract is perhaps embodied in one line or two or in half a dozen or more, and is entirely simple and plain, and any man who can read can ascertain by a glance of the eye its meaning and effect, a party certainly cannot be excused from reading the contract when he has enough, and more than enough, time despite all possible hurry to give the needed inspection.

In the present case it does not appear, from either the petition or the proposed amendment that the contract was complicated and difficult to understand, or that the plaintiff was unable to read or incapable of correctly interpreting it, and it is not alleged, nor can it be implied, that he did not have ample time to read and re-read the entire note and transfer, or the complete contract, over and over again between the time when he left the office of West for his trip to East Rome and the time when he returned again to West and affixed his signature to the paper.

It appears to us, under the allegations of the petition and of the proposed amendment thereto, that the prosecution instituted by West, on account of which the present suit was brought, was, legally speaking, based on such probable cause as undoubtedly would relieve him from the consequences of instituting or pressing a malicious prosecution. It is of no moment to this court whether West was or was not "a loan shark," as alleged in the petition, or whether his business is one which is "not inherently uplifting to man," as urged in the brief for the plaintiff in error, for, even in a contest between a "working man" and a "loan shark," no matter where our sympathies might tend to lead us, we are constrained to follow the law as we see it, and to measure the acts of one by the identical rule that we would apply to the acts of the other. It does not appear from any of the pleadings that the prosecution was unfounded by reason of the fact that the lender exceeded the lawful rate to be exacted as interest, and that therefore the contract of assignment was void.

[2] We think the court did not err in refusing to allow the amendment and in sustaining the demurrer and dismissing the petition.

Judgment affirmed.

(16 Ga. App. 315)

REDDING v. STATE. (No. 6430.)

(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

INTOXICATING LIQUORS — 236 — UNLAWFUL KEEPING AT PLACE OF BUSINESS — SUFFICIENCY OF EVIDENCE.

The evidence did not authorize the verdict of guilty.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.]

Broyles, J., dissenting.

Error from City Court of Douglas; W. C. Lankford, Judge.

Jule Redding was convicted of keeping liquor at his place of business, and brings error. Reversed.

W. W. Bennett, of Baxley, and Chastain & Henson, of Douglas, for plaintiff in error. W. A. Wood, Sol., and McDonald & Willingham, all of Douglas, for the State.

WADE, J. The defendant was convicted on the charge of keeping liquor at his place of business. The evidence disclosed that he conducted a barber shop in a front room on the first floor of a house used as a boarding house, and that access to this room could be had directly from the street. A hall through the middle of the house separated the barber shop and the room immediately behind it from the room on the opposite side of the house. There was no direct means of communication between the barber shop and the room in its rear, for the door between the two rooms was boarded up and nailed securely. The defendant occupied as a lodger a room on the second floor of the same house, which likewise had no immediate connection with his barber shop.

According to the testimony of a woman named Stacy Michael, the boarding house was conducted solely by herself, and the defendant had nothing to do with the house, except that he rented a bedroom upstairs, occupied by himself and one Henry Lowe, for which he paid, and she rented him the barber shop and barber's chair for half of the profits of the shop after expenses were paid. She testified further that, when she was away "at the dormitory at work," the defendant sometimes rented rooms for her to persons applying, and collected the money and turned it over to her, but for this she paid him nothing, and he did this for accommodation only, in her absence. The defendant himself, according to the evidence of the policeman who arrested him, said that he and Stacy Michael "operated the house together and divided the profits equally."

Henry Lowe, who roomed with the defendant, testified that he had never bought any liquor from the defendant, but that he roomed with him "in a house run by a woman by the name of Stacy Michael," and that the defendant had some liquor in a quart bottle sitting on the table in his room when the witness moved into the room with him, and the defendant told him that he was welcome to anything that the defendant had, and on two or three occasions, in the absence of the defendant, the witness went into the room they occupied as a bedroom, and picked up a bottle of liquor and took a drink therefrom, and left on the centertable some money; that he left a dime at one time and at another a quarter, but he never told the defendant that he left the money there, or that he was going to leave the money there, and he did not know who actually got the money, as he never heard the defendant himself say anything about the money or about missing the liquor, and he never told the defendant that he drank the liquor or left the money, but he left money "because he thought the defendant needed it"; that the defendant never sold him liquor, and he knew nothing of his ever selling or offering liquor for sale to any

one else; that, while he told the chief of police that he would find liquor in that house, he did not know whose liquor the chief found, and knew nothing about the defendant having any liquor, except as stated above; that he told the chief that he bought some liquor from the defendant, but what he meant when he told him that was what he had related in reference to drinking from the defendant's bottle and leaving money on the table.

The chief of police testified that the witness Lowe said that he had bought liquor from the defendant at different times, and had further told him that he would find liquor in the two-story house occupied by Stacy Michael, himself, and others, in a certain room between the ceiling, and he went there and found two quarts of liquor between the ceiling in a room in that building just back of the barber shop operated by the defendant; that there was no connection between the room where the liquor was found and the barber shop, as the door leading from that room to the barber shop had been nailed up, and the only way to go from the room where the liquor was found into the barber shop was to come from that room through a door into the hall and go out through the hall and around to the east corner of the house into the barber shop; that when he went to make the search he told the defendant he wanted a drink of liquor, and the defendant said that he had none, and, when he informed the defendant that he was going to search, the defendant told him to "go ahead and search" wherever he pleased, and he then went into the room back of the barber shop and found the liquor as stated; that he asked the defendant to whom the liquor belonged, and the defendant first said he did not know anything about it, but after they started to the jail the defendant said it belonged to Stacy Michael.

Stacy Michael testified, in addition to what has already been recited, that she was running the house in question, had rented it and was paying rent, and that the two quarts of liquor discovered by the policemen between the ceiling were hers and had been found in her private room; that she hid the liquor back of the ceiling to keep anybody from finding it; that she ordered the liquor under a prescription from a doctor at the hospital, for the purpose of washing the scalp of her little boy, who had eczema, and the defendant did not know that she had it in her room, nor did any one else know it, so far as she was aware, but some one must have known where it was or they would not have known where to tell the chief to find it.

The defendant in his statement said that he rented the barber shop from Stacy Michael, and had nothing to do with the operation of the house; that he knew nothing about the liquor in Stacy Michael's room, and did not know whose it was; that he

was in the barber shop when the policeman called him out and told him he wanted a drink, and he then told the policeman that he did not have any liquor; that he did not know that the witness Lowe had left any money in his room, or had consumed any whisky there, or that any one else had left any money there.

In *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574, it is said:

"The phrase 'at their place of business,' appearing in the general prohibition statute of 1907, includes in its meaning the immediate room or place in which the business in question is conducted, also any nearby room or place used by the proprietor in connection with the business or in such a relation to the actual place of business as to indicate that the nearby room, compartment, etc., is a convenient place which the proprietor would probably use for keeping therein such liquors as he might desire to furnish others for the purpose of inducing trade, or for keeping therein liquors intended for unlawful sale under cover of the business carried on in the main place. (a) The preposition 'at' has a great relativity of meaning, conforming readily to the nature of the thing which constitutes its grammatical object and to the principal notion in the mind of the person using it. It generally includes in its meaning all that 'in' would, but not quite as much as 'in and near' would. (b) 'A place of business,' within the purview of the state prohibition law, means a place devoted by the proprietor to the carrying on of some form of trade or commerce."

In that case the defendant had a little store in La Grange, and there was a small room in the rear, cut off by a partition wall, in which no goods were usually bought or sold, but where whisky was found; and this court held that having the liquor in the back room was a keeping at the place of business of the defendant.

In *Bashinski v. State*, 5 Ga. App. 3, 62 S. E. 577, this court held:

"A nearby room, which a person uses in connection with the business conducted by him in his regular place of business, is a part of his place of business, within the purview of the general prohibition statute."

In the opinion the court approved the following charge by the trial judge:

"If you believe, from a consideration of the evidence adduced on the trial of this case, that he did keep such restaurant, that he did keep such soft drink dispensary, and that on the premises of this establishment conducted by him, and connected therewith in said business, there was a room wherein he had stored alcoholic, spirituous, malt, or intoxicating liquors in any quantity, I charge you that, if such storage room was connected with that place of business, the prisoner at the bar would be guilty of a violation of the law of Georgia."

In *Smith v. State*, 11 Ga. App. 89, 74 S. E. 711, this court expressly reaffirmed the ruling in *Jenkins v. State*, supra, and held further that the following instruction was one of which the defendant could not complain:

"If you find that the place out there was so nearly connected with the business of the defendant as to convince you that it was used in

conjunction with the business, then that would be such 'a place of business' as contemplated by the law; if it is not so shown, then it would not be."

See, also, *Flahive v. State*, 10 Ga. App. 401, 73 S. E. 536, and many other cases in which this doctrine is adhered to by this court.

In the present case, so far as the evidence discloses, the room on the ground floor occupied by the defendant as a barber shop was his only place of business in the boarding house conducted by the woman Stacy Michael, or by the woman and himself together under his exclusive control. The whisky found by the officer was not discovered in the barber shop or in any room connected directly therewith; and though it is true the whisky was found in the room immediately back of it, which could be entered through a door opening into the hall, it nevertheless appeared that this room was used by the woman Stacy Michael as her private bedroom, and was in no sense under the control of the defendant or used in connection with his business. So, also, the evidence that he may have kept a bottle of whisky for his own use in the bedroom upstairs could not be held to show a keeping "at his place of business," so far as relates to the barber shop. Of course, had it appeared that a large amount of whisky was found in his bedroom under the circumstances, it might have been inferred (since the bedroom and barber shop were in the same building) that perhaps the accused kept the whisky in the bedroom either for the purpose of unlawful sale or to use in inducing trade or custom in his shop; and the phrase "at his place of business" might possibly, under such circumstances, be stretched to include such a keeping, where it was apparently probable that the keeping was in connection with the business conducted in a different room in the same building. It is true there was testimony from the chief of police that the accused admitted to him that he and Stacy Michael together conducted the boarding house, and it is insisted by counsel for the state that the conviction was authorized on the theory that the defendant was interested in the con-

duct of the boarding house in which the liquor was stored, and therefore that the whole house was his place of business.

It is undisputed that the only liquor found was found in a room occupied by the Michael woman, which was not apparently connected in any way with the barber shop, or directly with the offices or public portions of the boarding house, except that the room was entered from the hall. Even admitting that the defendant was interested with the Michael woman in operating the boarding house, we cannot hold that whisky stored by her in her own private bedroom therein, wholly without his knowledge or consent, so far as the evidence discloses, was kept by him at his place of business. While that question is not before us for determination, if the woman Stacy Michael had herself been charged with keeping liquor at her place of business, and that place of business was a public boarding house, it does not appear to us that her conviction would be authorized upon proof merely that she had a small quantity of liquor for her own use and in her own personal bedroom, used and occupied by her apart from the management and totally disconnected from the operation of the boarding house itself, except in so far as it afforded a place for her personal lodgement and comfort. However, since there is nothing in this case to indicate that the accused had any knowledge whatever that two quarts of liquor were kept by Stacy Michael in the room adjoining his barber shop but disconnected therefrom, and it does not appear from the evidence at the trial whether the whisky that the witness Lowe found in the room jointly occupied by himself and the accused was found there within two years before the filing of the accusation, which charged the specific offense of keeping liquor on hand at his place of business in the boarding house, and since the conviction must therefore stand or fall solely on the testimony touching the whisky found in the room occupied by Stacy Michael, the court erred in overruling the motion for a new trial.

Judgment reversed.

BROYLES, J., dissents.

(16 Ga. App. 231)

SMITH v. STATE. (No. 6410.)

(Court of Appeals of Georgia. May 4, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW §552 — CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

"To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused." Pen. Code 1910, § 1010.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. §552.]

Broyles, J., dissenting.

Error from City Court of Zebulon; E. F. Dupree, Judge.

Brewster Smith was convicted of crime, and brings error. Reversed.

Henry O. Farr, of Zebulon, for plaintiff in error. John F. Redding, Sol., of Barnesville, for the State.

WADE, J. When this case was formerly here for review (Smith v. State, 14 Ga. App. 610, 81 S. E. 817), the judgment of the lower court was reversed because of the fact that certain physical objects referred to in the testimony of a witness for the purposes of identification, but not formally tendered in evidence for the purpose of having their admissibility passed upon by the court, were sent out with the jury, to be used by them as evidence in the consideration of the case, without any waiver on the part of counsel for the defendant. In the opinion the court said:

"We are the more inclined to award another trial in the present instance because it is extremely doubtful if the evidence in behalf of the state, which is circumstantial in its nature, is sufficient to exclude every other reasonable hypothesis than that of the defendant's guilt."

The court further said (14 Ga. App. 612, 81 S. E. 818):

"Let it be admitted that it was the defendant who was present; there was no evidence that the still was on his land, and it was shown to be located a mile and a quarter from his home. He was lying upon the ground, with his back against a tree, and therefore was not apparently engaged, or about to be engaged, in the operation of the still. There is no evidence that he was in his working clothes, or in his shirt sleeves, or that he had any interest in the still or its product; and it seems to us that it is perhaps as reasonable to infer that he intended to consume some intoxicant, acquired by gift or purchase, after its manufacture had been completed by the actual owner as that he was a participant in the manufacture—interested in the ownership of the still, or its products."

The evidence in the present record is substantially the same as that referred to above, with some few minor differences. At the former trial it did not appear that the still was on the land of the defendant. There was evidence that it was "about a mile and a quarter from the defendant's" home; whereas at the last trial there was no evidence to

show where the still was located, whether near by or far away from the home of the defendant. At the former trial it did not appear whether the defendant was "in his working clothes or in his shirt sleeves," and at the last trial the evidence showed that the accused was, in fact, in his shirt sleeves between 9 and 10 o'clock in the morning of April 8, 1914; and, while the court, when the case was formerly here, intimated that evidence to the effect that the defendant was in his working clothes or "in his shirt sleeves" might be a circumstance tending to show his criminal connection with the illicit manufacture of spirits then being actively conducted by the negro apparently in charge, the court did not mean to intimate that proof of the defendant's garb alone would be sufficient to connect him with the commission of the alleged crime. The evidence on the former trial disclosed that the defendant dropped his hat when he fled from the neighborhood of the still on the approach of the officers, and the evidence at the last trial also shows this fact, and likewise the additional fact that the hat itself dropped by the defendant "had still slop all over it." Otherwise, as already stated, the evidence was the same as on the previous trial.

As was said when the case was here before, proof of flight alone "is not an incriminatory circumstance of sufficient probative value of itself to authorize conviction of crime." The fact that the defendant was in his shirt sleeves might add some slight additional element of suspicion, but, when it is remembered that he was thus garbed on the 8th of April, a month when, as a matter of common knowledge, spring, in this state is usually well advanced, and coats are more or less superfluous garments in bucolic localities, the absence of a coat does not necessarily suggest that the defendant was at the still ready to assist in its further operation, or resting from labor already expended in that direction. It may be just as well supposed that the defendant was on his way to some other locality and stopped to rest and observe the interesting process by which alcoholic beverages may be distilled from harmless and nutritious materials. A thousand and one reasons might be imagined to explain the defendant's presence, many of which would be entirely consistent with his innocence, and no less reasonable than the theory that he was present in his shirt sleeves to assist in conducting the illicit still. So, too, the fact that the hat dropped by him in his flight was covered with "still slop" does not necessarily connect the defendant with the operation of the still itself. He may have been prying about and examining the various processes of manufacture for some time before the officers arrived, and may have accidentally dropped his hat into a barrel of "slop" or "beer" without necessarily be-

ing concerned in the production of the "slop" or "beer," or the alcoholic product to be derived therefrom. The fact that the defendant ran when the officer approached was also a suspicious circumstance, but, on the other hand, if he accidentally stopped by the place where the still was being operated, and, though realizing that he was witnessing an illegal performance, yielded to curiosity, remained for a time to examine the still and its appurtenances, and had finally deposited himself at full length under and behind a tree, perhaps to indulge in a morning nap, what is more natural than that, when suddenly interrupted by the officers running by him and seizing the person operating the still, and realizing that his very presence was in a measure compromising to him, he should have sprung to his feet and fled to the adjacent swamp, without even stopping to recover the slop-stained hat, knocked from his head by an overhanging limb. The circumstances are certainly suspicious, and it may be conjectured that the defendant was guilty, but a conviction based on conjecture alone cannot be allowed to stand, no matter how often separate juries may surmise the guilt of the defendant.

It is true that juries in criminal cases are judges of both the law and the facts; but, as time and again declared, juries must take the law given them in charge by the court to guide and control them in the consideration of the evidence, and must apply to the evidence the rules of law so given them in charge. See *Pettigrew v. State*, 14 Ga. App. 462, 81 S. E. 446, and numerous cases there cited. Any finding of fact by a jury supported by some evidence must be allowed to stand; but, where circumstantial evidence alone is relied upon to establish the guilt of one charged with crime, and such evidence fails to exclude every other reasonable hypothesis than that of the guilt of the accused, it is not only within the power of this court, but it is the absolute duty of the court, to set aside a verdict of guilty. In this case the evidence was altogether circumstantial, and consequently a conviction resting upon evidence which fails to come up to the standard prescribed by law and quoted in the headnote of this decision is contrary to law. Since the jury found by their verdict that the accused was actually present at the still, and there was some evidence tending to show his presence there, we treat the fact of his presence as established, notwithstanding the testimony introduced by him to show that he was at an entirely different place on the day charged in the indictment and testified about by the witnesses for the state.

There is no merit in the special assignment of error based on the refusal of the court to allow the introduction in evidence of a certain indictment, with a plea of guilty, and the sentence in the case of one Harry Kendall, who was charged with the operation of the identical still at the identical time and place with the defendant, since its introduction could not have thrown light upon the question of the guilt of the defendant in the present case; as in misdemeanors all concerned in the commission of the crime are principals, and the evidence that Kendall pleaded guilty as a principal would not tend to negative the idea that Smith was also guilty of the same crime.

Nor is there any merit in the exception that the verdict was contrary to law because the jury recommended the defendant to the mercy of the court, and thereby indicated that they entertained doubt as to the guilt of the accused, but nevertheless refused to give him the benefit of that doubt as required by law. The fact that the jury recommended the accused to the mercy of the court does not necessarily imply that they entertained the slightest doubt as to his guilt, though a verdict with such a recommendation may often be a compromise verdict, and the inclusion of the recommendation may indicate on the part of some one or more of the jury a slight lingering doubt as to the guilt of the accused. It must be assumed that when jurors acting under their oaths, finally return their solemn verdict in court finding the accused guilty, all reasonable doubts resting upon their minds have been resolved, and they are morally certain of his guilt. Many extrinsic circumstances, oftentimes evidenced by the appearance, health, afflictions, deformities, or environment of the accused, may constrain the jury, in the exercise of human compassion, to ask the judge to extend such measure of mercy to the accused as may be consistent with his conception of duty and right, where the jury nevertheless feels compelled to find against the defendant on the bald questions of fact, and by their verdict declare him guilty of the charge they are impaneled to try.

Judgment reversed.

BROYLES, J. (dissenting). I think that the undisputed fact of the defendant's flight from the still in his shirt-sleeves, and the further undisputed fact that his hat was covered with "still slop," were some evidence of his guilt, and, as this court and the Supreme Court have uniformly held, where there is any evidence to sustain the jury's verdict, the discretion of the trial judge in upholding their finding will not be controlled.

(16 Ga. App. 313)

PORTER v. CITY OF THOMASVILLE.

(No. 6015.)

(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

1. JUDGES \Leftrightarrow 49—DISQUALIFICATION—OFFER OF REWARD—MAYOR.

One charged with the violation of a municipal ordinance is, equally with those charged with greater crimes, entitled to a fair and impartial trial; and that an alleged violator of a municipal ordinance cannot obtain a fair trial (within the legal intendment of that term) before a mayor who has offered to pay \$50 for the conviction of the particular defendant of the particular offense with which he is charged is a proposition which does not admit of argument. The rule in *Elliott v. Hipp*, 134 Ga. 844, 68 S. E. 736, 137 Am. St. Rep. 272, 20 Ann. Cas. 423, has no application in such a case; for a mayor, in the trial of a municipal case, acts as judge and jury, and as a juror he would be clearly disqualified. See *Dumas v. State*, 62 Ga. 58; *Beall v. Clark*, 71 Ga. 818 (2); *Almand v. County of Rockdale*, 78 Ga. 199; *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501; *Moore v. Farmers' Mut. Ins. Co.*, 107 Ga. 199, 33 S. E. 65; *Bank of the University v. Tuck*, 107 Ga. 211, 33 S. E. 70; *Lyens v. State*, 133 Ga. 587 (4), 66 S. E. 792.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 187, 188; Dec. Dig. \Leftrightarrow 49.]

2. CRIMINAL LAW \Leftrightarrow 1071—CERTIORARI—PETITION.

"In application for certiorari, all the allegations of fact therein contained, including statements of what was testified, are to be taken and considered as true by the court, when clearly set forth and when the petition is verified as prescribed in Civ. Code 1910, § 5184." *Linder v. Renfro*, 1 Ga. App. 58, 57 S. E. 975. As the state of facts referred to above was set forth in the petition in the present case, the judge of the superior court erred in refusing to sanction the certiorari.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2702; Dec. Dig. \Leftrightarrow 1071.]

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

George T. Porter was convicted of violating a municipal ordinance of the City of Thomasville. The judge of the superior court refused to sanction certiorari, and defendant brings error. Reversed.

C. E. Hay, of Thomasville, for plaintiff in error. Louis S. Moore and W. C. Snodgrass, both of Thomasville, for defendant in error.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 313)

PORTER v. CITY OF THOMASVILLE.

(No. 6016.)

(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \Leftrightarrow 304, 1071, 1081½—JUDICIAL NOTICE—VIOLATION OF ORDINANCE—CERTIORARI—PETITION—REQUISITES—ANSWER.

While a recorder, mayor, or other judge of a municipal court may take judicial notice of

the ordinances of the city, judges of the superior court and the reviewing courts have no judicial knowledge of municipal ordinances. A petitioner for a writ of certiorari, brought to review his conviction in a municipal court, must either set out the ordinance, if he admits its existence, or deny the existence of the ordinance under which he was convicted, and, "if the existence of the ordinance is denied, the petition should be sanctioned; and it is incumbent upon the judge whose decision is under review to show by his answer that there was an ordinance authorizing the conviction complained of." *Hill v. City of Atlanta*, 125 Ga. 698, 54 S. E. 354, 5 Ann. Cas. 614.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 700-717, 2702, 2725, 2951½; Dec. Dig. \Leftrightarrow 304, 1071, 1081½.]

2. CRIMINAL LAW \Leftrightarrow 1071—VIOLATION OF ORDINANCE—CERTIORARI—PLEADING AND PROOF.

An allegation that "no ordinance whatever has been adopted or enacted in the city of Thomasville prohibiting any of the acts alleged to have been committed by the defendant," and that "the alleged ordinance under which defendant is about to be tried, and which is charged to have been violated, has not been adopted by the mayor and aldermen of said city, and is not of force in said city" (without regard to whether an ordinance upon the same subject may at some time have been adopted), was sufficient to entitle the accused to submit proof in support of this plea, and it was error for the municipal judge ex more motu to refuse proof and strike the plea setting up the foregoing facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2702; Dec. Dig. \Leftrightarrow 1071.]

3. ASSIGNMENTS OF ERROR.

In view of the foregoing rulings, consideration of the remaining assignments of error would be premature and unnecessary.

4. CRIMINAL LAW \Leftrightarrow 1071—VIOLATION OF ORDINANCE—CERTIORARI—PETITION.

The judge of the superior court erred in refusing to sanction the certiorari, because his judicial knowledge no more included knowledge that the purported ordinance was legally adopted than that the ordinance previously adopted, if one was passed, was identical with the purported ordinance upon which the accused was being tried, and the allegations of the petition should have been taken to be true, prior to the answer of the judge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2702; Dec. Dig. \Leftrightarrow 1071.]

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

George T. Porter was convicted of violating a municipal ordinance of the City of Thomasville. The judge of the superior court refused to sanction certiorari, and defendant brings error. Reversed.

C. E. Hay, of Thomasville, for plaintiff in error. Louis S. Moore and W. C. Snodgrass, both of Thomasville, for defendant in error.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 310).

ANTHONY v. WINGFIELD. (No. 5927.)
(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇨706—PRESENTATION FOR REVIEW—DENIAL OF NEW TRIAL—EVIDENCE.

Where the grounds of a motion for a new trial are dependent upon a consideration of the evidence, and a brief of the evidence has not been prepared in even substantial compliance with section 6093 of the Civil Code of 1910, this court will not attempt to review the discretion of the trial judge in overruling such grounds. *Grier v. Brown*, 118 Ga. 670, 45 S. E. 455; *Wall v. Mercer*, 119 Ga. 346, 46 S. E. 420; *Gairdner v. Tate*, 121 Ga. 253, 48 S. E. 907; *Whitaker v. State*, 138 Ga. 139, 75 S. E. 254; *Albany, etc., R. Co. v. Wheeler*, 6 Ga. App. 270, 64 S. E. 1114.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2944-2947; Dec. Dig. ⇨706.]

Error from City Court of Washington; Wm. Wynne, Judge.

Action between G. T. Anthony and J. T. Wingfield. From the judgment, Anthony brings error. Affirmed.

Colley & Colley and W. A. Slaton, all of Washington, Ga., for plaintiff in error. J. M. Pitner and I. T. Irvin, Jr., both of Washington, Ga., for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 312)

MATHEWS v. STATE. (No. 6004.)
(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

1. **ANIMALS** ⇨36—INDICTMENT AND INFORMATION ⇨100—VIOLATION OF QUARANTINE LAW—REQUISITES OF INDICTMENT.

"It is a general rule that the allegations of fact made in the body of an indictment, in order to constitute an offense, must show that the accused did all of those acts which the statute prescribed shall be a crime if done." *Herring v. State*, 114 Ga. 96, 99, 39 S. E. 866, 867.

(a) The indictment in this case is based on the quarantine law as to cattle (Pen. Code 1910, § 582; Civ. Code 1910, § 2082). It alleges that the accused, on a day named, "did

then and there, unlawfully and with force and arms, move live stock, to wit, one fawn-colored jersey cow and her calf, within a quarantined area on his premises, in violation of the quarantine rules of the commissioner of agriculture of Georgia, to wit, without having said cattle officially inspected and disinfected, and without written permission from an authorized state cattle inspector, contrary to the laws of said state," etc. The particular rule or rules violated should have been precisely designated and identified, and should have been set forth in the exact language thereof.

(b) The indictment charges the accused with the commission of a misdemeanor, by reason of the fact that he did "move live stock," describing it "within a quarantined area on his premises," etc. Paragraph 6 of rule No. 3, bulletin No. 9, series A of the "Revised Rules and Regulations for the Suppression and Eradication of Infectious and Contagious Diseases Affecting Live Stock in the State of Georgia," effective on and after March 15, 1914, and promulgated under authority conferred by law in the acts of the General Assembly (No. 472, p. 125, Laws 1910), and approved by the commissioner of agriculture of the state of Georgia, provides that the owners or keepers of cattle that have been sufficiently quarantined, etc., "may move cattle from or onto such quarantined premises upon inspection and written permission by a regularly appointed and commissioned cattle inspector." Neither this nor any other precise provision of the rules or regulations established by the commissioner of agriculture under the provisions of the Code, supra, appears to prohibit the movement of live stock within a quarantined area on the premises of the accused.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 95, 96; Dec. Dig. ⇨36; *Indictment and Information*, Cent. Dig. §§ 286-288; Dec. Dig. ⇨109.]

2. **QUASHING INDICTMENT.**

The court erred in overruling the motion to quash the indictment.

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

W. C. Mathews was convicted of violating the quarantine law, and brings error. Reversed.

Harris & Johnston, of Ringgold, for plaintiff in error. Sam P. Maddox, Sol. Gen., of Dalton, for the State.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(16 Ga. App. 315)

ROBERTS v. STATE. (No. 6328.)

(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence strongly authorized the verdict.

2. INSTRUCTIONS.

The excerpts from the charge of the court which are complained of may, while standing alone, be subject to some criticism; but, when considered in connection with the charge as a whole and in the light of the evidence in the case, they contain no reversible error.

3. CRIMINAL LAW §1173—APPEAL—HARMLESS ERROR—FAILURE TO INSTRUCT—CIRCUMSTANTIAL EVIDENCE.

The direct evidence being in itself sufficient to authorize the conviction of the accused, the failure of the court to charge upon circumstantial evidence, in the absence of a timely written request to do so, if error, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.]

4. CRIMINAL LAW §1064—APPEAL—PRESENTATION BELOW—INSTRUCTIONS—MOTION FOR NEW TRIAL.

The exception that the state's contentions were unduly stressed is not so presented as to submit anything for the consideration of this court, but would require a careful scrutiny and analysis of the entire charge of the court, and the language to which the exception is taken is not embodied in the motion for a new trial, as required by the decisions of the Supreme Court and this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.]

Error from City Court of Macon; Robert Hodges, Judge.

C. M. Roberts was convicted of crime, and brings error. Affirmed.

W. D. McNeil, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 314)

CENTRAL OF GEORGIA RY. CO. v. PITTS & ESPY. (No. 6088.)

(Court of Appeals of Georgia. May 7, 1915.)

(Syllabus by the Court.)

SALES §181—ACCEPTANCE OF CROSS-TIES—REBUTAL OF PRESUMPTION.

Though the placing of cross-ties at a switch on the line of a railway company for its acceptance and use, and their subsequent removal by some one, might create a presumption that the ties had been accepted and used by the company, and a corresponding obligation on its part to pay therefor, yet where positive, unequivocal, and uncontradicted testimony emphatically denies that the ties were ever inspected or received by the company, this presumption is legally rebutted. The verdict against the railway company in this case was therefore unauthorized,

and the judge of the superior court erred in overruling the certiorari.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-481; Dec. Dig. § 181.]

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Action by Pitts & Espy against the Central of Georgia Railway Company. Judgment for plaintiff. Certiorari overruled, and defendant brings error. Reversed.

J. Branham, of Rome, and J. M. Bellah and J. D. Taylor, both of Summerville, for plaintiff in error. C. D. Rivers, of Summerville, for defendant in error.

WADE, J. Judgment reversed.

(16 Ga. App. 321)

SCHOFIELD-BURKETT CONST. CO. v.

RICH. (No. 5801.)

(Court of Appeals of Georgia. May 10, 1915.)

(Syllabus by the Court.)

1. AMENDMENTS—DEMURRERS TO PLEAS.

There was no error in allowing the amendments to the defendant's pleas, nor in overruling the demurrers to the pleas as finally amended; the written contract signed contemporaneously with the notes, and afterwards introduced in evidence, not being set out or referred to in the pleadings.

2. EVIDENCE §441—PAROL—UNAMBIGUOUS CONTRACT.

A purchaser of an article, who has given his promissory notes for the price, and signed contemporaneously an unambiguous written contract in regard to the same transaction, and therein accepted a limited warranty and stipulated not to exact anything beyond, cannot prove by parol other representations or warranties of the seller, unless upon the ground of fraud. Civ. Code 1910, § 4263, par. 1; Tindall v. Harkinson, 19 Ga. 448; Castleberry v. Scandrett, 20 Ga. 247; Collier v. Harkness, 26 Ga. 362, 71 Am. Dec. 216; Sawyer v. Vories, 44 Ga. 663; Allen v. Gibson, 53 Ga. 600, 601; Mansfield v. Barber, 59 Ga. 854; Haley v. Evans, 60 Ga. 158 (2), 159; Stripling v. Holton, 68 Ga. 821; Stone v. Moore, 75 Ga. 565; Fuller v. Buice, 80 Ga. 395 (1), 397, 6 S. E. 17; Thompson v. Boyce, 84 Ga. 497, 503, 11 S. E. 353; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Georgia Iron Co. v. Ocean Accident Corp., 133 Ga. 331, 65 S. E. 775; Pryor v. Ludden & Bates, 134 Ga. 288, 292, 67 S. E. 654, 28 L. R. A. (N. S.) 267; Brannen v. Brannen, 135 Ga. 590, 591, 69 S. E. 1079; Sheffield v. International Harvester Corp., 3 Ga. App. 374, 59 S. E. 1113; Heitmann v. Commercial National Bank, 6 Ga. App. 584, 65 S. E. 590. See, also, Roebeling's Sons Co. v. Southern Power Co., 142 Ga. 472-477, 83 S. E. 138-148R.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.]

3. TRIAL §252 — INSTRUCTIONS — FRAUD—EVIDENCE.

The evidence failing to show any deceit or fraud on the part of the plaintiff, it was error for the court to allow the admission of parol testimony as to verbal contemporaneous promises of the plaintiff, which added to and varied the unambiguous written contract. It was also error for the court to charge upon

the subject of fraud, there being no evidence to authorize the jury to find that any fraud or deceit had been practiced by the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ⚡252.]

4. CONTRACTS ⚡176—CONSTRUCTION—QUESTION FOR COURT.

The construction of a contract which is clear and unambiguous is a question for the court, and not for the jury. Civ. Code, 1910, § 4265.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. ⚡176.]

5. EVIDENCE ⚡441—PAROL—UNAMBIGUOUS CONTRACT.

It has been held that a plea, alleging that a note was renewed or paid by a defendant on the consideration of a verbal promise from the plaintiff, made after the note was executed, to repair defects, known to the defendant, in machinery or other personal property, and that this promise was not kept, and in consequence of the breach thereof the defendant was damaged, was meritorious. *Atlanta City Street Railway, etc., v. American Car Co.*, 103 Ga. 254, 29 S. E. 925; *Blount v. Edison General Electric Co.*, 106 Ga. 197, 32 S. E. 113. While this is true, the ruling does not apply in the instant case, where the alleged verbal promise by the plaintiff to make the machine work satisfactorily, pull up stumps, etc., or to refund the purchase money, was given contemporaneously with the signing of the notes and with the signing of the unambiguous written contract in which the defendant accepted a limited warranty (as to the quality of the material in the machine for one year), and stipulated therein not to exact anything beyond, and he will not be allowed to introduce by parol anything to add to, take from, or vary his solemn written contract, and the court erred in not excluding all the evidence as to the above-mentioned verbal promises of the plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1846, 2030-2047; Dec. Dig. ⚡441.]

6. NEW TRIAL ⚡70 — GROUNDS — INSUFFICIENCY OF EVIDENCE.

The defendant, by his admissions in his answer, admitted a *prima facie* case in the plaintiff, and assumed the burden of proof. This burden he failed to carry, and the finding of the jury in his favor was not authorized by the legal evidence; and the trial judge erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. ⚡70.]

7. INSTRUCTIONS—ADMISSION OF EVIDENCE.

There were other errors in the charge of the court and in the admission of evidence, but as, under our rulings as above given, they are not likely to be repeated upon another trial of this case, it is unnecessary to discuss them here.

Russell, C. J., dissenting.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by A. J. Rich against the Schofield-Burkett Construction Company. Judgment for plaintiff, and defendant brings error. Reversed.

Harrell & Wilson, of Bainbridge, for plaintiff in error. W. H. Krause and T. S. Hawes, both of Bainbridge, and P. D. Rich, of Colquitt, for defendant in error.

BROYLES, J. Judgment reversed.

WADE, J. (specially concurring). To what is said in the rulings announced by the majority of the court I add this special concurrence merely for the purpose of bringing out some of the facts which appear in the record, and thereby, perhaps, making clearer the reasons for the conclusion reached by Judge BROYLES and myself. At the time the notes given for the purchase price of the machinery sold to the defendant by the Schofield-Burkett Construction Company were signed, a considerable time after the machinery had been placed in the defendant's possession, had been installed, and had been in actual operation, a contract was also signed which recites that the consideration of these notes was the purchase by the defendant from the plaintiff of an excavating machine therein described, and which contains certain provisions making all the remaining notes due and collectible on failure of the defendant to pay any one of them at maturity, and reserving title to the property until payment of the entire purchase price; and the following recital and waiver is likewise incorporated therein:

"The execution of the above notes and this contract is an agreement on my part that the above described property is accepted by me as being in full conformity with all warranties made by Schofield-Burkett Construction Company, and any objections and all complaints as to any of said property are hereby waived."

This agreement under seal was duly executed in the presence of the clerk of the superior court, and immediately under the signature of the defendant the following provision was entered:

"I hereby accept the excavating machine on the following conditions: That the said Schofield-Burkett Construction Company agrees to guarantee the material and workmanship of the said machine for the term of one year from date, against all defects in material, etc."

This guaranty covers only "the material and workmanship" of the machine against "all defects in material, etc." The abbreviation "etc.," following immediately the words, "all defects in material," must necessarily be held to include matters which are *eiusdem generis*. So it appears that this entire proviso or condition, ingrafted in the contract at the time it was signed, amounted only to an express guaranty of the materials and workmanship of the excavating machine for the term of one year, against "all defects in material." It is not contended that the guaranty by its terms covered anything more, or that it included the successful operation of the machinery, or that the machinery was reasonably suited to do the work for which it was purchased, and hence this proviso in no way destroyed the effect of the solemn written waiver, and of the representations, made in the body of the instrument itself, that the property was accepted by the maker of the notes, who executed the contract referred to—

"as being in full conformity with all warranties [*italics mine*] made by Schofield-Burkett

Company, and any objection and all complaints as to any of said property are hereby waived."

Despite this agreement in writing, executed at the time the notes were executed, which recited that the property purchased was accepted by the defendant "in full conformity" with "all warranties" made by the plaintiff, the court allowed the defendant to testify as to certain promises, agreements, and warranties in direct conflict with what the defendant himself asserted in this written agreement; and it appeared, from his testimony, that the promises, representations, or warranties, which he alleged were made to him by Burkett at the time the notes and this contract were executed, were made before the signing of the notes or the contract, to induce the execution thereof. There was no evidence of fraud, nor does the evidence suggest that any device was used by Burkett to prevent the defendant from reading misleading conditions of the agreement which he signed, but, to the contrary, it appears that he took the papers submitted him by Burkett for the plaintiff company to his attorney, and only after he had consulted with his attorney, and after the latter had advised him as to the effect of the contract, did he in the presence of his attorney execute the notes and the contract. To my mind, if written contracts must have accorded to them any higher degree of value than parol contracts, and if there be any virtue in the established rule that antecedent negotiations, representations, and in fact everything said before the making of a contract between parties able and willing to contract, are merged into the contract as written and executed, where no fraud is practiced and no fraudulent device used to induce the execution thereof, it was manifestly error to allow the defendant to testify to representations or promises which contradicted and varied the terms of the valid written instrument executed by him, which declared that *all warranties* (among such warranties being, of course, the implied warranty, as well as the alleged special warranty shown by some testimony to have been made before the execution of this instrument, that the machine sold was reasonably fitted for the purposes intended) in reference to this machinery had been fully complied with. To put the matter in shorter form: The written contract declared that the machinery was accepted as being in full conformity with all warranties made by the plaintiff, whereas the testimony of the defendant, admitted by the court, represented in direct conflict or contradiction of this agreement that the plaintiff company, through Burkett, had made a parol contemporaneous warranty as to the value and efficiency of the machinery, and a voluntary agreement to make good any deficiencies, other than those expressly referred to by the additional proviso ingrafted upon the contract.

I do not think the case of Atlanta City Street Railway Company v. American Car Company, 103 Ga. 254, 29 S. E. 925, militates against the view expressed above. In that case a *renewal* note was executed in consideration of a promise by the payee to repair certain defects in personal property, for the purchase price of which the original note had been given, which defects were known to the maker of the renewal note at the time it was executed; and the consideration moving the maker of the renewal note to execute it was not only the purchase price of the defective property already received by the maker, and for which it had previously given its note, but a material part of the consideration, inducing the execution of the renewal note and supporting it, was the promise of the plaintiff to repair the known defects then existing in the machinery, since the fact of renewal might itself support an additional promise or new consideration. In the instant case the contract and notes, executed at the same time, were not given in renewal; there were no known defects in the machinery, so far as appears from the writing itself, but the writing declares that the machinery was accepted as being in full conformity with all warranties made by the plaintiff company. Had notes alone been given, containing no representation that all complaints and objections to the property for which they were given had been waived, and that the property itself conformed with all warranties, evidence could, of course, have been admitted to show that the property was represented as being suitable for the purposes for which it was purchased, or that certain warranties had been made in regard thereto, since the consideration of a note may always be inquired into. The notes sued upon, not being in renewal, and the alleged contemporaneous parol agreement, set up by the evidence of the defendant, being wholly without any consideration and in direct contradiction of the recitals in the contract signed at the time, were therefore improperly admitted. I do not think that the case of Blount v. Edison General Electric Co., 106 Ga. 197, 32 S. E. 113, has any bearing whatever on the question at issue in this case. It is urged that a promise to make the machinery do the work desired was made by the plaintiff *after* the execution of the notes and contract referred to, at the time when the first note fell due, and the defendant declined to pay it until assured by the plaintiff that the plaintiff would guarantee the future successful operation of the machinery. It is somewhat doubtful, under the evidence, exactly when this alleged agreement was made and its precise effect, but it appears that the note was past due at that time and the defendant was legally bound to pay it, since he had, by express terms in his contract, already discussed, waived all "complaints" and "objections" to the machinery for which this note was partially given.

and had declared that the said machinery fully conformed with all warranties made by the plaintiff, and there appears to have been at that time absolutely no consideration moving to the plaintiff to make any agreement or promise in reference to the machinery, since the defendant had, by signing the written contract and waiver, precluded the possibility of interposing any defense (unless fraud had been shown), and was therefore bound at law to ultimately pay the obligation, regardless of his wishes or of the facts as to the sufficiency of the machinery to do the required work. In other words, a promise of the sort that the defendant attempted to set up, made at the time the first note fell due, and after the execution of a contract which waived everything in reference to the machinery except the quality of the material which entered into its construction and the workmanship displayed in its manufacture, was a mere naked agreement, as there was no attempt to prove a new and distinct subsequent agreement based on a consideration. Civil Code, § 5794. It is nowhere suggested in the record that the materials used in the construction of the machinery and the workmanship were defective in any way, but, to the contrary, it appears that both the workmanship and the material were without defects. It appears to me that the ruling in *Case Threshing Machine Company v. Broach*, 137 Ga. 602, 73 S. E. 1063, exactly covers the facts of this case. The court said:

"Where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between them, and parol evidence of prior or contemporaneous conversations, representations, or statements will not be received for the purpose of adding to or varying the written instrument. If such writing contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge, or modify that which the writing specifies. *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. 711; *Holcomb v. Cable*

Co., 119 Ga. 466, 46 S. E. 671; 2 *Mechem on Sales*, § 1254; *Pay & Egan Co. v. Dudley*, 129 Ga. 314, 58 S. E. 826; *Seitz v. Brewer's Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837."

From all of which it is clear to my mind that the court erred in admitting testimony concerning parol contemporaneous agreements, which attempted to vary the terms of a written contract that expressly acknowledged that all warranties had been complied with.

RUSSELL, C. J. (dissenting). The ruling in the first paragraph of the decision is an adjudication by this court that the defendant would be entitled to the verdict rendered in his favor if his plea was sustained by competent legal evidence and the trial free from error, and I, therefore, concur in that ruling. I also agree to the ruling in the second paragraph. Further than this I am not able to agree to the propositions stated by the majority of the court, because I am of the opinion that, under the evidence which the jury preferred to believe, the case falls under the rulings in *Atlanta City Street Railway Co. v. American Car Co.*, 103 Ga. 254, 29 S. E. 925, and *Blount v. Edison General Electric Co.*, 106 Ga. 197, 32 S. E. 113. While I would not sanction any infraction of the well-settled rule that parol evidence is not admissible to vary or affect the terms of a valid written instrument, it seems clear to me that the breach of a promise concurrent with the written obligation of another party, which promise was made designedly to induce the execution of the instrument, may itself be a fraud, and such a fraud as may avoid the contract, which, but for the false promise, would not have been made. And, in this view of the case, I am not prepared to say, although there are errors in the charge, that the verdict rendered is not supported by law and evidence, and to hold that the trial judge erred in overruling the motion for a new trial.

(169 N. C. 169)

LYNCH v. CAROLINA VENEER CO.
(No. 548.)

(Supreme Court of North Carolina. May 19, 1915.)

1. APPEAL AND ERROR ¶692—ASSIGNMENTS OF ERROR—SHOWING OF PREJUDICE.

Error cannot be assigned for ruling out questions asked witnesses, unless it is shown what replies were sought to be elicited, so that the court may see that the appellant was injured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. ¶692.]

2. WITNESSES ¶402—IMPEACHING OR CONTRADICTING OWN WITNESS.

A party introducing a witness and offering him to the court as credible cannot impeach him, but may show a different state of facts by another witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1268; Dec. Dig. ¶402.]

3. MASTER AND SERVANT ¶293—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries to an employé by slipping into a vat of boiling water from a platform, the railing of which had rotted away, instructions that the test was whether a reasonably prudent man, a reasonably cautious employer of labor, under similar circumstances, having proper regard for the safety of his employé, meaning "that regard which an ordinarily prudent man would have furnished under like circumstances," would have maintained the vat without some protection, and that, if a reasonably prudent man would have protected the vat, then it was defendant's duty to have done so, and his failure to do so was negligence, were proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. ¶293.]

4. MASTER AND SERVANT ¶291 — ACTIONS FOR INJURIES—INSTRUCTIONS.

In such action, an instruction that the burden was on plaintiff to satisfy the jury by the greater weight of the evidence that defendant failed to conform to the duty of a prudent man (that is, that he failed to construct and maintain the vat in the manner which a prudent man would have done, who was exercising that proper and reasonable regard for the safety of his employé which the law required an employer to exercise) was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. ¶291.]

5. MASTER AND SERVANT ¶286 — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Plaintiff was employed to catch logs as they were lifted from a vat of boiling water, peel the bark off them, and roll them to another room, and had occasion at times to return logs to the vat, requiring him to work near the vat and often at its very edge, on a platform five or six feet wide, saturated with water, and covered with slick bark. A railing had rotted away, and had not been replaced, though gone for about ten days before the accident. Plaintiff, in attempting to pull a log around to put it back into the vat, slipped on a piece of bark and fell into the vat, at a point where the railing was gone. The employer's president passed the place where the rail was gone several times a day, and its foreman knew that it was gone several days before the accident. Held, that it was the employer's duty to furnish plaintiff a reasonably safe working place, and whether the

failure to replace the guard rail was negligent was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. ¶286.]

6. MASTER AND SERVANT ¶101, 102—LIABILITY FOR INJURIES—APPLIANCES AND PLACES OF WORK.

The appliances and places for the safety of servants furnished and the methods employed by an employer should be such as commend themselves to a ordinarily prudent man, and the general custom in the use of safety appliances is not the sole test of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. ¶101, 102.]

7. TRIAL ¶260—INSTRUCTIONS COVERED BY THOSE GIVEN.

In an action for injuries to an employé who slipped into a vat of boiling water while moving a log, an instruction that if his employer ordered him not to use an axe in moving logs, but, violating his orders, he used the axe for such purpose, and his disobedience was the proximate cause of his injury, he could not recover, was substantially covered by an instruction that if suitable tools and appliances were furnished plaintiff with which to roll and move the logs, and if he failed to use them, but used an axe which pulled out causing him to fall into the vat, he could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ¶260.]

8. TRIAL ¶258 — INSTRUCTIONS — NECESSITY OF APPLYING TO PARTICULAR ISSUE.

A prayer concluding, "plaintiff cannot recover," without applying it to any issue, is defective, and its refusal cannot be assigned as error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 646, 647; Dec. Dig. ¶258.]

Appeal from Superior Court, Buncombe County; Cline, Judge.

Action by W. R. Lynch against the Carolina Veneer Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin, Rollins & Wright, of Asheville, for appellant. Jones & Williams, of Asheville, for appellee.

CLARK, C. J. This is an action by an employé to recover damages for personal injuries. The defendant is the Veneer Manufacturing Company, which has in use several large vats, each 20 feet long, 10 feet wide, and 6 feet deep, filled with boiling water, in which large logs are subjected to the moist heat to soften them for veneering purposes. These vats are parallel to each other, in the same room, and are surrounded by narrow platforms 5 or 6 feet wide, on which the plaintiff, with other employés, was stationed to catch the logs as they were lifted from the vat, peeling the bark off, and rolling them to the veneer room. If a log was lifted from the vat of a different kind of wood from that being used at the time, it was rolled back into the vat. This duty required the plaintiff to work near the open vat and often at its very edge. The plaintiff, a young man 22 years old, had been in the employ of the company on this

work 2½ months. Down to within 10 days of his injury the defendant had used a rail as protection, consisting of a heavy 2x6 scantling laid flat and extending 10 or 12 inches above the floor. This was not a part of the vat but a protection. About 10 days before the plaintiff's injury, this railing had rotted away and had not been replaced at the time of the injury. The president of the defendant company passed by the place where the rail had rotted away 3 or 4 times a day, and the defendant's foreman testified that he knew that the railing had rotted away several days before the accident. The defendant, however, with full knowledge of the absence of the protection formerly used, continued to require his employes to peel and drag the logs on the narrow platforms, 5 or 6 feet wide, saturated with water, covered with slick bark, and adjoining deep vats filled with boiling water.

While the plaintiff was engaged in peeling and moving the logs on the platform, which that day were poplar and oak, a chestnut log was lifted from the vat, and the plaintiff, in the line of his duty, put it back into the vat. To do this he struck the axe, which he was furnished with for that purpose, into the end of the log, and, in attempting to pull it around to put it back into the vat, he slipped on a piece of bark and fell into the vat, where the protection had rotted away.

The jury found upon all the evidence that the plaintiff was injured by the negligence of the defendant and did not contribute to his own injury and assessed damages. From this verdict, and judgment thereon, the defendant appealed.

[1] The defendant's exceptions 1 and 2 are because the court refused to permit witness to answer certain questions. Without considering these exceptions further, it is sufficient to say that error cannot be assigned for ruling out questions, unless it is shown what replies were sought to be elicited, so that the court may see that the appellant was injured by such ruling. *Stout v. Turnpike Co.*, 157 N. C. 366, 72 S. E. 993; *Knight v. Killebrew*, 86 N. C. 402.

[2] The next exception is because the defendant was not allowed to impeach a witness introduced by himself. Having offered the witness to the court as credible, the defendant could not be permitted to impeach him. It could, however, have shown a different state of facts by another witness. *Sawrey v. Murrell*, 3 N. C. 397; *State v. Taylor*, 88 N. C. 694.

[3, 4] Exceptions 4 and 5 are abandoned. Exceptions 6, 7, 8, 9, 10, and 12 are to the charge, but the instructions excepted to presented merely the well-settled rule of the prudent man. The court charged the jury:

"Now, this is the test, gentlemen: 'Would a reasonably prudent man, a reasonably cautious employer of labor under these or similar circumstances, having proper regard for the safety of his employes and to furnish him a safe place in which to work, and that means that regard which an ordinarily prudent man would have

furnished under like or similar circumstances, would such a man have maintained this vat without some protection, railing, or other protection around it for the safety of the employes who had occasion to go and come around and about it in performing the work there?'"

The court also charged the jury:

"If you find that a reasonably prudent and cautious man would have protected this vat with some sort of railing or other construction around it, and you are satisfied of that by the greater weight of the evidence, then it was the duty of this defendant to have done that; and, if he failed to do that, such failure would be an act of negligence upon his part."

And also:

"The burden is upon the plaintiff to satisfy you, by the greater weight of the evidence, that the defendant failed to conform to the duty of the prudent man in this respect; that is, that the defendant failed to construct and maintain its vat in the manner which the prudent man would have done who was exercising that proper regard, reasonable regard, for the safety of his employes, that the law requires the employer to exercise."

[5] The facts of this case are almost identical with those in *West v. Tanning Co.*, 154 N. C. 44, 69 S. E. 637, in which the plaintiff slipped into such a vat of boiling water as this, in a similar plant. It was the duty of the defendant to furnish the plaintiff with a reasonably safe working place, and the evidence was proper to be submitted to the jury that, in not replacing the previous guard rail as a protection, the defendant was guilty of negligence.

[6] We cannot concur with the defendant that general custom in the use of safety appliances is the sole test of negligence. But the appliances furnished, methods employed, and places for the safety of servants should be such as commend themselves to an ordinarily prudent man. *Hornthall v. Railroad*, 167 N. C. 629, 82 S. E. 830; *Tate v. Mirror Co.*, 185 N. C. 280, 81 S. E. 328; *Ainsley v. Lumber Co.*, 165 N. C. 122, 81 S. E. 4.

The charge of the court in this and other respects excepted to are approved in the cases above cited, and also in *Steele v. Grant*, 166 N. C. 635, 82 S. E. 1038; *McAtee v. Manufacturing Co.*, 166 N. C. 448, 82 S. E. 857; *Steeley v. Lumber Co.*, 165 N. C. 27, 80 S. E. 963; *Reid v. Rees*, 155 N. C. 231, 71 S. E. 315; *Aiken v. Manufacturing Co.*, 146 N. C. 324, 59 S. E. 696. There are other exceptions to the charge, but we do not think that they require further discussion, as they are covered by the general propositions above stated and the cases already cited.

[7] There were 24 prayers for instruction handed up to the judge, and as to one of these, marked 10a, the appellant contends that it was overlooked by the court. This prayer was:

"If the jury find that the defendant ordered the plaintiff not to use the axe in moving the logs around, but, violating his orders, he used the axe for that purpose, and his disobedience was the proximate cause of his injury, he could not recover."

Without discussing the question whether this prayer was overlooked by the judge be-

cause of the manner in which it was placed on his desk, it is sufficient to say that the judge substantially gave that prayer as No. 16 of the special instructions as follows:

"If the jury find that suitable tools and appliances were furnished the plaintiff with which to roll and move the logs, and that the plaintiff failed to use the appliances furnished him, but used an axe, and, while using the axe and attempting to move the logs, the axe pulled out, causing the plaintiff to fall in the vat, he could not recover, and it would be the duty of the jury to answer the first issue, 'No.'"

[8] Besides, it has been often held that a prayer which concludes as this, "The plaintiff cannot recover," without applying it to any issue, is defective, and a refusal to give it cannot be assigned as error. *Earnhardt v. Clement*, 137 N. C. 93, 49 S. E. 49; *Satterthwaite v. Goodyear*, 137 N. C. 304, 49 S. E. 205; *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125, and cases there cited.

Nor was it error for the court to refuse to charge the jury that, if they believed the evidence, the plaintiff was guilty of contributory negligence. After careful consideration of all the exceptions, we do not find that the defendant sustained prejudice in the trial of this cause.

No error.

(159 N. C. 211)

LAWRENCE et ux. v. ELLER et ux.
(No. 514.)

(Supreme Court of North Carolina. May 19, 1915.)

LANDLORD AND TENANT §63 — RIGHT TO QUESTION TITLE OF LANDLORD.

One who enters into possession of land as a tenant cannot, while retaining possession, assert against his lessor an after-acquired title, which he deems superior to that of the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 159-163, 165-167, 169, 172-176; Dec. Dig. §63.]

Appeal from Superior Court, Avery County; Webb, Judge.

Action by H. L. Lawrence and wife against B. F. Eller and wife. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

It was admitted in the pleadings that defendants B. F. Eller and wife, or B. F. Eller, as agent of his wife, had rented the tract of land in controversy to plaintiff for the year 1912 at the contract price of \$25; that the lessee had entered into possession and occupation of the property under and by virtue of the contract, and had continued such possession since that time; that in December, 1912, plaintiff had acquired a deed for the property from W. P. Eaton and wife, the original owners, and in January, 1913, had instituted the present action against the lessors, claiming to be the true owners under said deed, and without having surrendered or made any offer to surrender possession acquired by them under and by virtue of the lease. It was further alleged in the pleadings that W. P. Eaton and wife had previous-

ly, in 1906, contracted to sell the property to one D. C. Eller, who had entered under the contract of purchase and, after committing much spoil and injury to the property, had abandoned his contract to the original owners, and plaintiff had then acquired the title by purchase and deed and were the true owners of the property. Plaintiff further alleged that defendants, by some fraudulent arrangement or contrivance with D. C. Eller, had obtained possession of the property, for which he had no right whatever, and, while holding under such claim, had made the lease under which plaintiff entered. They alleged, further, that, while plaintiffs occupied the property under their pretended claim, they had procured a deed to be made them by the sheriff of Watauga county, purporting to convey to them the right of D. C. Eller in the property, and that this was their only claim of title, and plaintiffs thereupon demand judgment; that B. F. Eller and wife be declared the tenants of plaintiff; and that this pretended deed of the sheriff be declared fraudulent and void as constituting a cloud on their title.

Defendants answer, denying the allegations in impeachment of their title, and setting forth, also, that D. C. Eller bought the land originally from Eaton and wife for \$1,200 to \$1,300, and took a bond for title to convey same, which was duly registered in Watauga county, where the land was then situate; that some money was paid down and notes executed for the remainder, to wit, two notes for \$425 each and one for \$200; that D. C. Eller paid the \$200 note and one of the notes for \$425, and afterwards, in 1908, defendants bought the land from D. C. Eller, paying in full for his interest, and afterwards acquired the other note for \$425 by purchasing the same for full value from persons to whom it had been assigned by Eaton and wife; that defendants neglected to take a written assignment from D. C. Eller for his interest in the property, but, being a man of no education, he was misled and deceived in reference thereto by D. C. Eller, but that present defendants had acquired the title to said land or the right thereto in the manner specified, and being in possession, claiming as owners under their purchase, as stated, they had rented to plaintiff for 1912, and plaintiff, being fully aware of all the facts, and that the land had been fully paid for, had entered into a pretended agreement with Eaton and wife to purchase the land and taken a deed therefor, to be paid for in case recovery could be had against these defendants, and ask judgment that defendants be declared the owners of the property, and that the money paid therefor be declared a lien thereon, etc., and for general relief.

The court having intimated an opinion that plaintiffs could not maintain the present action unless and until possession had been restored to defendants, in deference to

such intimation, plaintiffs submitted to a nonsuit and appealed.

T. A. Love, of Pineola, and J. W. Ragland, of Newland, for appellants.

HOKE, J. (after stating the facts as above). It is recognized as the general rule that a tenant is not allowed to controvert the title of his landlord or set up rights, adverse to such title, without having first surrendered the possession acquired under and by virtue of the agreement between them. The position does not usually obtain where, after the renting, the title of the landlord has terminated or has been transferred either to a third person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord, and, in courts administering principles of equity, the estoppel is not recognized when the tenant has been misled into a recognition of his lessor's title by mistake or fraud and under circumstances which would induce a court of equity to hold the landlord a trustee for the tenant, and there are other exceptions of a restricted nature. The general rule, however, is as stated, and, while varying at times in its application, has been everywhere recognized as sound in principle, and has always been very rigidly enforced in this jurisdiction. *Campbell v. Everhart*, 139 N. C. 503-514, 52 S. E. 201; *Pool v. Lamb*, 128 N. C. 1, 37 S. E. 953; *Springs v. Schenck*, 99 N. C. 552, 6 S. E. 405, 6 Am. St. Rep. 552; *Davis v. Davis*, 83 N. C. 71; *Farmer v. Pickens*, 83 N. C. 550; *Wilson v. James*, 79 N. C. 849; *Abbott & Foster v. Cromartie*, 72 N. C. 292, 21 Am. Rep. 457; *Callender v. Sherman*, 27 N. C. 711; *Towne v. Butterfield*, 97 Mass. 105; *Brown v. Keller*, 32 Ill. 157, 83 Am. Dec. 258; *Davis v. Williams*, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; *Rogers v. Boynton*, 57 Ala. 501; *Ward v. Ryan*, (1876-77) 10 Ir. R. C. L. 17; *Peyton v. Stith*, 5 Pet. 485, 8 L. Ed. 200; 2 *McAdam's Landlord and Tenant*, § 421; 18 A. & E. (2d Ed.) p. 414; 24 Cyc. 946.

In *Davis' Case*, supra, Chief Justice Smith said:

"It is well-settled doctrine that one who, as tenant, gains possession of the land of another, cannot resist an action for its recovery, brought after the termination of the lease, by showing a superior title in another or in himself, acquired before or after the contract. The obligation to surrender becomes absolute and indispensable. 'Honesty forbids,' says *Ruffin, C. J.*, 'that he should obtain possession with that view, or, after getting it, thus use it.' *Smart v. Smith*, 13 N. C. 258. 'Neither the tenant, nor any one claiming by him,' remarks *Daniel, J.*, 'can controvert the landlord's title. He cannot put another person into possession, but must deliver up the premises to his own landlord.' *Callender v. Sherman*, 27 N. C. 711. 'If he entered as tenant, or after entry had become such,' is the language of *Rodman, J.*, 'he was estopped from asserting his title, until he had restored the possession to the plaintiff.' *Heyer v. Beatty*, 76 N. C. 29. Even a homestead right cannot be asserted in opposition to the recovery. *Abbott v. Cromartie*, 72 N. C. 292, 21 Am. Rep.

457. The rule does not preclude the tenant from showing an equitable title in himself on such circumstances as under our former system would call for the interposition of a court of equity for his relief, and which relief may now be obtained in the action, as is held in *Turner v. Lowe*, 66 N. C. 413. Yet the force of the general proposition remains unimpaired that, where the simple relation of lessor or lessee exists without other complications, the latter cannot contest the title of the former. *Forsythe v. Bullock*, 74 N. C. 135. The obligation to restore a possession thus obtained, before any inquiry into the title is permitted, although springing from the contract, rests upon the foundation of good faith and honest dealing among men."

In *Farmer v. Pickens*, 83 N. C. 550, *Dillard, Judge*, tersely states the position:

"It is settled that a person accepting a lease from another is estopped during the continuance of the lease, and afterwards, until he surrenders the possession to the landlord, to dispute his title, being a rule founded on a principle of honesty which does not allow possession to be retained in violation of that faith on which it was obtained or continued."

In *Springs v. Schenck*, supra, the court held:

A tenant cannot be heard "to deny the title of his landlord; nor could he rid himself of this relation * * * without a complete surrender to him of the possession of the land."

In *Towne's Case*, supra:

"* * * A tenant at will is estopped from denying his landlord's title without surrender of the leased premises or eviction by title paramount or its equivalent."

In *Brown v. Keller*:

"A tenant must surrender the premises before asserting rights adverse to his landlord which he acquired after renting the premises."

And, in *Davis v. Williams* [89 Am. St. Rep. 55]:

(2) "A tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy. (Page 58.)"

(3) "It is only where there is a change in the condition of the landlord's title for the worse, after a tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title. (Page 58.)"

(4) "A tenant must first surrender the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter. (Page 58.)"

(5) "An estoppel will be enforced in a court of equity as well as in a court of law. (Page 59.)"

A correct application of the principle declared and upheld in these cases are in full support of his honor's ruling; it appearing, from a perusal of the pleadings, that, without any change having taken place since the renting in the title of the lessor, the plaintiff, after having become defendant's tenant and during his tenancy, has undertaken to acquire what he considers a superior title to that of his landlord, and, while maintaining the possession acquired under and by virtue of his lease and without surrender, he institutes the present action to have himself declared the true owner, and that defendants are in fact and truth his tenants.

It has been said that the estoppel referred

to does not prevail in actions involving an issue as to title, but, if such a limitation on the general rule prevails in this jurisdiction, it applies only to actions involving strictly the issue as to title, and does not extend to those where the possession and the rights growing out of or incident to it are presented or in any way affected. *Peyton v. Stith*, 5 Pet. 485, 8 L. Ed. 200; *Bigelow on Estoppel* (6th Ed.) p. 585; 18 A. & E. (2d Ed.) p. 419.

While the action seeks also to have a deed, referred to in the pleadings, declared to be a cloud on plaintiff's title, this is only an incident and evidential. The gravamen of the action is have plaintiff declared the true owner, and that defendants are his tenants, and, under the authorities cited, such an action cannot be maintained by plaintiff unless and until he first surrenders the possession to the person from whom he rented. There is no error, and the judgment of his honor is affirmed.

Affirmed.

(169 N. C. 204)

CARVER v. CAROLINA, C. & O. RY. CO.
(No. 519.)

(Supreme Court of North Carolina. May 19, 1915.)

1. CARRIERS — MISCONDUCT OF PASSENGERS — ARREST — LIABILITY OF CARRIER.

Where a passenger's misconduct justified the conductor in arresting him or in calling on police officers to do so, and officers called on arrested him, the carrier was not liable for the officers' use of excessive force, not requested by the conductor, or for mistreatment of the passenger not perpetrated in the presence of the conductor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1119-1124, 1140, 1141; Dec. Dig. § 283.]

2. CARRIERS — MISCONDUCT OF PASSENGERS — ARREST — LIABILITY OF CARRIER.

Where a passenger's conduct did not justify the conductor in ordering him into the custody of police officers, but the conductor in so doing acted in good faith, though mistaken, the carrier was liable only for compensatory damages sustained by the passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.]

3. CARRIERS — MISCONDUCT OF PASSENGERS — ARREST — LIABILITY OF CARRIER.

Where a conductor wrongfully and unjustifiably ordered the arrest of a passenger, and his act in so doing was wanton, malicious, reckless, or through gross negligence and in disregard of the passenger's rights, punitive damages could be awarded in the sound discretion of the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.]

Appeal from Superior Court, Rutherford County; Webb, Judge.

Action by Calvin Carver against the Carolina, Clinchfield & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is a civil action tried upon these issues:

"1. Did the defendant wrongfully and illegally injure the plaintiff, as alleged in the complaint? Answer: Yes.

"2. What actual damages, if any, is the plaintiff entitled to recover of defendant? Answer: \$500.

"3. Did the defendant wantonly and maliciously injure the plaintiff, as alleged in the complaint? Answer: Yes.

"4. What exemplary damages, if any, is the plaintiff entitled to recover of defendant? Answer: \$300."

James J. McLaughlin, of Johnson City, Tenn., and F. D. Hamrick and J. W. Pless, both of Rutherfordton, for appellant. McBrayer & McBrayer and Solomon Gallert, all of Rutherfordton, for appellee.

BROWN, J. The evidence in this case tends to prove that the defendant ran an excursion train from Spartanburg to Altapass, on which were cars reserved for ladies. The plaintiff entered the car at Forest City with a number of companions and, according to his own admission, all were drinking. The evidence tends to prove that, on account of the plaintiff's drinking and open disturbance on the train, the conductor was compelled to phone to Marion for regular police officers to meet him at the station for the protection of his passengers. Two regular police officers met the train at Marion, and after the train left they arrested the plaintiff, who was then drinking and swearing in the presence of ladies and other passengers. The evidence tends to prove that the conductor ordered him under arrest by the regular officers and went about his affairs, leaving him in the custody of these officers; the conductor not further interfering. The evidence tends to prove that the officers, of their own volition, as they said for their own protection, and not at the instance of the conductor, placed handcuffs on the plaintiff and moved him to the smoking apartment. Then the plaintiff became more tractable and with the consent of the conductor, at the instance of the officers, the plaintiff was released. There was no further prosecution of the plaintiff, and he brings this suit for damages for the alleged wrongful arrest.

[1] There was quite a number of assignments of error relating to the evidence, as well as to the charge of the court. We deem it necessary to notice only one of them. The defendant requested his honor to charge the jury:

"If the plaintiff violated the law on defendant's train so as to justify his arrest by the conductor, and he was taken into custody by regular officers of McDowell county, the conductor, under the law, was not required to anticipate that the officers would mistreat the plaintiff; therefore you are charged that if plaintiff was properly arrested and turned over to proper legal officers of McDowell county, and that he was not subject to any improper indignities or suffering in the presence of the conductor, and a reasonably prudent man in the position of

the conductor would not have anticipated any such mistreatment, then you would answer the first issue, 'No.'"

Instead thereof his honor gave the following instruction:

"If you find that the officers aforesaid used excessive force in putting handcuffs on the plaintiff; or if you find that it was not necessary to put handcuffs on the plaintiff at the time he was arrested to safely keep him until he was discharged; or if you find that the officers put handcuffs on him because they were irritated at him because of the language that he had used, if you find that he used profane language, or because they were mad at him, knowing at the time that it was not necessary to handcuff him to arrest him and keep him; if you find that they did know it was not necessary to handcuff him in order to keep him—then the court charges you that a wrongful act was done the plaintiff, and it would be your duty to answer the first issue, 'Yes.'"

This exception is well taken. The instruction asked for should have been given. The charge of the court placed too great a burden upon the defendant, as the conductor had no authority over the officers, and could have done nothing legally to restrain their control and management of the prisoner while in their custody.

In *Brunswick & W. R. R. Co. v. Ponder*, 117 Ga. 66, 43 S. E. 431, 60 L. R. A. 715, 97 Am. St. Rep. 152, it is said:

"If our conclusion be correct that the conductor could assume that the arrest was a lawful one, and was under no duty to prevent it, we think the company cannot be held liable for the excessive force used. Ponder became the prisoner of the officers as soon as they laid hold of him, and before he was removed from the train. He was taken out from under the protection of the conductor" by "the officers of the law. He was then in the custody of the law, and, whether or not the conductor or any one else was authorized to prevent the use of unnecessary force in making the arrest, the railroad company was in this regard no longer under any duty to him as a passenger."

In *Pratt v. Brown*, 80 Tex. 608, 16 S. W. 443, it is held:

"A railroad company whose station agent requested a policeman to arrest a disturber in a depot is not liable for the act of the officer in detaining the person arrested for an unreasonable time."

It is further contended by the defendant that the plaintiff is not entitled to recover punitive or exemplary damages assessed under the fourth issue. In the view which we take of the case, the plaintiff would not be entitled to recover punitive damages, or any other damages, because of the act of the policemen in putting handcuffs upon the plaintiff, as the evidence shows that the conductor was not responsible for that act, and did not request or authorize it.

[2] If it should be shown upon the next trial that the conduct of the plaintiff on the train was such as to justify the conductor in calling upon the policemen and asking them to take the plaintiff in custody, then the defendant would not be liable for any damages. If the jury should find that the conduct of the plaintiff was not such as to

warrant the conductor in ordering him into the custody of the officers of the law, but that the conductor acted in good faith, although mistaken, the defendant would then be liable for such actual or compensatory damages as the plaintiff may have sustained.

[3] But if the jury should further find that the conductor wrongfully and unjustifiably ordered the arrest of the plaintiff without necessity, and that this act of the conductor was wanton, malicious, reckless, or was done through gross negligence and disregard of the plaintiff's rights as a passenger, then punitive damages may or may not be awarded in the sound discretion of the jury. Punitive damages are not recoverable in actions of this character unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury. *Holmes v. Railroad*, 94 N. C. 319.

New trial.

(189 N. C. 189)

RAINES v. SOUTHERN RY. CO. (No. 551.)
(Supreme Court of North Carolina. May 19, 1915.)

1. MASTER AND SERVANT §230—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—INFANTS.

If an inexperienced member of a section crew, about 16 years old, who was sent to flag a train, was not provided with the means of giving the signal with due regard to his own safety, and by reason thereof was killed while exercising that degree of care for his own protection which a person of his age, intelligence, and experience would ordinarily have exercised under the circumstances, he would not be guilty of contributory negligence; as all that is required of an infant is that he exercise care and prudence equal to his capacity.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 687-700; Dec. Dig. § 230.]

2. MASTER AND SERVANT §230—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

If an employé about 16 years old, sent to flag a train, sat near the track in a dangerous position, thinking that he was far enough away, and his exposure to injury was not the result of any failure to exercise that degree of care which one of his age and knowledge would have taken for his safety under the circumstances, his act was not necessarily contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 687-700; Dec. Dig. § 230.]

3. MASTER AND SERVANT §230—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

A youthful employé sent to flag a train was not an intruder or licensee, and did not act willfully in placing himself on the track in front of the moving train, and unless he was negligent, and his negligence was the proximate cause of the injury, there could be a recovery for his death.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 687-700; Dec. Dig. § 230.]

4. TRIAL §296—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for the death of a youthful employé sent to flag a train, where the court charged that he was guilty of contributory negligence "if he sat down near the track in a dangerous

position, if he thought that he was far enough away, if he put himself in a perilous position on the railroad track, and he was killed," the error in charging that he was negligent if he sat near the track in a dangerous position, though he thought he was far enough away, was not cured by the alternative proposition that he was negligent if he put himself in a perilous position on the track, as it could not be told by which branch of the instruction the jury were guided.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ☞ 296.]

5. MASTER AND SERVANT ☞248—LIABILITY FOR INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

The negligence of an employé sent to flag a train in falling asleep on the track would not be contributory in a legal sense nor the proximate cause of his death, if the engineer of the train, after he saw him lying there, and became aware of his perilous situation, could, by exercising proper care, have stopped the train in time to avoid the injury, and failed to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. ☞ 248.]

6. MASTER AND SERVANT ☞228—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—STATUTORY PROVISIONS.

The federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), does not change the law as to what is contributory negligence, but merely changes its legal effect upon the issue as to damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. ☞ 228.]

7. DEATH ☞58—PROOF OF PECUNIARY LOSS—BURDEN OF PROOF.

In an action for the death of a minor under the federal Employers' Liability Act, the burden was not on plaintiff to satisfy the jury that deceased would have contributed to the support of his father after he arrived at the age of 21 years, and as to the amount of such contribution; it being sufficient if the facts show a reasonable expectation of benefit to accrue to the parent by the continuance of his life.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75-78; Dec. Dig. ☞58.]

8. DEATH ☞103—PROOF OF PECUNIARY LOSS—QUESTION FOR JURY.

Where an employé was 15 or 16 years old, in good health, sober, industrious, and of average intelligence, and was earning \$1.10 a day, and contributing regularly to the support of his father, and his conduct towards his father tended to show that he was in mind and disposition imbued with a proper conception of his filial duty, and entertained the proper affection for his father, whether the father had a reasonable expectation of benefit or pecuniary aid if the employé had lived was a question for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. ☞103.]

Appeal from Superior Court, Buncombe County.

Action by B. E. Raines, administrator, against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. New trial granted.

The son of the plaintiff, who was named Bub Raines, was employed by the defendant as a member of the section crew on its line

between Asheville, N. C., and Spartanburg, S. C., and at the time of the accident he had been sent out to flag an approaching train. In attempting to do so he was struck by the train and killed. At the time he was between 15 and 16 years old. With reference to his contributory negligence, the court instructed the jury as follows:

"If he sat down near the track in a dangerous position, if you find he thought that he was far enough away, if he put himself in a perilous position on the railroad track, and he was killed, the court charges you that he would be guilty of contributory negligence, and it would be your duty to answer the second issue, 'Yea.'"

Upon the third issue, as to damages, the court charged the jury as follows:

"There is no presumption in law that Bub Raines would have contributed to the support of his father after he arrived at the age of 21 years, and the burden is on the plaintiff to satisfy the jury by the greater weight of the testimony that he would have continued to contribute to the support of his father after he arrived at the age of 21 years; and the burden is also upon the plaintiff to satisfy the jury as to the amount of the contribution he would have made to his father after arriving at the age of 21 years, and, unless the jury are satisfied by the greater weight of the testimony that he would have contributed to the support of his father after reaching the age of 21 years, then the jury could only award in this case, if they come to the issue of damages, the present value of such contributions as you find from the evidence Bub Raines would have made to his father from the time he was killed until he reached the age of 21 years."

Exceptions were duly taken to these instructions and each of them. The jury returned the following verdict:

"(1) Was the plaintiff's intestate, Bub Raines, killed by the negligence of the defendant, Southern Railway Company, as alleged in the complaint? Answer: Yes."

"(2) Did the plaintiff's intestate, Bub Raines, by his own negligence contribute to his death, as alleged in the answer? Answer: Yes."

"(3) What amount, if any, is the plaintiff entitled to recover? Answer: \$192."

Judgment was entered thereon, and plaintiff appealed.

Jones & Williams, of Asheville, for appellant. Martin, Rollins & Wright, of Asheville, for appellee.

WALKER, J. (after stating the facts as above). [1] The charge as to contributory negligence and damages was erroneous. If the plaintiff was young and inexperienced, and was not provided with the means of giving the signal, with due regard to his own safety, and by reason thereof he was killed while in the exercise of that degree of care for his own protection which a person of his age, intelligence, and experience would ordinarily have given under the circumstances, he would not be guilty of contributory negligence. *Ensley v. Lumber Co.*, 165 N. C. 687, 81 S. E. 1010; *Alexander v. Statesville*, 165 N. C. 527, 81 S. E. 763. In the case last cited, we said:

"The rule of law in regard to the negligence of an adult and the rule in regard to that of

an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of 3 years of age less caution would be required than of one of 7; and of a child of 7 less than of one of 12 or 15. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case"—citing *Murray v. Railroad Co.*, 93 N. C. 92; *Bottom v. Railroad Co.*, 114 N. C. 699, 19 S. E. 730, 25 L. R. A. 784, 41 Am. St. Rep. 799; *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401, 21 L. Ed. 114; *Railroad v. Stout*, 17 Wall. (U. S.) 657, 21 L. Ed. 745; *Mangam v. Railroad Co.*, 33 N. Y. 455, 98 Am. Dec. 66; *Sh. & Redf.* on Neg. § 49, and other authorities.

All that is required of an infant is that he exercise care and prudence equal to his capacity. *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67.

[2-6] Examined in the light of this rule, the instruction as to contributory negligence was too broad, and should have been restricted to its proper limits. If the decedent was standing too near the track, or at a place near the track which brought him within the zone of danger, and his exposure to injury was not the result of any failure to exercise that degree of care which one of his age and knowledge would have taken for his safety under the circumstances, his act would not necessarily be contributory negligence. He was not an intruder or "licensee," within the rule of some of the cases cited by appellee. If a person places himself on a track in front of a moving train, or too near thereto for safety, and does so willfully or designedly or negligently, he must take the consequences; but, where the act was not willful, and it was not so in this case, it must have been negligent, in order to authorize a finding of contributory fault on his part, and the negligence must have been the proximate cause of the injury. The court excluded this question of negligence from the consideration of the jury, when it gave the instruction that:

"If he sat near the track in a dangerous position, if you find that he thought that he was far enough away, * * * it would be your duty to answer the second issue, 'Yes.'"

The alternative proposition, that "if he put himself in a perilous position on the railroad track," it would be contributory negligence, if it was correct, did not cure the error, as we cannot tell by which branch of the instruction the jury were gulled to their verdict. *Tillett v. Railroad Co.*, 115 N. C. 662, 20 S. E. 480; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Edwards v. Railroad*, 132 N. C. 99, 43 S. E. 585. An error in the charge must be eliminated by a retraction of it, or a proper explanation, which will remove the wrong impression made by it, and the giving of another correct, but conflicting, instruction, does not answer the purpose, as it does not produce the desired result. If the de-

ceased had fallen asleep on the track, his negligence in doing so would not be contributory, in a legal sense, unless it was the proximate cause of the injury to him, and yet the court charged the jury, in effect, that it would be. If, notwithstanding his negligence in sleeping on the track, the defendant's engineer, after he saw him lying there and became aware of his perilous situation, could, by exercising the proper care, have stopped the train in time to avoid the injury, and failed to do so, his negligence in not doing so would be considered as the proximate cause of intestate's death.

[8] The federal Employers' Liability Act does not, as we understand it, change the rule of law as to what is contributory negligence, except as to its legal effect upon the issue as to damages, an affirmative finding in respect of such negligence reducing the amount of damages as indicated in the act.

[7, 8] We are also of the opinion that there was error in the instruction of the court in regard to the measure of damages, and, as the question may be again raised, we will now decide it. The intestate, at the time of his death, was employed in interstate commerce, and the case was therefore properly tried under the federal Employers' Liability Act. With respect to damages the court instructed the jury that the burden was on the plaintiff to satisfy the jury that the intestate would have continued to contribute to the support of his father after he arrived at the age of 21 years, and, further, that he must satisfy them as to the amount of such contribution as he would have made after his maturity. This could hardly be the rule intended by Congress, as such facts would be incapable of anything like accurate or even approximate proof. They depend so much upon contingencies as to be beyond the human ken. We cannot foretell what a man will do with his estate in the future, and therefore Congress, aware of this difficulty in making proof, required that the amount of recovery should be measured by the reasonable expectation of benefit which would accrue to the parent, or a dependent, by the continuance of the life in question. We think this part of the charge, in its general scope and tendency, was not in accordance with the correct principle to be gathered from the evident meaning and purpose of the act, and we have already so decided. Here the intestate was under no obligation to support and maintain his father. 29 Cyc. 1619. What he might do for him, in that way, would be voluntary on his part—a mere gift or gratuity, prompted, it is true, by filial devotion or duty, but nevertheless a moral, and not a legal, obligation. *Dooley v. Railroad Co.*, 163 N. C. 454, 79 S. E. 970. We said in that case, quoting from and approving the language of Justice Pollock in *Franklin v. Railroad Co.*, 4 Hurl. & Norman, 511:

"If, then, the damages are not to be calculated on either of these principles, nothing re-

mains except that they should be so calculated in reference to a reasonable expectation of pecuniary benefits, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and, if so, to what extent, were the questions left in this case to the jury. The proper question, then, was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and, in fact, he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that the actual benefit should have been derived; a reasonable expectation is enough, and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him."

Again this court says in the Dooley Case:

"A person entitled to the benefit of the action may recover damages for the loss of a pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death"—citing *Tiffany on Death by Wrongful Act* (2d Ed.) § 159.

Mr. Tiffany has classified the losses which may be considered in assessing the damages, and the persons entitled to be compensated therefor. The first description of loss is principally confined to a husband's loss of his wife's services, a wife's loss of her husband's support and services, a parent's loss of the services of a minor child, and a minor child's loss of the support of a parent. But the statutes do not confine the benefit of the action to husbands, wives, minor children, and parents of minor children. The second description of loss includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. He then proceeds to say:

"Thus the second description of loss may be divided into: (1) Losses of prospective gifts; and (2) losses of prospective inheritance. The loss sustained by a husband, wife, minor child, and a parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative can only be of the latter description."

We approved this elucidation of the act in Dooley's Case, in which Justice Allen so fully and clearly explains this new law, and cited in support of Mr. Tiffany's statement the following cases: *Greenwood v. King*, 82 Neb. 22, 116 N. W. 1128; *Hillebrand v. Stans Bisc. Co.*, 139 Cal. 236, 73 Pac. 163; *Duckman v. Railroad Co.*, 237 Ill. 108, 86 N. E. 712; *Railroad Co. v. Kindood*, 57 Texas, 498; *Hopper v. Railroad Co.*, 155 Fed. 277, 84 C. C. A. 21. The case last cited was much like this one. The action was there brought by a father for loss by the death of his daughter, who was killed by the negligence of the defendant in that case. She had not contributed anything to her father's support, nor had

she rendered any appreciable service to him. He had, on the contrary, been at considerable expense in supporting, maintaining, and educating her. Judge Van Devanter, then Circuit Judge, now a Justice of the Supreme Court of the United States, said in regard to the father's right to damages:

"Considering this evidence in the light of the natural influence or prompting of filial ties, we think it would have sustained a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter"—citing several cases to sustain his view.

It may here be remarked that the Dooley Case presents facts in almost exact analogy to those we are now considering, as it was an action by the father for loss sustained by the death of his son. In this case it appears that the intestate was a boy of good health, earning \$1.10 per day, and was contributing regularly to the support of his father. He was sober, industrious, and of average intelligence for his age. His conduct towards his parent tended to show that he was, in mind and disposition, imbued with a proper conception of his filial duty and entertained the proper affection for his father. The evidence in this case of a reasonable expectation by the father of benefit or pecuniary aid or other advantage of gift or inheritance, if the life of his son had been spared to him, was sufficient for submission to the jury. Before closing this opinion, we must advert to the recent case of *Irvin v. Railroad Co.*, 164 N. C. 5, 80 S. E. 78, where it is said:

"We held in *Dooley v. Railroad*, 163 N. C. 454 [79 S. E. 970], that an action may be maintained under the federal statute in behalf of a parent when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the child, although the child has not contributed to the support of the parent, and the authorities which support this principle also hold that evidence of contributions by the child to the support of the parent is material and important in determining whether such reasonable expectation exists, and in the assessment of damages which may be recovered, and, if such evidence is material and competent for the parent, the defendant may prove the contrary."

That case sustains our conclusion that the instruction as to damages was erroneous, and was in harmony with what is thus said in *Am. Railroad Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456:

"The cause of action which was created in behalf of the injured employé did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employé from his injury, creates a new and distinct right of action for the benefit of the defendant relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé. The damage is limited strictly to the financial loss thus sustained."

And the case of *Railroad Co. v. McGinnis*, 228 U. S. 175, 33 Sup. Ct. 426, 57 L. Ed. 785, is to the same effect. We think that the law

is unquestionably settled by those decisions as to the measure of damages under the federal act.

New trial.

(169 N. C. 127)

HALLMAN v. SOUTHERN R. CO. (No. 513.)

(Supreme Court of North Carolina. May 19, 1915.)

1. APPEAL AND ERROR ⇨1027—HARMLESS ERROR—PARTY NOT ENTITLED TO RECOVER.

Error which affects only one issue submitted to the jury is harmless, where another issue was properly submitted and no element of damages was considered which could not be allowed under the finding on the second issue, which was sufficient to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. ⇨1027.]

2. CARRIERS ⇨355—EJECTION OF PASSENGER—MISSED CONNECTIONS—REPRESENTATIONS BY AGENT.

Where the holder of a mileage book, who had exchanged part thereof for a ticket over a short route, was assured by the agent that if he failed to make connections over the short route the ticket would be good over the longer one, and when he missed his connections, he told the conductor of such representations, and offered, if the conductor would not permit him to ride on the ticket, to surrender mileage equal to the difference between the fares, or to exchange his mileage for a ticket on reaching a station, but the conductor demanded cash, and on plaintiff's refusal to pay ejected him from the train, the carrier was liable for the ejection, though the mileage contained a condition requiring it to be exchanged for a ticket and the station agent had no authority to guarantee the connection.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1416-1422; Dec. Dig. ⇨355.]

3. CARRIERS ⇨382—EJECTION OF PASSENGERS—DAMAGES—ELEMENTS.

In an action for the ejection of a passenger who had been misled by the carrier's agent, the jury can consider in awarding damages, plaintiff's loss of time, extra hotel bill, and humiliation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. ⇨382.]

4. TRIAL ⇨133—MISCONDUCT OF COUNSEL—ARGUMENT—CURE BY COURT.

Where the trial judge, as soon as objection was made to the arguments of plaintiff's counsel, stopped the argument and withdrew it from the consideration of the jury, defendant's exception to the argument will not be sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. ⇨133.]

Appeal from Superior Court, Catawba County; Long, Judge.

Action by H. L. Hallman against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover damages, the plaintiff alleging that he bought a ticket from the agent of the defendant at Hickory on the 18th of August, 1913, for Winston-Salem by Barber's Junction, and that the agent guaranteed the connection at said junction; that he failed to make said connection, and after leaving said junction was

wrongfully ejected from the train. These allegations were denied by the defendant. The plaintiff offered evidence tending to prove that on the 18th of August, 1913, he went to the office of the defendant at Hickory and told the agent of the defendant that he wanted a mileage book if he could make the connection at Barber's Junction, and if not, he would not buy one on that day; that the agent assured him that he would make the connection at Barber's Junction, and he then bought the mileage book, 86 miles of which was exchanged for a ticket from Hickory to Winston-Salem by Barber's Junction; that in a short time he noticed that the train to leave Hickory was marked late, and he then returned to the ticket office and asked the agent if he was sure the connection would be made; that the agent assured him that he would make the connection at Barber's Junction, but that if he failed to do so, he could go to Winston-Salem the longer route, by Greensboro, on the same ticket; that he would guarantee the connection; that he relied upon this assurance of the agent, and entered the train of the defendant; that when the conductor on the train took up his ticket he asked the conductor if the connection would be made at Barber's Junction, and was assured that it would be; that when within about two miles of Barber's Junction, the conductor told him that the train which he expected to take at that point had gone, and that he, the plaintiff, would have to go around by Greensboro to get to Winston; that he relied upon the assurance of the agent that he could go to Winston-Salem by Greensboro on the ticket he had bought, and procured no other ticket; that as the train was leaving Barber's Junction for Greensboro, the conductor came to him and demanded 55 cents, the difference in fare in the two routes to Winston-Salem; that he then told the conductor of the assurance of the agent at Hickory that if he failed to make his connection at Barber's Junction he could go by Greensboro on the same ticket; that he tendered to the conductor his mileage book, and asked him to take out the additional miles, which he refused to do; that he requested the conductor to permit him to go back to the office at Barber's Junction and have mileage taken for the difference in the two routes, or that he permit him to have the extra mileage taken by the agent at Salisbury; that these offers were refused, and he then tendered to the conductor his whole mileage of 914 miles, which was refused; that the conductor thereupon ejected the plaintiff from his train on account of his refusal to pay the extra fare of 55 cents. There was evidence on the part of the defendant contradicting the evidence of the plaintiff. The defendant objected to the evidence offered by the plaintiff, tending to prove that the agent at Hickory guarau-

teed the connection at Barber's Junction, insisting that the agent had no authority to make such a contract, and that the contract, if made, was invalid because a discrimination. The jury returned the following verdict:

"1. Did defendant's ticket agent at Hickory, N. C., enter into a contract with the plaintiff in behalf of the defendant, guaranteeing a connection at Barber's Junction for Winston-Salem? Answer: Yes.

"2. Did the defendant wrongfully eject plaintiff from the train at Barber as alleged? Answer: Yes.

"3. Did the defendant assault the plaintiff by pushing him from the steps as alleged in the complaint? Answer: No.

"4. What damage, if any, is plaintiff entitled to recover? Answer: \$400."

There was a judgment in favor of the plaintiff, and the defendant appealed.

S. J. Ervin, of Morganton, for appellant.
A. A. Whitener, of Hickory, for appellee.

ALLEN, J. [1] There is authority sustaining the contention of the plaintiff that an agent of a common carrier, authorized to sell tickets, has an implied authority to guarantee connection (*Foster v. Railroad* [C. C.] 56 Fed. 435; *Hayes v. Railroad*, 163 Mich. 174, 128 N. W. 217, 31 L. R. A. [N. S.] 229), and also authority in support of the position of the defendant that a contract of this character is unlawful because it does not afford equal opportunities and advantages to all of the patrons of the common carrier (*Railroad v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1083, Ann. Cas. 1914A, 501); but it is not necessary for us to pass upon these questions, as in our opinion no error was committed in the trial of the second issue and the jury was not permitted to consider any element of damage under the fourth issue, which the plaintiff would not have been entitled to recover on account of being wrongfully ejected from the train, and the findings upon these two issues are sufficient to support the judgment.

The finding upon the first issue, therefore, has no materiality, except as it may tend to show that the jury accepted the plaintiff's version of the occurrence at Hickory, but this sufficiently appears from the finding upon the second issue, when read in connection with the charge.

[2] His honor, among other things, charged the jury upon this issue, as follows:

"The plaintiff contends that he made inquiry of Mr. Miller as to whether the passenger train No. 22 made connection at Barber Junction with the train running from Charlotte by way of Barber Junction to Winston-Salem, and he contends that in this inquiry Mr. Miller told him that he would make connection at Barber Junction; he contends and alleges that he relied upon that assurance given him by Mr. Miller, and after buying a mileage book that the book was pulled from Hickory to Winston, and that he received a ticket from Hickory to Winston-Salem in exchange for the mileage that he pulled, and he alleges and contends that some time after that Mr. Miller stated to him he would guarantee he would make connection

at Barber Junction on this train No. 22, and that, relying upon this assurance, he boarded train No. 22 when it came to Hickory and became a passenger thereon; and he contends that when the train reached a point a few miles from Barber Junction, the agent of the defendant, the ticket collector, gave him information that he would not make his connection at Barber Junction for Winston, and that he would be required to pay the sum of 55 cents in cash in order to continue his journey by way of Salisbury and Greensboro to reach Winston; and he contends that when this was called to his attention by the auditor he informed him of what had happened between himself and Mr. Miller at Hickory, and that after his talk with the conductor and the ticket collector they still insisted he would have to pay 55 cents in order to continue his journey. He contends also that, after making known to them what had occurred between himself and Mr. Miller, and after they made demand upon him that he pay 55 cents in cash, he informed the auditor and conductor, one or both, that he was willing to let them have a sufficient number of miles off of his mileage book with which to make the sum demanded of him, to wit, 55 cents. He also contends that in his interview he offered to let his book be pulled to Barber's Junction in order to make up this 55 cents; also that he made an offer that if they would let him ride on to Salisbury, his mileage book might be used there so that enough could be pulled from the book to make up the 55 cents; but he says these offers made by him to use the book and take the mileage off of it instead of cash were refused by the conductor and ticket collector, and he insists you ought to find from the evidence also that, under these circumstances, when he got to Barber, the train not being there for him to go on the short route, they should not have put him off the train, but allowed him to go on under the circumstances by way of Salisbury and Greensboro, he insisting that if there was not actually a contract between himself and the agent, Mr. Miller, at Hickory, except as was understood by both him and Miller, nevertheless he was misinformed and misdirected, and the conditions at Barber were erroneously represented to him by Mr. Miller, and therefore that he should not have been held to the exact terms of the contract as expressed on the ticket and put off the train. He, therefore, insists that he was wrongfully put off the train and that you should answer the second issue, 'Yea.'

"If the plaintiff has satisfied you by the greater weight of the evidence that his contentions to which I have called your attention are true, and that although this ticket was issued having upon it the terms that it does, it was good for transportation by way of the short route, that is to say, by way of Barber, and if you further find that he was actually misled at the time Mr. Miller issued the ticket to him by the erroneous representation, misdirection, or mistake of Mr. Miller at that time, that is to say, the time he boarded the train, and that thereby he was caused to become a passenger on the train; and if you further find that the plaintiff was not advised or informed as to the connection of this train at Barber otherwise, or could not have been, in the exercise of reasonable care, and you further find that the plaintiff, while he was on the train and when the extra amount of 55 cents was demanded of him, informed the conductor and the collector, one or both, of what had occurred between himself and the agent, Mr. Miller, at Hickory; and if you further find that the plaintiff then, under those circumstances, after making that explanation and offering to pay the 55 cents extra from his mileage book by the pulling of coupons therefrom at Barber or at Salisbury or on the train, and you find that the conductor would not allow him to do this—if all these

facts are found by you as contended by the plaintiff, and by the greater weight of the evidence, then the court instructs you that the conductor would not have been authorized, as the court understands the law, to have put him off the train."

This part of the charge is fully supported by *Mace v. Railroad*, 151 N. C. 404, 66 S. E. 342, 24 L. R. A. (N. S.) 1178; *Harvey v. Railroad*, 153 N. C. 567, 69 S. E. 627; *Dorsett v. Railroad*, 156 N. C. 439, 72 S. E. 491; *Norman v. Railroad*, 161 N. C. 330, 77 S. E. 345, Ann. Cas. 1914D, 917. In the *Mace Case* the following instruction to the jury was approved:

"If you find from the evidence that the ticket that has been introduced in evidence is a copy of the tickets which were issued to the plaintiff and contained the stipulation, 'via the short route and return the same way,' then the plaintiffs would be bound by that, and they would have to go the shortest route and return the same way, unless the agent who sold them the tickets at Rock Hill told them that they were good by way of Marion as well as by way of Statesville and Charlotte. If the agent told them that, and the plaintiffs did not know which was the shortest route, and could not, by reasonable diligence, have ascertained that, then they had a right to rely upon the statement made to them by the agent at Rock Hill; and if, under these circumstances, they went to Hickory, and, in order to ascertain whether they could go on the train to Marion, applied to the agent at Hickory, and he confirmed the statement that was made by the agent at Rock Hill by telling them that they could go back by Marion, then they had a right to rely upon the statement of the two agents and to return by way of Marion; and if they were ejected from the train after offering that ticket and informing the conductor, then they were wrongfully put off the train, and the defendant would be liable in actual damages, it makes no difference whether the ejection was with or without rudeness, with malice or without, or wanton or not wanton"

—and the facts here are stronger in behalf of the plaintiff because, after relying upon the statements of the agent, he tendered his mileage book and asked the conductor to take out the extra mileage, which was not done in the *Mace Case*. In the *Harvey Case*, Justice Hoke, speaking for the court, says:

"It follows that where by the wrong and fault of the company, a lawful holder of a mileage book is prevented from making the exchange required, such holder is relieved of the conditions, and his book becomes a complete contract of carriage, unaffected by the restrictions referred to."

And in the *Norman Case*, the court, commenting upon the cases previously decided, says:

"The principle upon which *Mace v. Railroad*, 151 N. C. 404 [66 S. E. 342, 24 L. R. A. (N. S.) 1178], *Harvey v. Railroad*, 153 N. C. 567 [69 S. E. 627], and *Dorsett v. Railroad*, 156 N. C. 439 [72 S. E. 491], were decided is the same, as in each the railroad was held liable in damages for expelling a passenger, brought about by the mistake of the agent, although the conductor was obeying a rule of the company."

[3] If, therefore, proper instructions were given to the jury upon the second issue, and there is no reason for disturbing the finding upon that issue, and if the answer to that

issue alone is sufficient to justify the assessment of damages, we are not called upon to decide the interesting questions discussed in the brief of the appellant, unless some element of damage was considered by the jury which was only applicable to the first issue, and when we turn to the charge upon damages, we find that the only matters which the jury was permitted to consider was loss of time, an extra hotel bill, and humiliation, all of which ought to have been taken into consideration by the jury if the first issue had not been presented or considered.

[4] There are three exceptions taken by the defendant to parts of the argument before the jury, but none of them can be sustained because it appears from the statement of the case that as soon as objection was made, his honor stopped the argument and withdrew the matter from the consideration of the jury in terms that could not be misunderstood.

We find no error.

No error.

(169 N. C. 215)

WILLIAMSON v. JEROME et al. (No. 487.)
(Supreme Court of North Carolina. May 19, 1915.)

1. JUDGMENT \S 930—FOREIGN JUDGMENT—DEFENSES—"FRAUD."

While an action on a foreign judgment may be defended on the ground of fraud in procuring it, the "fraud" must be such as prevented the defendant from having an adversary trial of the issues so that it would authorize the vacation of the judgment by the courts of the same state, not merely fraud in the cause of action which could have been interposed as a defense to the action in which the judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1760; Dec. Dig. \S 930.]

For other definitions, see Words and Phrases, First and Second Series, Fraud.]

2. JUDGMENT \S 930—FOREIGN JUDGMENT—DEFENSES—FRAUD.

Where a suit was brought against a bank and several individuals in a foreign state, and property of the bank was attached, but not any property of the individual defendants, and all of the defendants appeared and answered, and thereafter the action against the bank was dismissed, and the attachment dissolved, the mere fact that the bank was joined as a party, there being circumstances which would lead plaintiff to believe that he had a cause of action against it, does not show fraud which defeats a recovery on the foreign judgment against the individual defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1760; Dec. Dig. \S 930.]

Appeal from Superior Court, Rowan County; Adams, Judge.

Action by William A. Williamson against Thomas J. Jerome and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

This is a civil action, tried upon these issues:

"(1) Was the judgment sued on in this case procured by the fraud of the plaintiff, as alleged in the answer? Answer: No.

"(2) In what amount, if any, are the defend-

ants T. J. Jerome, T. H. Vanderford, William F. Snider, and Tola D. Maness indebted to the plaintiff? Answer: \$5,692.93, with interest from November 28, 1913, and \$101.40, with interest from the 27th day of March, 1914.

"(3) In what amount, if any, is the defendant Moses L. Jackson indebted to the plaintiff? Answer: \$5,692.93, with interest from November 28, 1913, and \$101.40, with interest from the 27th day of March, 1914 (by consent of defendant Jackson)."

From the judgment rendered, the defendants appeal.

A. H. Price, of Salisbury, W. P. Bynum, of Greensboro, and T. H. Calvert, of Raleigh, for appellants. John S. Henderson, of Salisbury, for appellee.

BROWN, J. This is an action brought to recover upon a judgment obtained by the plaintiff against the defendants Jerome, Vanderford, Snider, and Maness in the Supreme Court of the state of New York, in New York county. Defendants pleaded that said New York judgment had been procured by fraud. Defendant Jackson was not sued in the action in New York, but by his own request became a party to this action, and judgment rendered against him in the court below; he admitting that his liability was the same as the other defendants.

The Wachovia Bank & Trust Company, a North Carolina corporation, was made a party to this action in the New York court, and attachment proceedings were sued out in said action against all the New York defendants, but no property of the individual defendants was found or attached, and no property of the bank was attached as that of the individual defendants. Upon the trial in the New York court, a separate answer having been interposed by the bank, the action was dismissed as against the bank.

The action in the New York court was brought to recover the value of services by way of commissions which the plaintiff claimed that the defendants owed him for procuring a purchaser for certain stocks and bonds of the Salisbury & Spencer Railway Company. The complaint alleged the employment of the plaintiff and that he procured as a purchaser W. N. Coler & Co., and that the agreed value of the services was \$5,000, and that the plaintiff had not been paid. The defendants answered, admitting that the plaintiff had not been paid, but denied the employment, as well as the value of the alleged services. The case was tried in November, 1913, in the Supreme Court, Trial Term, in the city of New York. The defendants were present in person, as well as by attorney, and the cause was tried before a jury. Some of the defendants testified on the witness stand. The presiding justice delivered his charge to the jury, and a verdict was rendered for the plaintiff. The defendants appealed the case to the Appellate Division of the Supreme Court of New York, and judgment was affirmed.

The plaintiff having brought his action in

the superior court of Rowan county to recover on the New York judgment, the defendants set up a plea of fraud, and alleged, in substance, that the plaintiff, in order to secure jurisdiction of the defendants in New York, as the defendants allege, made the Wachovia Bank & Trust Company of Winston, N. C., a party to the action in New York, and attached large sums of money in the banks of New York belonging to the said Wachovia Bank & Trust Company, and falsely and fraudulently alleged in his complaint and affidavit of attachment that the said bank was a party to the contract by which the plaintiff was employed to sell said stocks and bonds. The defendants also allege that the plaintiff, in order to force them to enter an appearance in said action in New York, which they did, and in order to secure jurisdiction of the defendants in that action, including the said bank, falsely and fraudulently alleged that the said bank was a party to his contract of employment, and that the money attached belonged to the defendants in that action, including these defendants. There was no other evidence of fraud offered. His honor instructed the jury that if they believed the evidence to answer the first issue, "No." The correctness of this ruling is the principal assignment of error.

[1] We agree with his honor that there is no evidence whatever of fraud practiced by the plaintiff in procuring a judgment against the defendants in the New York court. The fraud for which a judgment may be enjoined in another state must consist in the procuring of such judgment. The courts of this state will not vacate or enjoin a judgment merely based upon a cause of action, which may be vitiated by fraud, for this is a valid defense which may be interposed at the trial; and, unless its interposition is prevented by the fraud of the adversary, it cannot be asserted against a judgment either foreign or domestic. Black on Judgments, § 919, and cases there cited.

It has been held in this state that in an action in the courts of this state on a judgment rendered in a sister state it is open to the defendant to allege and prove fraud in the procurement of the judgment, and the term "fraud" in this connection includes all such circumstances of fraud or imposition in procuring the judgment as would induce and authorize the courts of the original forum to interfere to prevent the enforcement of an unconscionable recovery. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

Again, it is said in the same case, 153 N. C. 160, 69 S. E. 63:

"The fraud which warrants equity in interfering with such a solemn thing as a judgment must be such as is practiced in obtaining the judgment, and which prevents the losing party from having an adversary trial of the issue."

[2] The fact that the plaintiff saw fit to sue the bank and trust company, along with these defendants, in the New York court, is no evidence of a fraudulent purpose to decoy

the defendants to that jurisdiction. The plaintiff doubtless thought he had a good cause of action against the bank and trust company. The plaintiff claimed that the whole amount of the purchase price for the stocks and bonds of the railway company paid by Coler & Co. was received by the bank, and that in this transaction the defendant Snider and the cashier of the bank acted for the bank.

The plaintiff claimed that at every stage the bank was sanctioning the employment of the plaintiff. We fail to see how the presence or absence of the individual defendants in any way affected the action against the bank. There was no correspondence between the plaintiff and the defendants in evidence by which the defendants were decoyed to New York for the purpose of having service made upon them. It was the bank's duty to defend its own case, and, if the defendants went to New York for the purpose of defending the action, it was their own voluntary act. The fact that the bank succeeded in having the attachment set aside as to its funds is no evidence of any fraud in procuring the judgment against the individual defendants. Where a suit is brought against a nonresident defendant, and the service of process is by publication, if he voluntarily appears and defends the action, the court acquires complete jurisdiction of his person, and the judgment is valid and binding alike in the state where rendered, in the domicile of the defendant, and in all other courts. Black on Judgments, § 903.

In order to constitute a fraudulent procurement of the defendant for the purpose of service, there must be actual fraud or trick upon the defendant; a mere request to him to go to another state and defend a suit in attachment actually pending there is not a fraudulent device. Black on Judgments, § 909. See, also, *Duringer v. Moschino*, 93 Ind. 495.

These defendants were not required to appear and defend the action in the New York court. No property of these individuals had been attached; for none had been found. There was no issue raised in respect to the ownership of any property claimed by these defendants. The property attached belonged solely to the bank, and it was the bank's duty to defend its rights. If these defendants rushed to its rescue, it was their voluntary act.

There is nothing in the evidence which tends to prove that the defendants were denied any opportunity to make good such defenses as they had. The record of the trial, together with all the evidence taken in the New York court, is set out, together with the charge of the presiding judge, and the entire record shows that these defendants presented every possible defense, and that the judgment against them was affirmed by the appellate tribunal.

We agree with his honor that there is no evidence of fraud to support the plea which the defendants have interposed.

The judgment of the superior court is affirmed.

(169 N. C. 377)

STATE v. LYERLY. (No. 466.)

(Supreme Court of North Carolina. May 19, 1915.)

LARCENY \Leftrightarrow 71—INSTRUCTIONS—INTENT.

Where, on a trial for larceny of a \$50 bill, prosecutor testified that he went to accused's store and told him that he had the bill; that accused asked to see it; that prosecutor showed it to him; that he took it and went to the back part of the store and stayed a while, and gave to prosecutor a \$2 bill; that prosecutor did not then notice it, and left the store, and a few minutes later discovered that his \$50 bill was missing, and that he returned to the store and found that accused had left—an instruction that if the jury found that accused obtained possession of the \$50 bill under the circumstances proved by prosecutor, with a felonious intent permanently to deprive prosecutor of the money and to convert it to his own use, and in pursuance thereof obtained possession and converted it to his own use, he was guilty was not erroneous.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 191-194; Dec. Dig. \Leftrightarrow 71.]

Appeal from Superior Court, Rowan County; Adams, Judge.

Tobe Lyerly was convicted of larceny, and he appeals. Affirmed.

A. H. Price, of Salisbury, Thos. H. Vanderford, Jr., and Wm. C. Coughenour, Jr., of Salisbury, for appellant. Attorney General Bickett and Assistant Attorney General Calvert, for the State.

BROWN, J. The prosecuting witness Pethel testified:

"I am a fireman on the Southern Railroad, and on the 20th day of June was paid off. I had a new \$50 bill, and I went to the defendant's store at night and told him I had a 'pretty.' He asked to see it. I showed it to him. He took it and went to the back part of the store and stayed a while. I called to him to return my money. After a while he came back and gave me a \$2 bill. I did not know it at the time. I found it out after I left the store. I had a \$50 bill, two \$20 bills, and some \$1 bills in my purse when I went to defendant's store. Did not have any \$2 bills. The defendant kept the \$50 bill two or three minutes before he came back to me from the rear of the store. He then gave me a \$2 bill, as I afterwards found out. He kept the \$50 bill. I have never seen it since. He never returned it to me."

He further testified that he then left the defendant's store, and a few minutes later had occasion to look into his pocketbook and discovered that his \$50 bill was missing, and that he had a \$2 bill in the place of the \$50 bill. He immediately returned to the store and found that the defendant had left. The witness had not been gone more than 10 minutes from the time that defendant took his bill until witness missed it and returned.

The defendant testified that Pethel came

to his store and took out a \$50 bill, and that witness looked at it in the presence of several others and gave it back to Pethel. He did not go to the rear of the store and did not give Pethel \$2.

Another witness for the defendant testified that the defendant did not go to the back of the store, and did not leave the place where the bill was handed to him by the prosecuting witness.

The only assignment of error is to the part of the charge of the court, which appears on page 8 of the record, and in which the court instructed the jury that if they should find from the evidence beyond a reasonable doubt that the defendant obtained possession of the \$50 bill, under the circumstances testified to by the prosecuting witness, with "an existing felonious intent permanently to deprive the prosecutor of his ownership in the money and to convert it to his own use, and in pursuance of such intent and in the execution of such design" did as testified to by the prosecuting witness, they should return a verdict of guilty of larceny, as charged. The charge of his honor is supported by the precedents. There is no pretense that the prosecutor loaned this money to the defendant. The case is properly made to turn upon the theory that the defendant was guilty of a trick or device in gaining possession of the \$50, with a present felonious purpose to deprive the owner of his money and to convert it to the defendant's own use. A very instructive opinion in line with this case is *State v. Bryant*, 74 N. C. 124. See, also, *State v. Scott*, 64 N. C. 586; *State v. McRae*, 111 N. C. 685, 16 S. E. 173; *State v. Henderson*, 66 N. C. 627.

No error.

(169 N. C. 224)

SHUFORD v. BRADY. (No. 518.)

(Supreme Court of North Carolina. May 14, 1915.)

1. WILLS — 439—CONSTRUCTION.

The intent of the testator, gathered from the entire instrument, should be given effect in construing a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. —439.]

2. WILLS — 634—CONSTRUCTION—INTEREST DEVISED.

Where a testator devised land to his son, with directions that, in case of the son's death without wife or children before 21, it should pass to named individuals, but made different disposition in case of the son's death after reaching his majority and marrying, the rights of the contingent remaindermen were defeated by the son's attaining his majority and marrying.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. —634.]

3. ESTOPPEL — 27—BY DEED.

Where all of those persons in being who might take under a will united in a conveyance, such conveyance operated as an estoppel to them and those claiming under them.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 63-67; Dec. Dig. —27.]

4. EVIDENCE — 58—PRESUMPTIONS.

The law presumes that children may be born to the married couple as long as the relation exists.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 80; Dec. Dig. —58.]

5. WILLS — 634—CONSTRUCTION—INTEREST DEVISED.

Where a testator devised land to his son, with directions that, should the son reach maturity, marry, and have children, the property should at his death go to the oldest child living, and that should the son, having married, die childless, it should pass to his wife, the wife took a remainder in fee defeasible upon the birth of children of the marriage; hence, though no children had been born to them, the husband and wife could not pass good title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1438-1510; Dec. Dig. —634.]

Appeal from Superior Court, Catawba County; Harding, Judge.

Controversy without action between A. L. Shuford and C. D. Brady. From a judgment for defendant, plaintiff appeals. Affirmed.

Council & Yount, of Hickory, for appellant.

BROWN, J. The following are substantially the facts set out in the case agreed:

The plaintiff contracted to sell and convey to the defendant a house and lot in the town of Conover, and tendered the defendant a deed therefor, properly executed, but the defendant declined to accept the same, contending that the plaintiff could not convey a good and indefeasible title to the property. The plaintiff derives his title to the property through the will of one John Q. Seats, and this controversy hinges upon the construction of that will and arose out of the investigation of the title to this lot of land.

The material parts of the said will are as follows:

"Now first I give my son Alexander Hamilton all real estate that I may have at the time of my death, except what is otherwise directed in this my last will, and direct my executor in the following manner: All money that may be due my estate will go to pay my debts, but should that not be enough, take of the rents, as I direct my executor to rent all property that will make anything, to pay the debts. After the debts are all paid, my executor or guardian for my child Alexander Hamilton shall continue to rent all the property that I leave to my son A. Hamilton and will use the same for keeping up the property, such as painting, roofing, etc. This is to be done until my son is of proper age to take charge of the property I leave him.

"Now, further, this is my will, should it be so that my son die before he is twenty-one (21) years old, and leaving no wife or child, then this real estate shall go to Alice Lee Burkett and her heirs, but should Alice Lee Burkett not be living at that time, this real property shall go to my wife, Fannie E., and she may dispose of it as she pleases at her death.

"But further, as regards my son, should he live and marry and have children, at his death this real property shall go to his oldest child living. But should my son die leaving no children, but a wife, she shall come in full possession of this real property, and shall do with it as she pleases at her death."

It is further stated:

"That Alexander Hamilton Seats is now 37 years of age and has been married for about ten years, but no children have been born to them, and the probability is that there will be none, and Mrs. Fannie Allen, formerly Mrs. Fannie Seats, is again a widow, and Alice Lee Burkett is an unmarried adult woman, and all of said parties are still living, and on the 6th day of October, 1905, all of said parties joined in the execution of a warranty deed for the land devised under the last will and testament of the said John Q. Seats to Henry Wagner and Raymond Miller, which said deed is a link in the plaintiff's chain of title, and the land in controversy is a portion of the land devised by the last will and testament of the said John Q. Seats and a portion of the land conveyed by the devisees in the deed above referred to."

His honor was of the opinion that, upon the facts agreed, the plaintiff could not convey a good and indefeasible title to the property described in the pleading and render judgment against the plaintiff for the costs. In this judgment we concur.

[1] It is true that, in the first paragraph of his will, the testator uses language which would confer upon his son Alexander a fee-simple estate to the property devised, but it is well settled that the intent of the testator is the object to be sought in construing a will, and this intent must be gathered from a consideration and examination of the entire instrument. *McCallum v. McCallum*, 167 N. C. 310, 83 S. E. 250. This cardinal principle in the construction of wills, so as to effectuate the plainly expressed intention of the testator, has been largely extended to the construction of deeds, as well. *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514.

[2] In the consideration of this deed, the interests of Alice Lee Burkett and the widow of the testator, Fannie E. Seats, have been eliminated by the fact that the son Alexander did not die before attaining the age of 21 years old, leaving no wife nor child.

[3] The deed which has been tendered in this case would undoubtedly operate as a grant of whatever interest the grantors in the deed have, and it would operate as an estoppel upon all those claiming directly under them.

[4, 5] But there is a provision in this will which reads as follows:

"But, further, as regards my son, should he live and marry and have children, at his death this real property shall go to his oldest child living. But should my son die, leaving no children, but a wife, she shall come into full possession of this real property, and shall do with it as she pleases at her death."

It is manifest that the testator did not intend, by the language in the first paragraph of his will, to give to his son Alexander a fee-simple estate in the property devised, although the words used, standing alone, are sufficient for that purpose. By the later paragraph of the will, the testator has limited the interest of his son to an estate for life. The limitation over to the son's wife, who is now living, constitutes a remainder in fee,

defeasible upon the birth of children from the marriage.

It is true, according to the facts agreed, that no children have been born to the couple, and it is stated that there is no probability that any will be born. This is a prophecy which the law values but little. The law presumes that children may be born to a married couple as long as that relation continues to exist, it matters not how old either or both may be. In case children are born, then the estate is devised to the oldest child living at the time of Alexander Seats' death. Upon such contingency happening, the contingent remainder in fee to the wife would not vest. *Hauser v. Craft*, 134 N. C. 320, 46 S. E. 756; *Whitfield v. Garra*, 134 N. C. 25, 45 S. E. 904. It is thus made plain that the oldest child of Alexander Seats and his wife will not take through them as heirs at law, but will take, if at all, as a devisee of the testator, John Q. Seats. Therefore the deed executed by Alexander Seats and his wife would not estop such child, if born, from asserting title to the land after its father's death.

The cases cited by the learned counsel for the plaintiff (*Cheek v. Walker*, 138 N. C. 446, 50 S. E. 863, and *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687) are quite different from the language used in the instrument construed in the case under consideration, and are no authority for the contention that Alexander Seats acquired a fee-simple estate under the terms of his father's will.

Upon the whole record, we are of opinion that the plaintiff cannot make a good and indefeasible title to the property contracted to be sold to the defendant.

The judgment of the superior court is affirmed.

(169 N. C. 186)

HARDISTER v. RICHARDSON. (No. 479.)
(Supreme Court of North Carolina. May 19, 1915.)

1. MASTER AND SERVANT ⇐286—INJURY TO SERVANT—PERMISSIVE USER OF SKIP—SUFFICIENCY OF EVIDENCE.

In an action against a mine operator for death of an employ  thrown down the shaft when a "skip" in which he was riding to the surface turned over, evidence held sufficient to go to the jury on the point of permissive user of such skip.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇐286.]

2. EVIDENCE ⇐317—HEARSAY.

In an action against the operator of a mine for death of an employ  thrown down the shaft upon the overturning of a "skip" in which he was riding to the surface, testimony of a witness as to what another witness told him with reference to riding on such skip was inadmissible as hearsay, it not being offered to contradict the one making the statement, who had not been examined and who was not asked about the matter on his subsequent examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. ⇐317.]

3. MASTER AND SERVANT §278—INJURIES TO SERVANT—SAFETY OF SKIP—SUFFICIENCY OF EVIDENCE.

In an action against a mine operator for death of an employé thrown down the shaft when the "skip" in which he was riding to the surface turned over, evidence held sufficient to warrant a finding that such skip could have been made reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. §278.]

4. MASTER AND SERVANT §293—INJURIES TO SERVANT—INSTRUCTIONS—RES IPSA LOQUITUR.

In an action against a mine operator for death of an employé killed with another by being thrown down the shaft when the "skip" or hoist arrangement on which he was riding to the surface turned over, a charge of the court, permitting the jury to consider the concrete application presented by the case of the doctrine of res ipsa loquitur as a circumstance in evidence tending to prove negligence was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. §293.]

Appeal from Superior Court, Randolph County; Adams, Judge.

Action by W. E. Hardister, as administrator, against R. P. Richardson. Judgment for plaintiff, and defendant appeals. No error.

This is a civil action, tried upon these issues:

"1. Was the death of the plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did said intestate, by his own negligence, contribute to the injury causing his death? Answer: No.

"3. What damages, if any, is plaintiff entitled to recover? Answer: \$2,500.00."

J. A. Spence, of Ashboro, and J. M. Brown & Son, of Albemarle, for appellant. Hammer & Kelly, of Ashboro, for appellee.

BROWN, J. There are three assignments of error: (1) Overruling motion to nonsuit; (2) excluding evidence of witness Jeff Parrish; (3) to an instruction of the court to the jury.

1. The evidence, taken in its most favorable view for plaintiff, tends to prove: That for some time prior to his death, plaintiff's intestate was employed by defendant to work in a gold mine as an underground hand. That the shaft of the mine had been sunk to a depth of 250 feet. That when intestate began work a bucket was used by defendant for the purpose of drawing ore and employes out of the mine, and the defendant had adopted and posted written rules governing the use of this bucket. That these rules prescribed a certain number of rings of a bell as a signal to the holsterman that the bucket was loaded with ore, and for a certain other number as a signal that men were on. That the bucket was drawn up by means of a cable which wound round a drum, which drum was caused to revolve by means of a steam engine, the operator of this engine being known as a "holsterman." That there was also a

ladder running from the bottom of the shaft to the surface. That the employes of defendant habitually rode in this bucket, using the signals prescribed in said printed rules with the knowledge and by the permission of defendant. That this bucket remained in use until about 10 days before the death of intestate, when it was displaced by a car known as a "skip," which ran upon iron rails. That the aforesaid rules were used to govern the use of the skip. That defendant and his foreman rode upon the skip, and used these same rules which were used for the bucket. That the operator of the hoisting engine was not notified that the rules governing the use of the skip were different from those which had been used for the bucket. He was never notified that there was a rule forbidding the use of the skip by employes. The skip was a self-dumper, the bed not being fastened securely to the body thereof. That an inexpensive chain or hook would have made the "skip" perfectly safe. That on the day of intestate's death, intestate and two other members of his crew, one of them, Neill Glass, being in charge of the crew, gave the prescribed signal, indicating that there were men aboard. This signal was answered by the holsterman, indicating that he understood same, and the skip was then put in motion, and, after being drawn up about 50 feet, was derailed and turned bottom upward, throwing intestate and his companions out and instantly killing them.

There is abundant evidence of contributory negligence, tending to prove that the intestate was personally forbidden by the foreman to ride on the skip. All this character of evidence was offered by the defendant, and doubtless properly submitted to the consideration of the jury under that issue. There is no assignment of error relating to the evidence or to the charge upon the second issue, and it is presumed, therefore, that defendant is content therewith.

[1] We think there is evidence sufficient to be submitted to the jury of a permissive user of the skip. It is admitted that the employes used the bucket constantly until it was displaced by the skip. When this was substituted, the defendants' plain duty was to notify his employes not to use it. By directing the holsterman not to bring the workmen up on the skip, defendant could most effectually have prevented its use for such purpose. He knew the miners had been using the bucket, and he must have known they would use the skip. To a man worn out with a day's toil in a mine, the temptation to use the skip rather than climb up 250 feet on a ladder is almost irresistible. Besides, the defendant and his foreman set the example and rode in the skip several times, using the same signals which had been used for the bucket, thereby adopting the same signals for the skip that had been in use for the bucket; this was an

implied invitation to the employes to ride the skip. "Actions speak louder than words," and by this conduct defendant told his employes that the skip was safe for their use. The testimony of several of the employes tends to prove that they and their associates knew nothing of the existence of a rule forbidding the use of the skip by them. There is evidence tending to prove that a hook and chain fastened to the skip would have made the skip perfectly safe and prevented the derailment which caused the death of the intestate and his companions. The motion to nonsuit was properly overruled.

[2] 2. The defendant asked witness Cranford this question: "What did Jeff Parrish tell you with reference to riding on that skip?" Plaintiff objects; sustained; exception. The declarations of Jeff Parrish to Cranford are hearsay and incompetent. They were not offered to contradict Parrish, for he had not been examined as a witness. He was afterwards introduced and examined as a witness for defendant, and no such question was asked him.

3. The defendant excepts to the following part of his honor's charge:

"Now, if you find from the evidence that the defendant used the car for the purpose of carrying his employes from the mine to the surface, and that the intestate boarded the car for that purpose, and the car was derailed while in transit, before it reached the surface, and the intestate thereby thrown down the shaft and killed, you may consider such derailment as a circumstance in connection with other evidence in finding whether the defendant was negligent in the respects complained of; that is, you may consider the fact of derailment, if you find from the evidence that the car was derailed, as a circumstance tending to show negligence. Plaintiff contends that there is other evidence which should be considered by the jury in connection with this, and that upon all the evidence the jury should find that there was negligence on the part of the defendant; that the car referred to was a self-dumping car; that the bail was connected with the car near the rear part; that there was no chain or other appliance used in connection with the car for the purpose of securing it upon the rails. The defendant contends that the car was such as was approved and in general use among the mines at that time for the purpose for which it was installed; that it was not intended for use by the employes in the mine, and that it was safe for the purpose for which it was constructed and operated. Now you are to consider the evidence relating to these contentions of the parties, and, after finding the facts from the evidence and applying the principle which has been stated, say whether the plaintiff's intestate was killed by the negligence of the defendant, and whether such negligence was the proximate cause of his death."

[3, 4] The ground of the objection is that there is no evidence to support it, and that his honor applied the doctrine of *res ipsa loquitur*. As we have said, there is abundant evidence of a permissive user of the skip, and that it could have been made reasonably safe. His honor very properly and correctly allowed the jury to consider that the *res ipsa loquitur* as a circumstance in evidence

tended, with the other evidence, to prove negligence. *Ridge v. Railroad*, 187 N. C. 518, 83 S. E. 762, and cases there cited.
No error.

(189 N. C. 150)

WALKER v. PARKER. (No. 521.)

(Supreme Court of North Carolina. May 19, 1915.)

1. PUBLIC LANDS — 164 — ENTRY — NOTICE — PROTEST.

Under Revisal 1905, §§ 1707, 1708, requiring an enterer of public lands to file with the entry taker a writing setting forth where the land is situate, and requiring the entry taker to post a copy of the entry at public places and advertise the same for 30 days, any person claiming title in the land covered by the entry may, within the 30 days, but not thereafter, file his protest.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

2. PUBLIC LANDS — 164 — ENTRY — NOTICE.

The right to protest an entry of public lands is given only to those claiming title to or interest in the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

3. PUBLIC LANDS — 164 — PROTESTING ENTRIES — PROCEEDINGS.

Where a protest against an entry on public land is filed, the clerk must, as required by Revisal 1905, § 1709, issue notice to the claimant to appear and show cause why his entry shall not be declared void, and the issue joined must be passed on by a jury, but the state has no interest in the issue; since, under section 1699, a grant issued for land previously granted could work no injury to the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

4. PUBLIC LANDS — 164 — ENTRY ON PUBLIC LANDS.

One has no right to enter land unless it is vacant and unappropriated land of the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

5. PUBLIC LANDS — 164 — PROTEST PROCEEDINGS — NATURE OF PROCEEDINGS — CONCLUSIVENESS.

A proceeding on protest of a public land entry is not one to try title, and protestant in an action to recover the land after the grant issues may prove that the state had lost title by adverse possession at the time the grant issued, unless issue has been joined and judgment rendered, which may operate as an estoppel.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

6. PUBLIC LANDS — 164 — PROTEST PROCEEDINGS — RIGHT OF PROTESTANT.

A protest against a public land entry may allege and prove that the land was not vacant and unappropriated by reason of an adverse possession for 30 years.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

7. EVIDENCE — 91, 93 — BURDEN OF PROOF — AFFIRMATIVE ALLEGATIONS.

A party alleging an affirmative has generally the burden of proving the allegation, and, when a fact is peculiarly within the knowledge of a party, or the evidence is more available to him, or he has better means of knowledge than the other, he must assume the burden of proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 113, 115; Dec. Dig. —91, 93.]

8. PUBLIC LANDS —164—PROTEST PROCEEDINGS—REQUISITES OF PROTEST.

A protest against a public land entry must state that protestant claims an interest in or title to the land covered by the entry, or the protest must be dismissed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

9. PUBLIC LANDS —164—PROTEST PROCEEDINGS—REQUISITES OF PROTEST.

A protestant against a public land entry who claims that a grant has issued for the land must name the grant and describe it with as much particularity as he can.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

10. PUBLIC LANDS —164—PROTEST PROCEEDINGS—BURDEN OF PROOF.

Where a protest against a public land entry alleges that the state has issued a grant covering the entry, the enterer has the burden of proving that the grant does not cover the land described in the entry, and, where he fails to do so, no grant can issue on his entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

11. PUBLIC LANDS —164—PROTEST PROCEEDINGS—BURDEN OF PROOF.

Where an enterer on public lands shows that a grant described in a protest against the entry does not cover the land, the protestant may, but only if he has so alleged, prove that the land is not vacant and unappropriated land by reason of adverse possession.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

12. PUBLIC LANDS —164—PROTEST PROCEEDINGS—BURDEN OF PROOF.

Where a protestant against a public land entry alleges that the land entered is not vacant and unappropriated by reason of an adverse possession, the burden of proof is on him.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. —164.]

Appeal from Superior Court, Wilkes County; Harding, Judge.

Proceedings to protest an entry of public lands by Ellen Walker against P. R. Parker. From a judgment for protestant, the enterer appeals. Reversed and new trial ordered.

This is a proceeding to protest an entry. The protestant alleged in her protest that she was the owner of two tracts of land, one of 45 acres and the other of 50 acres, the 50-acre tract being, as she alleged, the land covered by the David Parker grant, and that, if the land described in the entry was within the boundaries of these two tracts of land, it was not vacant and unappropriated. The 50-acre tract is located between the 45-acre tract and the land described in the entry, and therefore the land in the entry could not be within the boundaries of the 45-acre tract, and the jury found that the David Parker grant did not cover the land in the entry. The protestant offered evidence of an adverse possession of the land for 30 years for the purpose of showing title out of the state.

The jury returned the following verdict:

"(1) Is the land embraced in P. R. Parker's entry as described on the map, or any part thereof, covered by the grant to David Parker

from the state of North Carolina under whom protestant claims? A. No.

"(2) Is the plaintiff, Ellen Walker, seised and possessed of said land, or any part thereof, by virtue of open, notorious, continuous, and adverse possession under known and visible lines and boundaries for a period of 20 years? A. No.

"(3) Has the plaintiff, Ellen Walker, or those under whom she claims, been in the adverse possession of the land referred to as the P. R. Parker entry in this case for 30 years, such possession being ascertained and identified under known and visible lines or boundaries? A. Yes.

"(4) Is the land described in the entry and survey of plaintiff's contention vacant and unappropriated? A. No."

The charge of his honor indicates that the second issue has not been properly transcribed, and that the question really presented in that issue was whether the protestant had been in adverse possession of the land for 21 years under color. His honor charged the jury that the burden was upon the enterer upon the third issue to satisfy the jury that the protestant had not been in the adverse possession of the land described in the entry for 30 years, and the enterer excepted. There was a judgment in favor of the protestant, and the enterer appealed.

H. C. Caviness, of Wilkesboro, for appellant. Hayes & Jones, of North Wilkesboro, and Finley & Hendren, of Wilkesboro, for appellee.

ALLEN, J. "All vacant and unappropriated lands belonging to the state," subject to certain exceptions which are not involved in this appeal, are the subject of entry (Revisal, 1693), and it has been held that:

"Lands that have been once granted by the state to individual citizens, that is, cut off from the undefined public domain and appropriated to private uses, do not become vacant, within the meaning of the statute, simply because the state may in some way again acquire them, and fail to put them to any special use." State v. Bevers, 86 N. C. 590.

[1] The person who claims the right to make the entry is required to file with the entry taker a writing signed by him, setting forth where the land is situate, the nearest water courses and remarkable places that may be thereon, and the natural boundaries of any other person, if any, which divide the land entered from other lands (Revisal, 1707), and the entry taker is, among other things, required to cause a copy of the entry to be posted for 30 days at three public places in the township or townships in which the land covered by the entry is located, and at the courthouse door, and also to advertise the same for 30 days in a newspaper, if there is one in the county (Revisal, 1708). The purpose of this notice is to give information to the public, and any person who claims title or interest in the land covered by the entry has the right within the time provided for the publication of the notice and the advertisement, and not thereafter, to file his protest (Garrison v. Williams, 150 N. C. 677,

64 S. E. 783), which should contain a denial that the land is vacant and unappropriated land belonging to the state, and allegations as to his claim or interest therein.

[2] The right to protest is not given to intermeddlers, but only to those who claim title to or interest in the land (*Lumber Co. v. Clarke*, 152 N. C. 546, 67 S. E. 1057), and the protestant is therefore required to assert his title or interest.

[3] When the protest is filed, it is then the duty of the clerk of the superior court to issue notice to the claimant to appear at the next term of the superior court to show cause why his entry shall not be declared inoperative and void (*Revisal*, 1709), and the issue joined is then to be heard and passed upon by a jury.

The state has no interest in this issue because "it is immaterial to which one of * * * her citizens she grants a particular tract of land; from each she gets * * * the same revenue for it when granted." *O'Kelly v. Clayton*, 19 N. C. 248. And since the act of 1893, now section 1699 of the *Revisal*, a grant issuing for land previously granted can work no injury to the state or to any citizen, as it is expressly provided by that act that such grants are "void for all purposes," and "shall under no circumstances constitute any color of title whatsoever to any person whomsoever."

[4] It has therefore been held that, as the enterer has no right to enter land unless it is vacant and unappropriated land belonging to the state, the burden is upon him to prove that the land is subject to entry, but that this burden of proof is only as against the protestant. *Walker v. Carpenter*, 144 N. C. 674, 57 S. E. 461; *Bowser v. Wescott*, 145 N. C. 56, 58 S. E. 748; *Cain v. Downing*, 161 N. C. 598, 77 S. E. 764.

The case of *Bowser v. Wescott*, *supra*, states more fully than either of the others the grounds upon which the ruling of the court proceeds, which is that since the act of 1885 requiring the registration of deeds the enterer has access to the title of the protestant, and, as he is asserting as against the protestant that the land is vacant and unappropriated, he should assume the burden of examining and locating the grant which the protestant claims covers the land, and of proving that the land he proposes to enter is not within its boundaries.

These cases, thus understood, impose no burden upon the enterer which he ought not to assume, and, if the burden is sustained, and the fact is established that the grant does not cover the land, the presumption then arises, as the state has issued no grant, that the title is in the state, and, nothing else appearing, the enterer is entitled to his grant; but, if the protestant wishes to contest the right of the enterer further, upon the ground that the title of the state has been lost by adverse possession, he must rebut the presumption, and the burden of the evidence shifts

to him to furnish evidence of adverse possession.

[5] If the grant issues, no harm comes to the protestant if he has a just claim, as the proceeding upon the protest is not one to try title (*Lumber Co. v. Coffey*, 144 N. C. 560, 57 S. E. 344), and, in an action to recover the land after the grant issues, he may prove that the state had lost the title by adverse possession at the time the grant issued (*Lovinggood v. Burgess*, 44 N. C. 408), unless issues have been joined and a judgment rendered, which might work an estoppel. This presumption that title is in the state when no grant is shown is applied in contests between individual citizens for the recovery of land when the state is claiming no interest therein, and it would seem that the reason for the application of the principle would be stronger in a proceeding like this when it is shown that the state has issued no grant covering the land described in the entry, and when the protestant is claiming by adverse possession, and not because he has paid anything to the state for the land, and when the enterer proposes to pay what the state asks for it.

The case before us goes a bow shot beyond any of those heretofore considered by this court, as it appears that, although the protestant sets out in her protest by metes and bounds the two tracts of land which she claims to own, a 45-acre tract and a 50-acre tract, and says that the land is not subject to entry if within the boundaries of these two tracts, and although the jury has found that the land within the entry is not within the boundaries of the protestant's grant, she is permitted to offer evidence of adverse possession, although title by possession is not alleged in the protest as to the land proposed to be entered, and the burden is cast upon the enterer under the charge of his honor to prove that the protestant has not been in adverse possession of the land for 30 years. This ruling leads to the conclusion reached by his honor, and which is embodied in his charge to the jury, that, if the enterer failed to satisfy the jury that the protestant had not been in the adverse possession of the land for 30 years, they would answer the third issue, "Yes;" that is, if the protestant had not been in possession for 30 years, the jury should find that she had been in possession for that length of time.

[6] It was competent for the protestant to allege in her protest that the land was not vacant and unappropriated by reason of an adverse possession for 30 years, and to offer evidence in support of the allegation; but to impose the burden of proving the negative of this issue upon the enterer is in most cases to require an impossibility. Possession and use of land is evidence of an adverse possession, but it is not adverse if not under a claim of right, and no one knows so well as the claimant whether the possession

has been as of right or permissive. Again, there is no reason why the enterer should be observant of the condition and possession of the land prior to the time of taking out his entry, and he would not be in possession of the facts as to possession, while the protestant would have full knowledge, and could give information in detail as to the extent and length of possession.

[7] The general rule as to the burden of proof is that the burden is upon him who alleges the affirmative (*Millsaps v. McCormick*, 71 N. C. 531; *Edmonston v. Shelton*, 49 N. C. 451), and that, when a fact is peculiarly within the knowledge of a party, or the evidence is more available to him, or he has better means of knowledge concerning the fact to be established than the other party, he must assume the burden of proof (*Cook v. Guirkin*, 119 N. C. 17, 25 S. E. 715).

The protestant, when he claims by adverse possession, alleges the affirmative of the issue, in that he says there has been an adverse possession of the land for 30 years, and the evidence to sustain this allegation is peculiarly within his own knowledge, and the ruling of his honor therefore contravenes the rules usually applied as to the burden of proof, and also substantially destroys the presumption that title is in the state, unless it is shown that a grant has issued.

[8-12] We therefore conclude that the correct rules upon the trial of a protest to an entry are:

(1) The protestant shall be required to state in his protest that he claims an interest in or title to the land covered by the entry, and, if he fails to do so, his protest shall be dismissed.

(2) If he claims that a grant has issued for the land covered by the entry, he shall name the grant and describe it with as much particularity as he can.

(3) When the protestant alleges that the state has issued a grant covering the entry, the burden is on the enterer to prove to the satisfaction of the jury that the grant does not cover the land described in the entry, and, if he fails to do so, no grant can issue upon his entry.

(4) If the enterer establishes the fact that the grant described in the protest does not cover the land described in the entry, the protestant may, if he has so alleged in his protest, and not otherwise, prove that the land in the entry is not vacant and unappropriated land by reason of adverse possession, and that the burden of so proving is upon him.

(5) If the protestant does not allege in his protest that a grant has issued for the land, but that the land is not vacant and unappropriated by reason of an adverse possession, the burden of proof upon this allegation is upon the protestant.

We are therefore of opinion that the

charge of his honor as to the burden of proof was erroneous, and a new trial is ordered.

New trial.

WALKER, J., concurs in result.

(101 S. C. 159)

GALLOWAY v. WESTERN UNION TELEGRAPH CO. (No. 9102.)

(Supreme Court of South Carolina. May 12, 1915.)

1. TELEGRAPHS AND TELEPHONES \Leftrightarrow 73—FAILURE TO DELIVER MESSAGE—JURY QUESTION.

In an action for failure to deliver message, evidence held sufficient for the jury on the question whether the telegraph company had notice that the sender was an invalid.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. \Leftrightarrow 73.]

2. EVIDENCE \Leftrightarrow 151 — MENTAL ANGUISH — TELEGRAM—FAILURE TO DELIVER.

In an action against a telegraph company for failure to deliver a message, in which plaintiff's invalid wife requested him to meet her, he may testify that he suffered mental anguish though the question is one for the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 440; Dec. Dig. \Leftrightarrow 151.]

3. TELEGRAPHS AND TELEPHONES \Leftrightarrow 66—ACTIONS—EVIDENCE.

In an action against a telegraph company for failure to deliver a message, in which an invalid requested her husband to meet her, the invalid may testify that she would not have made the proposed journey had she known the message would not be delivered.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. \Leftrightarrow 66.]

4. TELEGRAPHS AND TELEPHONES \Leftrightarrow 37—DELIVERY OF MESSAGE—DELAY.

A telegraph company should not lead a sender to believe a message will be promptly delivered, where it knows, or should have known, circumstances which would prevent delivery.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. \Leftrightarrow 37.]

5. TELEGRAPHS AND TELEPHONES \Leftrightarrow 73—INSTRUMENT—CONSTRUCTION.

Where a telegram contained the name of a sanitarium, indicating the residence of the sender, the court should not construe it, but it is for the jury to determine whether from that notation the company had notice that the sender was an invalid.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. \Leftrightarrow 73.]

Hydrick and Fraser, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court of Darlington County; Geo. W. Gage, Judge.

Action by J. R. Galloway against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed in part, and in part reversed.

The defendant's exceptions herein are as follows:

(1) His honor erred, it is respectfully submitted, in allowing the following testimony of Dr. Wm. Eggleston to be introduced over the objection of the defendant:

"Mr. Willcox: May it please the court, we ob-

ject to this in the inception of this case. Here is a message from this lady in Richmond to her husband to meet her at a train. As to her condition she is not suing. She is not suing; her husband is suing. There is nothing in the telegram which discloses to the telegraph company her condition.

"The Court: I don't know; I don't reckon anybody will know until the Supreme Court declares. Note the exception.

"Q. What was Mrs. Galloway's condition at the time of this transaction. A. A very ill woman."

The error in admitting said testimony was because there was nothing on the face of the telegram which disclosed to the defendant the condition of plaintiff's wife, and that mental anguish would result to the plaintiff in case of the failure to deliver the telegram promptly.

(2) His honor erred, it is respectfully submitted, in allowing the following testimony to be introduced over the objection of the defendant:

"Q. Mrs. Galloway, what was your condition then? A. I was— (Objected to.)

"Mr. Willcox: We object to that, may it please the court, on two grounds. Regardless of the statute, there is no notice in the message as to her physical condition. There is nothing contained in the message which should have put the telegraph company on inquiry. That objection applies to her husband as well as herself. The second objection is that she is not suing, but her husband is suing, and knew nothing about it, and could not have had mental anguish by reason of her physical condition as of a past date.

"The Court: Go ahead.

"Q. Did you need assistance in Florence when you got there. A. I certainly did."

The error in admitting said testimony was because there was nothing on the face of the telegram which disclosed to the defendant the condition of the plaintiff's wife, and that mental anguish would result to the plaintiff in case of the failure to deliver the telegram promptly.

(3) His honor erred, it is respectfully submitted, in allowing the following testimony of Mrs. Carrie King to be introduced over the objection of the defendant:

"Q. State to the jury her condition. A. Well, she came there just about half past six, I expect it was, as near as I can remember, and there was no one up but my daughter and her papa, and she came to the door and called me and told me to get up quick, Cousin Dora was at the door. I said, 'No, it can't be possible,' because we were not expecting her to be out— (Objected to.)

"Q. Confine yourself to the condition of Mrs. Galloway. A. She was just as sick as she could be.

"Mr. Willcox: We object to all that testimony, without repeating it.

"The Court: Yes sir."

The error in admitting said testimony was because there was nothing on the face of the telegram which disclosed to the defendant the condition of the plaintiff's wife, and that mental anguish would result to the plaintiff in case of the failure to deliver the telegram promptly.

(4) His honor erred, it is respectfully submitted, in allowing the following testimony of the plaintiff to be introduced over the objection of the defendant:

"Q. Tell the jury how you felt about not being able to meet her at Florence? (Objected to.)

"The Court: The statute says that telegraph companies shall be liable in damages for mental anguish or suffering. It does not say when the mental anguish shall take place, whether before or after the event.

"Mr. Willcox: We object on the further ground that no man can tell how much mental anguish he suffered.

"Q. Did you suffer any mental anguish? (Objected to, on the same ground.)

"The Court: Mental anguish resides in the conscience; and if a man does not know his own conscience, who does?

"Q. Tell the jury how you felt? A. Well, I felt mighty bad, when I heard that she was in Florence and knew how bad off she was. Any man who has got a wife can imagine how one would feel in such a condition."

The error being that it was for the jury to say, after hearing the facts, what mental anguish or suffering the plaintiff should have sustained under the circumstances, and plaintiff's conclusions on the subject could not be put in evidence.

(5) His honor erred, it is respectfully submitted, in allowing the following testimony to be introduced in reply over the objection of the defendant:

"Q. Mrs. Galloway, if you had known at the time you sent that message that it would not reach your husband, would you have left Richmond? (Objected to.)

"The Witness: No, sir; I would not. (Objected to, as not in reply.)

"The Court: I think it is; I think it is competent.

"Q. You say you would not have left Richmond? A. Indeed not."

The admission of this testimony was error because there was no allegation in the complaint laying a foundation for its introduction, and it was not in reply to any testimony introduced by the defendant.

(6) His honor erred, it is respectfully submitted, in refusing to direct a verdict in favor of the defendant at the close of the whole case, for the reasons stated as the grounds of said motion, which were as follows: First, the entire testimony shows that there was no willfulness in the case; second, the entire testimony shows that there was no gross negligence in the case; third, the entire testimony shows that there was no negligence in the case, as a proximate cause of any mental suffering; fourth, the telegram was sent from Virginia, where the common law prevails, and there was no proof of any delict in South Carolina; fifth, the evidence does not warrant any recovery for mental anguish on the part of the addressee, J. R. Galloway; sixth, the amendment to the mental anguish statute of 1909, further amended in 1911, has no application to this case, because in no manner has that act changed the rule, which requires that a message itself shall contain notice of the ground for any mental anguish, or that the telegraph company should otherwise know it.

(7) His honor erred, it is respectfully submitted, in giving to the jury the following instruction: "You are further instructed that if there was wire trouble, of which defendant knew or ought to have known, and on that account the defendant could not promptly transmit and deliver the telegram, it was defendant's duty not to receive the message; and if it knew at the time it received the message or could and should have known of its inability to transmit the same, it should have informed the sender." This instruction was erroneous because it is not the duty of a telegraph company to refuse to receive a message when it knows that there is trouble with the wires, because such trouble may be repaired and the wires restored to service, or the company may, outside of the usual route or through other instrumentalities, transmit and deliver the message.

(8) His honor erred, it is respectfully submitted, in giving the jury the following instruction: "If the telegram was plain, free from ambiguity, it being a written instrument, it would be my duty to tell you whether or not it carried this notice to the telegraph company, but inasmuch as it is not plain, and inasmuch as there is other evidence by witnesses on the stand, it is my duty to leave to the jury to de-

termine whether or not the operator at Richmond ought to have known, from the telegram and from the circumstances afterwards happening, that it was a sick woman in the hospital, and that it ought to have immediate attention." This instruction was erroneous for the reason that the court thereby left it to the jury to construe the telegram, about the existence of which there was no question, and the construction of which was a question of law for the court and not for the jury.

(9) His honor erred, it is respectfully submitted, in giving the jury the following instruction:

"Did the telegraph company know when it received the telegram, or, under all the circumstances ought it to have known, that the wires were down? If it knew that the wires were down and it couldn't send the telegram, it ought not to have received the paper, because its duty when it receives the paper is not to hold it, but to transmit it. Whether or not it knew that its wires were down is a question for the jury, and you must decide it from the testimony, and if it did know its wires were down at the time it received the telegram, and if a storm came and blew down its wires so as to make it unable to send the telegram over its wires, or if you believe that is so, if you give credit to the witnesses who have testified, then I charge you there is no proof of willfulness, because the delay is then explained. I charge you that as a matter of law and leave for you to say whether or not it knew the wires were down." This instruction was erroneous because it is not the duty of a telegraph company to refuse to receive a message when it knows that there is trouble with the wires, because such trouble may be repaired and the wires restored to service, or the company may, outside of the usual route or through other instrumentalities, transmit and deliver the message.

Geo. H. Fearons, of New York City, and Willcox & Willcox and Henry E. Davis, all of Florence, for appellant. Miller & Lawson, of Hartsville, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful acts of the defendant in failing to deliver the following message from his wife at Richmond, Va., on the 18th of February, 1910:

"To J. R. Galloway, Hartsville, S. C. Will leave Richmond seven o'clock to-night. Meet me in Florence."

The jury rendered a verdict in favor of the plaintiff for \$100 actual damages, and \$100 punitive damages, and the defendant appealed upon exceptions, which will be reported.

[1] The first question that will be considered is whether there was any testimony tending to show that the defendant had notice, when the telegram was delivered to it for transmission, that Mrs. Galloway was an invalid. The message was telephoned to the defendant by Miss Rosa Hancock, superintendent of Johnson-Willis Sanitarium, where Mrs. Galloway was under treatment as an invalid. Miss K. M. Ellis, who was in the employment of the defendant at its office in Richmond, received the message and wrote on it the words "Johnson-Willis," so as to indicate the residence of the sender of the telegram. His honor, the presiding judge, charged the jury as follows:

"The telegram reads: 'Will leave Richmond seven o'clock to-night. Meet me in Florence'—and to the left is 'Johnson-Willis.' You heard the testimony of the witnesses on the stand about what that means. You heard the testimony of the young lady operator at Richmond, and you heard the testimony of Mrs. Galloway, and I leave it to the jury to say whether or not, from that testimony, and from this telegram, the operator at Richmond ought to have known that there was a sick woman at the hospital, and this telegram was about her. If you find that issue for the telegraph company, that they had no such notice, then they are not liable. If you find from the preponderance of the testimony that they ought to have had such notice, that the words on the telegram 'Johnson-Willis,' and from the testimony of other witnesses, that the operator ought to have known that this lady was at the hospital, and that the probability was that she was sick, then the telegraph company had notice, and they would be liable."

The testimony tends to show that the defendant had knowledge of facts sufficient to put it on inquiry which, if pursued with due diligence, would have led to notice of the fact that Mrs. Galloway was an invalid at a hospital. The issue of notice was therefore properly submitted to the jury.

The next question is whether there was any testimony tending to show that the plaintiff was entitled to punitive damages. The explanation given by the defendant for its failure to deliver the message is satisfactory, and shows that the plaintiff was not entitled to punitive damages.

[2] The next assignment of error is, because his honor, the presiding judge, erred, in allowing the plaintiff to testify that he had suffered mental anguish, on the ground that this was a question to be determined by the jury from the facts and circumstances in the case. It is true the jury must determine whether the plaintiff suffered mental anguish from the facts and circumstances, but there is no good reason why they should not also consider the testimony of the plaintiff as to his suffering. The authorities cited by the respondent's attorneys show that this assignment of error cannot be sustained.

[3] The next question is whether there was error in permitting Mrs. Galloway to testify in reply that she would not have left Richmond, at the time mentioned in the telegram, if she had known that it would not be delivered to her husband. The appellant has failed to satisfy us that the presiding judge's discretion was erroneously exercised.

[4] The propositions which the presiding judge charged, as set forth in the seventh and ninth exceptions, merely mean that a telegraph company should not lead a sender to believe that the message will be delivered promptly when it knows, or should know, that circumstances will prevent a prompt delivery. In this there was no error.

[5] The eighth exception cannot be sustained for the reason that there was no necessity for construing the telegram, but the words "Johnson-Willis," therein contained, were properly considered by the jury, in connection with the other testimony, in determin-

ing whether the defendant had notice of Mrs. Galloway's physical condition.

The charge of the presiding judge is sustained by the cases of *Holliday v. Pegram*, 89 S. C. 73, 71 S. E. 367, Ann. Cas. 1913A, 33, and *Watson v. Paschall*, 93 S. C. 537, 77 S. E. 291.

The four members of the court who participated in the hearing of the appeal herein being agreed that punitive damages cannot be recovered, the judgment as to such damages is reversed; but, the court being equally divided upon the question whether the plaintiff is entitled to recover actual damages, the judgment for such damages is affirmed.

WATTS, J., concurs. HYDRICK, J., thinks the verdict should have been directed for defendant on the fourth ground of the motion therefor. GAGE, J., disqualified. FRASER, J., concurs with HYDRICK, J.

(101 S. C. 152)

LAKE CITY v. GILLILAND. (No. 9103.)
(Supreme Court of South Carolina. May 12, 1915.)

CRIMINAL LAW §255—TAKING DOWN AND SIGNING TESTIMONY—WAIVER.

Right of defendant to have the testimony taken down in writing and signed by the witnesses was waived; his attorney knowing it was not being done, and making no objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 539-541; Dec. Dig. §255.]

Appeal from Common Pleas Circuit Court of Florence County; C. J. Ramage, Special Judge.

S. L. Gilliland, convicted before the Mayor of Lake City, was granted a new trial on appeal to the circuit court, and the City appeals. Reversed.

Philip H. Arrowsmith, of Lake City, for appellant. Stoll & Stoll, of Kingstree, for respondent.

HYDRICK, J. Respondent was tried before the mayor of Lake City and a jury for selling liquor in violation of an ordinance of the town. There were three trials. The first two resulted in mistrials. On the third, the jury found respondent guilty. From sentence he appealed to the circuit court, which overruled all his grounds of appeal, except two, upon which a new trial was ordered. From that order the town appealed to this court.

The circuit court erred in sustaining the exception that the bottle of whisky introduced in evidence was not identified. It was positively identified by the witness Green, and circumstantially by the other testimony in the case sufficiently to allow its admission in evidence.

The court erred also in sustaining the exception that the testimony had not been taken down in writing and signed by the witness-

es. When respondent's attorney knew, as he did, that the testimony was not being so taken down and signed, and made no objection, he waived the right to have it so taken. *Greenville v. Latimer*, 80 S. C. 92, 61 S. E. 224; *Abbeville v. Gooseby*, 93 S. C. 370, 76 S. E. 977; *Sumter v. Hogan*, 96 S. C. 302, 80 S. E. 497.

The judgment of the circuit court is reversed, and that of the mayor's court affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 170)

ADAMS v. GEORGIA-CAROLINA POWER CO. (No. 9104.)

(Supreme Court of South Carolina. May 14, 1915.)

1. SPECIFIC PERFORMANCE §37—CONTRACTS.

Specific performance of a contract for the purchase of land will be denied where there was no meeting of the minds of the parties, and thus there was no valid contract between them.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 108-112; Dec. Dig. §37.]

2. APPEAL AND ERROR §1116—QUESTIONS DETERMINED.

Where specific performance of a contract is denied on appeal because there was no valid contract between the parties, the question of title to lands involved in the contract cannot be decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4411, 4412; Dec. Dig. §1116.]

Hydrick, J., dissenting.

Appeal from Common Pleas Circuit Court of Edgefield County; John S. Wilson, Judge.

Action by Kate M. Adams against the Georgia-Carolina Power Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boykin Wright, of Augusta, Ga., and Shepard Bros. and Thurmond & Nicholson, all of Edgefield, for appellant. Tillman & Mays and Grier, Park & Nicholson, all of Greenwood, for respondent.

FRASER, J. This is an action for specific performance. The respondent in her argument thus states in part the history of the controversy:

"The defendant is a corporation organized for the purpose of erecting, operating, and maintaining a plant for the manufacture and sale of electric power. Its plant is situate on Savannah river, and, in order to obtain the power necessary to operate its plant, it began the erection of a dam across the Savannah river below the lands of the plaintiff. In course of the erection of this dam, it was found that the water would be backed up so as to submerge considerable lands belonging to this plaintiff, and would water-soak other of her lands. She owned a large tract of some 300 acres on Savannah river, and the defendant commenced proceedings to condemn so much of the same as it estimated would be affected by its dam across the river. The plaintiff questioned the right of the defend-

ant to take her lands by condemnation, and sought to have the condemnation proceedings stopped by injunction when negotiations were opened for a settlement of the differences between the (sic) parties."

The appellant proposed to take 51st/100 acres of plaintiff's land. Both the plaintiff and defendant claimed that a contract was made by the parties, and both ask for an enforcement of the contract, as they understand it. Both parties claim that the contract can be gathered from certain letters that passed between Mr. Grier, as attorney for the plaintiff, and Mr. Wright, as attorney for the defendant. These letters contain the whole showing and upon them rest the rights of the parties. The principal question between the parties is as to the ownership of a strip of land lying between the bank of the Savannah river and the middle of the river.

[1] Before specific performance can be decreed, it is first necessary to determine whether there is a contract between the parties or not. If there is no contract, then there is nothing to enforce. It would be speculative for a court to say what would have been the rights of the parties if they had made a contract. The declaration of opinion would be simply the individual opinions of the members of the court. Was there a contract between the parties?

The rule is thus stated in *Spears v. Long*, 32 S. C. 533, 534, 11 S. E. 334:

"Without stopping to inquire whether the contract in contention here was or was not of a class capable of being enforced, it was still necessary that it should have certain elements and incidents in order to authorize a court of equity to compel its performance. The court cannot make a contract for the parties, or even complete an imperfect one, and therefore it is indispensable that there should be a concluded contract 'certain and explicit.' As Mr. Pomerooy puts it: 'The contract must be concluded, certain, unambiguous, natural, and upon a valuable consideration; it must be perfectly fair in all its parts, free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise.' 3 Pom. Eq. Jur. § 1415, and notes."

In this case it gives this court pleasure to know that the only question is as to misapprehension and surprise. The only question is: Did the minds of the parties meet? When able and honorable counsel who conducted the negotiations come into court on opposite sides, and the one alleges that a certain tract of land was included in the contract, and the other states, with equal confidence, that it was not included, then the misapprehension is on the face of the pleadings. Here there is no variance between the pleadings and the proof on that subject.

Mr. Grier writes in his first letter:

"You, of course, recall that this letter is entirely without prejudice, and so will be your reply. In fact, we had just as well have it understood that any correspondence passing between us is to be considered by both of us without prejudice to the rights of our respective clients."

To this Mr. Wright replied the next day:

"My first impulse is to say in reply that any further correspondence between us on this sub-

ject would, in my opinion, prove futile, as my client and yours are so hopelessly apart, both as to acreage and price involved. However, it certainly cannot prejudice the cause of either for me here to give you my point of view."

Before either party can successfully claim that the other is bound by any letter that followed, it must appear that the personal character of the letters was distinctly repudiated, and that the "hopeless" disagreement had become a complete understanding. The record does not show it. Those letters were written before Mr. Wright knew that Mr. Grier would contend that his client owned the bed of the river to the center of the stream. When Mr. Wright was informed by Mr. Grier that the riparian proprietor claimed title to the middle of the stream, Mr. Wright promptly writes to Mr. Grier:

"To say that it was a surprise and shock to me is but expressing it mildly."

To this Mr. Grier in turn says:

"Frankly, it is somewhat a surprise to us that you raise the question"—i. e., plaintiff's title to the center of the stream.

Both parties stand where they stood that day. There are about 12 acres in the river. It is as clear as can be that Mr. Wright, for his client, never intended to include the 12 acres, and that Mr. Grier, for his client, never intended to exclude it from the deed. These 12 acres constitute a material part of the sale, and, since the parties did not, and do not, agree as to its ownership, their minds never met, and there is no contract between the parties.

There were other matters of disagreement, but it is needless to prolong this opinion.

[2] 2. It is unfortunate for these parties that this court cannot decide the real question between them, to wit, the ownership of the land lying between the bank and the middle of the stream. It is very clear that, having held that there is no contract to enforce, a declaration as to what would have been the construction if a contract had been made would not be binding on the parties or this court in subsequent litigation. The question as to the right of the plaintiff in this case to the 12 acres in controversy does not affect the plaintiff alone. It affects the rights of every citizen of this state who owns land lying on the navigable streams in this state where the tide does not ebb and flow. It may affect the rights of every citizen of this "state and the United States." Under our Constitution, no court would be justified in making a deliverance on a question of such wide and vital importance, unless its right and duty to do so is indisputable.

Judgment reversed, and the parties restored to their original status.

GARY, C. J., and WATTS and GAGE, JJ., concur.

HYDRICK, J. I dissent. The plaintiff alleges that she and the defendant made a contract. The defendant admits that allegation.

The correspondence between their attorneys (who were authorized to represent them in making the contract) which embodies the contract shows that they intended to contract and did contract. But after they had contracted a difference arose between them as to the legal effect of the contract, and that is now their only difference. They have by proper procedure brought that difference here, and the court ought to decide it.

(143 Ga. 473)

TERRY et al. v. DREW. (No. 353.)
(Supreme Court of Georgia. May 13, 1915.)

(Syllabus by the Court.)

1. JURY —25—RIGHT TO JURY TRIAL—ACTION IN CITY COURT.

Under the twenty-first and thirtieth sections of the act of 1909 (Acts 1909, pp. 260, 269, 271), creating the city court of Lumpkin, where a suit in that court, based on a promissory note and an open account, was in default, and no jury was demanded as provided by the act, the judge could render a judgment without a jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 154-173; Dec. Dig. —25.]

2. JURY —25—RIGHT TO JURY TRIAL—ACTION IN CITY COURT.

This was not in conflict with the section of the Constitution which provides that the court may render judgment without a jury in suits on unconditional contracts in writing, where no plea is filed on oath.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 154-173; Dec. Dig. —25.]

3. VACATION OF JUDGMENT.

Under the facts, there was no error in overruling a motion to vacate the judgment and reinstate the case on the docket for trial.

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action between F. C. Terry and others and J. R. J. Drew. From the judgment, the parties first mentioned bring error. Affirmed.

T. T. James, of Lumpkin, for plaintiffs in error. J. F. Souther, of Preston, and G. Y. Harrell, of Lumpkin, for defendant in error.

LUMPKIN, J. A case was in default in the city court of Lumpkin, at the December term, 1912. The suit was based partly on a promissory note and partly on an open account. No jury appearing to have been demanded, as provided by the act creating the city court of Lumpkin, a judgment was rendered by the judge without a jury. The city court having been abolished, and its business transferred to the superior court, a motion was made in that court to vacate the judgment and that the case be restored to the docket for trial. The motion was overruled, and the movant excepted.

[1] By section 18 of the act of 1909 (Acts 1909, pp. 260, 269), establishing the city court of Lumpkin, it was provided that, in cases where no issuable defense should be filed by the second day of the first term, a verdict or judgment might be taken, "as the case may

be." By the twenty-first section it was declared that the judge should have power and authority to hear and determine, without a jury, all civil cases of which that court had jurisdiction, and to give judgment therein: Provided that either party in a cause should be entitled to a trial by jury, upon entering a demand therefor by himself or attorney on or before the call of the docket at the term to which the case was returnable, in all cases in which such party would be entitled to a trial by jury under the Constitution and laws of the state. It was made the duty of the judge to sound the docket upon the opening of each term, for the purpose of ascertaining in what cases demands for a jury trial would be made. By section 30 it was provided that in cases where no defense was filed, or where the defense filed was stricken, the court should enter judgment or permit a verdict, as the case might be, upon demand of the plaintiff, on any day after the first day of the term. Thus, if there was no demand for a jury trial, the court was to enter judgment, performing at once the functions of a judge and that of a jury, where a jury would otherwise render a verdict. If a jury trial was duly demanded, a verdict was to be taken in proper cases.

[2, 3] The provision of the Constitution that judgment shall be entered by the judge without a jury in a suit on an unconditional contract in writing, where no plea is filed under oath (Civil Code 1910, § 6518), did not prevent the judge of the city court of Lumpkin from acting as judge and jury upon consent, or when no jury was demanded, and thus there was a sort of statutory consent or waiver. *Sutton v. Gunn*, 86 Ga. 652, 12 S. E. 979. In the absence of anything showing the contrary, it will be presumed that the judge did his duty in regard to calling the docket. If there had been a suit on an open account, and a default, and a jury had been demanded, a verdict would have been rendered. If in such a case no jury was demanded, the judge could act without a jury.

In the present case, the term of court was to begin on Monday, December 9, 1912. The judge was absent on that day, and court began on Tuesday. It continued until December 19th. On that day, the case being in default, a judgment was taken. Late in the afternoon of the same day, after court had adjourned for the term, the clerk received a plea in the case. On the hearing of the motion to vacate the judgment evidence was introduced. It showed that on the first day of court counsel for the defendant informed counsel of record for the plaintiff that he would file a plea on the next day. Counsel of record for the plaintiff replied that, if this were done, it would carry the case over until the next term; and, assuming that it would be done, he went to his home in another county. Prior to the commencement of the term of court, the plaintiff had retained

an additional attorney, whose name did not appear of record. Before the term closed, this attorney ascertained that no plea or answer had in fact been filed, and took the judgment.

Under the facts, and the act creating the city court, the judgment rendered by the judge without a jury was not unconstitutional, although it included a claim upon an open account; nor was any good reason shown for the delay in filing the plea. Accordingly there was no error in overruling the motion to vacate the judgment, made in the superior court, after the abolition of the city court of Lumpkin (Acts 1912, p. 243).

Counsel for the plaintiff in error relied on the decision of the Court of Appeals in *Turner v. Bank of Maysville*, 13 Ga. App. 547, 79 S. E. 180. In that case the principle now ruled was recognized, but it was said that there was no evidence of the waiver of a jury, that the judgment was based on a conditional contract in writing, and that the judge did not have in mind proof of notice in order to authorize a recovery of attorney's fees. Nor was any question of waiver involved in *Anders v. Blount*, 67 Ga. 41.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 479)

LEONARD v. FIELDS. (No. 355.)

(Supreme Court of Georgia. May 13, 1915.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT ⇨246 — LIEN — CROP OF SUBTENANT.

A crop produced on any part of the rented land is liable for the whole rent, whether produced by the tenant or his subtenant, unless the landlord assented to or ratified the subletting.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 991-1002; Dec. Dig. ⇨246.]

2. LANDLORD AND TENANT ⇨245—DISTRESS WARRANT—CROP OF SUBTENANT—ACCOUNTING.

Where a tenant sublets a part of the land without the landlord's consent, and also sublets a part of the land to the landlord, and the landlord is seeking, by distress warrant against the original tenant, to collect the rent of the whole premises out of the crop grown by the subtenant, he should account for such an amount as the rental value of the land which he subrented bears to the entire rental value.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 988-990; Dec. Dig. ⇨245.]

3. LANDLORD AND TENANT ⇨254 — LANDLORD'S LIEN—RIGHTS OF SUBTENANT.

A tenant has no power to consent to any application by the landlord of the subject-matter of the lien for rent, which would leave that lien in force to the prejudice of a subtenant, relatively to the collection of the entire rent from the crop grown by the subtenant. Nor can the landlord apply the proceeds of the tenant's crop to an independent indebtedness of the tenant, to the injury of the subtenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 986, 1034-1044; Dec. Dig. ⇨254.]

Error from Superior Court, Wilcox County; W. F. George, Judge.

Action by Joseph Fields against Will Leonard. Judgment for plaintiff, and defendant brings error. Reversed.

Hal Lawson, of Abbeville, for plaintiff in error. Max E. Land, of Cordele, for defendant in error.

EVANS, P. J. Joseph Fields rented 30 acres of land to John and Will Alexander, who subrented 12 acres to Will Leonard. A distress warrant, issued at the instance of the landlord against the principal tenants, was levied upon the crop grown by the subtenant, who filed a petition to enjoin the proceeding. On the trial it appeared that in October, 1910, Fields rented to John and Will Alexander 30 acres of land for the year 1911 for \$125, and took their note for this amount. At the same time he sold them a mule for \$165, retaining the title to the mule. About two or three months afterwards the Alexanders sold the mule without Fields' consent or knowledge. In the early part of the year 1911 the Alexanders subrented 12 acres of the land to Will Leonard for the sum of \$41, who gave to them his note for that sum. The Alexanders also subrented 6 acres to Fields, their landlord, for which he agreed to pay \$20. The remaining land was cultivated by the tenants and their cropper. Fields deposited in a bank the notes given by the Alexanders for the purchase of the mule and for the rent. On the maturity of the crop the Alexanders sold a bale of cotton, and gave \$25 of its proceeds to Fields. Subsequently the Alexanders sold to Fields the crop raised on the land cultivated by them, for an amount not disclosed in the evidence, with direction to credit the same on their indebtedness to him. Alexander testified that the \$25 from the proceeds of the bale of cotton which he paid to Fields and the \$20 which Fields was to pay for the rent of the 6 acres of land were to be credited on the rent note. Fields testified that these amounts were agreed to be credited on the mule note. The subtenant testified that Fields, upon discovery that he had subrented from the Alexanders, consented to his sublease. The landlord, on the other hand, denied that he said or did anything indicative of his assent to the sublease. The landlord further testified that the Alexanders deposited with a bank the note of the subtenant, with directions to apply its proceeds, when collected, on the rent note of his tenants, and that the bank collected the subtenant's note and applied its proceeds according to the subtenant's direction. The jury found in favor of the landlord the sum of \$64, and the subtenant moved for a new trial, which was refused.

[1] 1. A crop produced on any part of the rented premises is liable for the whole rent

of the entire premises, whether produced by the tenant or his subtenant, unless the landlord assented to or ratified the subletting. *Andrew v. Stewart*, 81 Ga. 53, 7 S. E. 169; *Thompson v. Commercial Guano Company*, 93 Ga. 282, 20 S. E. 309; *Hudson v. Stewart*, 110 Ga. 37, 35 S. E. 178. The whole of the crop also is liable for the special lien of the landlord for supplies, etc., furnished to the tenant to make the crop. *Nash v. Orr*, 9 Ga. App. 33, 70 S. E. 194. It appears from the evidence that the landlord sold the tenants a mule in October, 1910, reserving title to himself, and about two months thereafter the tenants disposed of the mule. The evidence does not show that the landlord sold the tenants the mule for the purpose of making the crop of the ensuing year, or that the furnishing of a mule was necessary to make the crop. In other words, the evidence is insufficient to show that the landlord had a special lien upon the crop raised upon the rented premises, by virtue of Civil Code, § 3348, which gives a special lien to a landlord for supplies, mules, etc., furnished to make the crop; and this indebtedness must be treated as unsecured by lien on the crop.

[2] 2. If nothing more appeared than that the tenants had sublet the land without the landlord's permission, the latter would be entitled to make the full amount of his rent out of the crop grown by the subtenant, on the distress warrant issued against the principal tenants. But other elements enter into the transaction. One is that the landlord subrented a part of the land from his tenants, who, according to the landlord's testimony, agreed that the rent contracted to be paid should be credited on the mule note. This presents the question: Can a landlord subrent from a tenant a part of the premises, and agree with his tenant that the amount agreed to be paid for the subrenting be credited upon an independent indebtedness of the tenant, so as to make the crop of a subtenant liable for the whole rent of the entire premises? We think not. Although the tenant and the landlord may characterize the surrender of a portion of the premises as a subrental, relatively to a subtenant the transaction will be regarded in the nature of a withdrawal of a part of the demised premises, and the landlord cannot thereafter equitably require the subtenant to pay the rent for the whole of the land originally rented. Nor do we think the price fixed by the landlord and his tenant as rent for the land which the tenant sublet to the landlord would be binding upon the tenant. Where the landlord is seeking to make the entire rent out of the crop of the subtenant, he should account for such an amount as the land which was turned back to him by the tenant bears to the entire rental value. In other words, there should be an equitable apportionment between the rent contracted to be paid and the rent of the land remaining

after the surrender of a part of it by the tenant to the landlord.

[3] 3. It is conceded that the landlord purchased from the principal tenant his entire crop raised on the rented premises, and applied the same on the mule note. There is a dispute as to whether the application of the payment was made by the direction of the tenant; but we do not think that makes any difference in this case. As between the parties, the rule governing appropriation of payments is clear and simple. If the creditor has several demands, the debtor may direct the application of the payment. If he fails to do so, the creditor has the right to appropriate at his election. If neither exercise the privilege, the law will direct the application in such manner as is reasonable and equitable. Civil Code 1910, § 4316. But, where one of the debts of the creditor is secured by lien on the property, and he receives from his debtor either the property under lien or its proceeds, the rights of third persons cannot be ignored by a conventional appropriation by the parties. In the case of a mortgage, the proceeds of mortgaged property must be applied to extinguish the mortgage indebtedness, without regard to any agreement between the mortgagor and mortgagee, so far as the rights of innocent third persons would otherwise be prejudicially affected. *Jones on Chattel Mort.* § 640; *Hughes v. Johnson*, 38 Ark. 285; *Ill.*, etc., *Bank v. Alexander Stewart Lumber Co.*, 119 Wis. 54, 94 N. W. 777. A tenant has no power to consent to any application by the landlord of the subject-matter of the lien for rent, which would leave that lien in force to the prejudice of a mortgagee of the tenant, relatively to so much of the crop as the landlord did not receive. *Cofer v. Benson*, 92 Ga. 793, 19 S. E. 56. The equity of a subtenant to have applied the proceeds of the crop grown by the tenant and received by the head landlord in extinguishment of the latter's lien for rent stands on the same footing. *Barlow v. Jones*, 117 Ga. 412, 43 S. E. 690. It would seem that the true equitable rule would require a landlord who receives the proceeds from a portion of the crop raised by his tenant to apply such proceeds to the rent, as against his subtenant from whom he is attempting to enforce the collection of the entire rent out of the crops grown by the subtenant, who subleased without his consent. The amount of this credit manifestly was not allowed. The total rent contracted to be paid was \$125. The landlord actually received \$41 from the subtenant, and contracted to pay \$20 for his sublease. Deducting these two items from the rent contracted to be paid leaves the sum found by the jury in favor of the landlord against the subtenant, and leaves out of consideration the \$25 paid by the tenant, as well as the value of the crop, which was not disclosed by the evidence. We therefore think that the ver-

dict is not supported by the evidence, and a new trial should be granted.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 483)

CROSBY v. LOVETT. (No. 356.)

(Supreme Court of Georgia. May 13, 1915.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS — SALE OF PROPERTY — INSOLVENT PURCHASERS — LIABILITY OF ADMINISTRATOR.

Where an administrator, who had an order authorizing him to farm the land of his intestate, bought mules with funds of the estate, and later sold them at an administrator's sale on credit to insolvent purchasers, taking no security except a retention of title to the property, if a loss arose from such failure he was liable therefor.

(a) If subsequently the administrator died, and an administrator de bonis non was appointed on the estate of his intestate, and also an administrator on his estate, and the former took the notes containing a reservation of title, retook possession of the mules without legal proceedings, and resold them at administrator's sale, at which they brought less than the amount invested in their purchase and the amount which they brought at the first sale, the administrator of the first administrator was liable for the difference; the administrator de bonis non tendering back to him the notes, and nothing appearing to show that the second administrator's sale was not fairly conducted, or that property did not bring a fair value thereat.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1507-1515; Dec. Dig. § 368.]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by G. D. Lovett, administrator, against H. A. Crosby, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

C. E. Parrish, of Adel, for plaintiff in error. W. D. Bule and Knight & Chastain, all of Nashville, for defendant in error.

LUMPKIN, J. H. A. Crosby was appointed administrator of Thomas Hill, deceased. Having an order of the ordinary authorizing him to farm the land, he took \$1,300 of the funds of the estate and bought five mules. Later he sold them at an administrator's sale to insolvent purchasers for the same price. The sales were made on credit, and the administrator took no security other than a reservation of the title to the property. Subsequently the administrator died, and an administrator was appointed for his estate. An administrator de bonis non was appointed for the estate of Hill. He received from the administrator of Crosby the notes reserving title to the mules, took possession of the mules without legal proceedings, and resold them at an administrator's sale. They brought \$552 less than the \$1,300 invested in them, and the amount for which they were originally sold. The administrator de bonis non of the

estate of Hill cited the administrator of the original administrator for a settlement before the ordinary. An appeal was taken. The administrator de bonis non tendered back to the defendant the notes. In the superior court the presiding judge directed a verdict in favor of the plaintiff for \$552. The defendant excepted.

No objection was made as to the form of the action, but the question raised was as to the liability of the administrator, who sold on a credit to insolvent purchasers mules which he had bought for and with funds of the estate, taking no security except a retention of the title to the property. Under Civil Code 1910, § 4023, and the decision in *English v. Horn*, 102 Ga. 770, 29 S. E. 972, the administrator was liable for the loss thus occasioned. The substantial facts were not in dispute, and there was no error in directing a verdict for the plaintiff. The contentions of counsel for the plaintiff in error as to estoppel, laches, and the necessity for submitting the case to a jury were not well founded.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 456)

McDONALD v. HEAD. (No. 346.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. PARTIES — § 93 — RIGHT TO EXCEPT — STRIKING OF INTERVENTIONS — INJUNCTION.

Where an equitable petition, seeking to obtain an injunction against the collection of a judgment for the purchase money of land, was filed, and certain persons, who claimed to hold bonds for title under the plaintiff, sought to intervene, but their interventions were stricken, this furnished no ground for exception by the plaintiff in the equitable proceeding.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.]

2. INTERLOCUTORY INJUNCTION.

There was no error in refusing to grant the interlocutory injunction sought.

Error from Superior Court, Jeff Davis County; J. P. Highsmith, Judge.

Injunction by B. B. McDonald against Mrs. S. E. Head. Judgment for defendant, and plaintiff brings error. Affirmed.

S. D. Dell, of Hazlehurst, for plaintiff in error. Wilson, Bennett & Lambdin, of Waycross, and J. Mark Wilcox, of Hazlehurst, for defendant in error.

LUMPKIN, J. McDonald brought an equitable petition against Mrs. Head, seeking to enjoin a proceeding by her to sell certain land under a judgment obtained by her against him for an unpaid balance of the purchase money. He alleged that the defendant had leased certain portions of the property sold to him to other persons, with the privilege on their part of purchasing such portions at as high a price as others would give therefor; that he took a bond

for title from her, and entered into an agreement with her to carry out her contracts with such persons; that afterward he made bonds for title to them, collected sums of money from them, and paid over the amounts collected to his vendor; and that he was insolvent and unable to respond in damages for a breach of his bonds. The defendant denied that she had received any payments made by the holders of the original options. The holders of the options sought to intervene. Their interventions were dismissed, but they did not except. The injunction was denied, and the plaintiff excepted.

[1] 1. The plaintiff did not make the holders of the options from his vendor parties defendant to his action, or show that he was entitled to any relief against them, or pray any such relief. They did not except to the striking of their interventions, and it did not furnish any ground of exception by the plaintiff. *Gammage v. Powell*, 101 Ga. 540, 28 S. E. 969.

[2] 2. The evidence was in conflict as to material issues in the case. Under it, there was no error in refusing to grant the interlocutory injunction sought.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 438)

JOINER, Tax Collector, et al. v. PENNINGTON. (No. 341.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. TAXATION \S 254—PROPERTY SUBJECT—SITUS—PORTABLE SAWMILL.

A portable sawmill is not subject to taxation in a county where it is temporarily located on the land of another, the owner of the sawmill living in a different county, and returning the same for taxation as personal property, together with other property in the county of his residence.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 419-426, Dec. Dig. \S 254.]

2. INTERLOCUTORY INJUNCTION.

The court did not err in granting the interlocutory injunction.

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Injunction by A. F. Pennington against M. S. Joiner, Tax Collector, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

A. F. Pennington filed his equitable petition for injunction against the tax collector of Jenkins county, in which he alleged that the official named was proceeding to collect a certain tax *fi. fa.* levied upon his property, the *fi. fa.* having been issued to enforce the payment of taxes on certain personalty of which petitioner was the owner, consisting of a portable sawmill, certain draft animals, and other equipment necessary for the operation of the sawmill; that petitioner was a resident of Jefferson county; that he moved

the sawmill from place to place when necessary for the profitable conduct of the business; and that while the sawmill was temporarily, in the year 1913, in Jenkins county, the tax collector of that county entered the same on the digest for taxation. The plaintiff insisted that the property was not taxable in Jenkins county, and that he had paid the tax leviable upon this property and his other property in Jefferson county, the county of his residence. The tax collector answered the petition. He neither admitted nor denied the allegations as to the residence of petitioner, or that he owned property only in the county of Jefferson and paid taxes on the same. It was admitted that petitioner did own, among other property, a portable sawmill, together with the necessary equipment, but neither admitted nor denied that in the conduct of the business petitioner moved the sawmill at such times and such places as might be necessary in the conduct of the business. It was alleged in the answer that taxable property of the value of \$1,850, consisting of 4 mules, 18 oxen, a sawmill and fixtures, carts and wagons, was owned and kept by petitioner in the county of Jenkins on October 16, 1912, and for some time prior thereto; that petitioner continued to keep said property in said county for nearly a year from October 16, 1912, and used it in the operation of a sawmill in said county, and kept said property during said time on land taxable in Jenkins county; that the owner had no other office than that in Jenkins county, through which he managed his sawmill business in that county; and that he failed, in the year 1913, to return said property in Jenkins county for taxation, and upon his failure to make such returns the tax receiver, on June 28, 1913, assessed and returned said property for taxation in Jenkins county, and gave notice to petitioner of the assessment and return. The issuance of the tax *fi. fa.*, and the placing of the same in the hands of the sheriff of Jefferson county for collection, were admitted. Upon the hearing no evidence was submitted; the judge stating that he would treat all the allegations in the answer as true. After consideration the court granted an interlocutory injunction restraining the collection of the *fi. fa.* until the final hearing of the case. To this order the tax collector excepted.

Wm. Woodrum, of Millen, for plaintiffs in error. R. N. Hardeman, of Louisville, for defendant in error.

BECK, J. (after stating the facts as above). [1, 2] We are of the opinion that the court did not err in granting the interlocutory injunction so as to preserve the status until the final hearing. The plaintiff in error insists that under the law as contained in section 1075 of the Civil Code of 1910 the property was taxable in Jenkins county. That section contains the following provision:

"All persons, companies, or corporations conducting any business enterprise upon realty not taxable in the county in which such persons reside, or the office of the company or corporation is located, shall return for taxation their stock of merchandise, raw material, machinery, live stock, and all other personalty employed in the operation of said business enterprise, and the notes and accounts made and the money used in the prosecution of such business enterprise, on hand at the time for the estimation of property for taxation, including all personalty of whatsoever kind connected with or used in said enterprise in any manner whatever, in the county in which is taxable the realty whereon such business enterprise is located or carried on: Provided, that the provisions of this section shall not apply to those corporations required by law to make their returns to the comptroller general."

We do not think that the provisions which we have quoted are applicable in cases like that presented in this record. If the sawmill in question were permanently located in the county of Jenkins, it would raise a different question. But the sawmill here sought to be taxed is a portable sawmill, movable from place to place with its equipment, and, as a matter of fact, is moved to such a place as would, in the opinion of its owner, render the operation of the same profitable. It is alleged in the answer that the property remained in Jenkins county for about a year, but it does not distinctly appear that it had remained as long as a year. But, even if it had remained for a period of a year, that would not be conclusive as against the contention of the petitioner that the mill and its equipment remained only temporarily in the place where it might be located. If the mill is actually a portable sawmill, remaining only temporarily in the place to which it may be carried for operation, and if, as a matter of fact, it is carried from county to county, then it is clearly taxable as personal property belonging to the owner in the county of Jefferson, that is, the county of petitioner's residence; and, if taxable there, it ought not to be taxed in one or more other counties where it might be for a time located because of the temporary advantage of the situation. What are the real facts of the case can be developed upon the final trial. The judge properly held that the status should be preserved until then, and there was no error in granting the interlocutory injunction.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 470)

RICHTER v. KILPATRICK. (No. 351.)
(Supreme Court of Georgia. May 13, 1915.)

(Syllabus by the Court.)

1. GAMING §12—WAGERING CONTRACT—INTENTION—KNOWLEDGE—SALE OF COTTON.

A written contract for the sale of cotton, valid on its face, was attacked by the seller as a wagering contract. It was not error to instruct the jury in substance that, in order to render the contract void as being a wagering

contract, it must appear, not only that the seller had, at the time of entering into the transaction, no intention of delivering the cotton, but also that the buyer knew the seller's intention in the premises.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. §12.]

2. GAMING §49—WAGERING CONTRACT—EVIDENCE.

The letters referred to in this division were relevant upon the issue of the legality of the contract.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 100-102; Dec. Dig. §49.]

3. CONTRACTS §45—ACTION FOR BREACH—EVIDENCE.

Where the construction of a contract is not involved, testimony that it was drawn by one of the parties after a certain form is immaterial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 169, 191, 205, 213, 214; Dec. Dig. §45.]

4. PLEADING §376—ADMISSION—PROOF OF CASE IN CHIEF.

A defendant, who in his plea admits the plaintiff's right to recover the amount sued for unless he sustains his defense, relieves the plaintiff of the necessity of proving his case in chief.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. §376.]

5. GAMING §49—GAMBLING CONTRACT—EVIDENCE—SUBSEQUENT ACTS OF PARTIES.

On an issue as to whether a contract for the sale of cotton contemplated a delivery of actual cotton, or was merely a speculative scheme, testimony of one of the parties that he sold the cotton which the other party contracted to deliver is inadmissible. The validity of a contract, as dependent upon the intention of the parties, cannot be established by proof of subsequent collateral action by one of the parties with relation to the subject-matter of the contract.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 100-102; Dec. Dig. §49.]

6. ASSIGNMENTS OF ERROR.

Other assignments of error are controlled by the foregoing rulings.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by I. T. Kilpatrick against R. D. Richter. Judgment for plaintiff, and defendant brings error. Reversed.

Middlebrooks & Burruss, of Madison, and Lewis, Davison & Lewis, of Greensboro, for plaintiff in error. Cobb, Erwin & Rucker, of Athens, and E. H. George and K. S. Anderson, both of Madison, for defendant in error.

EVANS, P. J. I. T. Kilpatrick and R. D. Richter entered into a contract for the purchase and sale of 100 bales of cotton at a stipulated price. Upon Richter's failure to deliver the cotton, Kilpatrick brought his action, claiming damages for its breach. The defendant admitted the execution of the contract, and that the amount sued for was prima facie due, and assumed the burden of proof. He further pleaded that the contract was without consideration, and was a gambling or wagering contract. The jury returned a verdict for the plaintiff, which the

court refused to set aside on motion for new trial.

[1] 1. The contract for the breach of which the plaintiff seeks to recover damages will be found in the report of the case when formerly before this court on exceptions to the sustaining of the demurrer to the petition. *Kilpatrick v. Richter*, 139 Ga. 643, 77 S. E. 1065. It was there held that the contract on its face did not disclose it to be a wagering contract, or subject to other infirmities alleged against it, and that on its face the contract appeared to be valid and enforceable. The defendant pleaded that it was not the intent of the parties that the actual cotton should be delivered, but the contract was for future delivery of cotton on margins, that the agent of the plaintiff who made the contract with him knew of its wagering character, and that neither the plaintiff nor the defendant contemplated the delivery of actual cotton as called for in the contract, but the transaction was purely a speculative one, determinable upon the state of the market at the maturity of the contract. The court in effect instructed the jury that, in order to render the contract void as a wagering contract, it must appear that both parties understood and agreed, expressly or impliedly, to the things which constituted a wagering contract, that the unexpressed or uncommunicated intention of one party to the contract is not binding upon the other, and that the contract would not be infected with illegality solely because of the understanding of the defendant as to its speculative character, provided the plaintiff had no knowledge of the defendant's understanding. There are some criticisms made upon the excerpts from the court's instruction conveying this principle; and although the charge may be open to some verbal criticisms made against it, when taken in its entire context it amounts to an instruction that, in order to render an apparently valid contract for the sale of cotton void as a wagering contract, it must appear, not only that the seller had at the time of entering into the transaction no intention of delivering the cotton, but also that the buyer then knew of the seller's intention in the premises.

[2] 2. Complaint is made that the court allowed in evidence certain letters in which the defendant offered to give to the plaintiff his notes for the amount claimed as damages for the breach of the contract. Although the defendant's plea admits the right of the plaintiff to recover the amount sued for, unless he sustains his affirmative defense, still these letters bear some relevancy on the question of the defendant's contention with respect to the illegality and nature of the contract.

[3] 3. The defendant was denied the right to elicit from the plaintiff, on cross-examination, that the contract sued upon was filled out on one of the latter's regular forms,

which was a composite of several forms of contract used by others. The evidence was properly rejected. It is immaterial whether the contract declared on was prepared by a particular scrivener, or after a particular form or combination of forms.

[4] 4. Complaint is made that the verdict cannot be sustained, because of the failure of the plaintiff to demand the cotton of the defendant. Even if it was necessary to prove a demand as a condition precedent to a suit for breach of the contract, the defendant waived the necessity of such proof by an admission in his plea that the plaintiff was entitled to recover the amount sued for, unless he sustained the defense therein set up.

[5] 5. The plaintiff was allowed to testify as follows:

"When I bought this cotton from Richter, I sold it. I sold to the Amoskeag Mills. The cotton was never delivered by Richter to me. I delivered the Amoskeag Mills cotton to fill my contract with them. I bought special cotton to fill this contract."

The principal point at issue between the plaintiff and the defendant was the legality of the contract which was the basis of the suit. The plaintiff testified that the intention of the parties was none other than as expressed in the contract, namely, to buy and sell actual cotton, and that if the defendant had a contrary understanding it was uncommunicated to him. The defendant, on the other hand, testified, that the intention of the parties was that the actual cotton was not to be delivered, that the contract was purely speculative in character, that such was his understanding of the contract when he entered into it, and that he communicated such understanding to the plaintiff and his agent. The differences between the parties as to this vital issue were irreconcilable. The plaintiff undertook to corroborate his version of the transaction by testifying that he had acted on the faith of the contract, as being for the delivery of the actual cotton. No damages are claimed by the plaintiff growing out of the contract made with the Amoskeag Mills. The conduct of the plaintiff in making such contract is purely supportive of his contention of the essence of the contract made with the defendant. Such testimony is open to the objection that it is of the self-serving character. The rule is well established that the declarations of a party in his own interest are never admissible, unless they constitute a part of the *res gestæ*. Declarations may be made by conduct as well as by spoken words. The rule has been applied in a suit by a shipper to recover two bales of cotton alleged to have been delivered to a carrier. The issue was as to the number of bales delivered, and the carrier offered its waybill to prove the number, and the evidence was rejected as being a declaration by the carrier in its own favor. *Southern Railway Co. v. Allison*, 115 Ga. 635, 42 S. E. 15. The validity of a contract, as dependent upon the intention of

the parties, cannot be established by proof of subsequent independent collateral action by one of the parties with relation to the subject-matter of the contract.

[§] 6. Special attention to other assignments of error is unnecessary, inasmuch as the principles previously enunciated dispose of them. Neither is it necessary to refer to the verbal criticisms upon the court's instruction, as the case will be retried, and the court's attention has been directed thereto, and they will probably not occur in another trial.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 432)

BARBER v. ROLAND. (No. 339.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. CONTRACTS — 332 — BREACH — PETITION.

There was no error in overruling the demurrer to the plaintiff's petition.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. — 332.]

2. EVIDENCE — 121 — RES GESTÆ — RECEIPT.

A receipt which formed a part of the res gestæ of the transaction was admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. — 121.]

3. CONTRACTS — 353 — BREACH — INSTRUCTIONS.

When taken in connection with other portions of the charge, the excerpts to which exceptions were taken do not require a new trial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. — 353.]

4. CONTRACTS — 57 — CONSIDERATION — MUTUAL PROMISES — NEGLIGENCE OF AGENT.

The doctrine that, when the sole consideration of a contract is the mutual promises of the parties, they must be mutually binding, is not applicable to this case.

(a) Under the charge of the court, the case was made to turn upon the existence of a voluntary agency, and the question whether such an agent was guilty of gross negligence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 345, 352, 353; Dec. Dig. — 57.]

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The verdict was supported by the evidence, and none of the grounds of the motion for a new trial require a reversal.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by J. P. Roland against W. H. Barber. Judgment for plaintiff, and defendant brings error. Affirmed.

A litigation was pending between Uretta Roland and G. W. Roland, wherein the former was seeking to have canceled a deed made by her to the latter. A settlement was agreed upon covering that case and an alimony suit, and a consent decree was taken. It provided that the defendant should pay to the plaintiff, on or before December 1, 1910,

\$1,750, and that, if he did so the title to the land should vest in him; otherwise in her. The amount was not paid by the date fixed, and on the next day she conveyed the land to another. J. P. Roland filed an equitable petition against her, and certain persons claiming under her, for the cancellation of the deed so made, and for other relief. It was alleged that Mrs. Roland concealed herself so as to avoid a tender within the time fixed; that the money was deposited in the Citizens' Bank of Moultrie to her credit, and this was known to her; that those taking under her did so with notice; that J. P. Roland bought the land from G. W. Roland, and arranged to secure the money to make the payment; and that the value of the property was more than that amount. On the trial, at the close of the evidence, the court directed a verdict for the defendants, and this judgment was affirmed by the Supreme Court. *Roland v. Roland*, 139 Ga. 825, 78 S. E. 249.

J. P. Roland then brought the present action against W. H. Barber, alleging, among other things, as follows: On October 16, 1910, the plaintiff agreed to buy from G. W. Roland the land above mentioned for the price of \$3,000, and a mule for \$175. Of the purchase money \$1,750 was to go in payment of the amount due to Uretta Roland in order to clear the title. Barber agreed to furnish \$3,175, if the plaintiff's wife would convey to him her home place at \$1,531.25, which would constitute a part of the sum of \$3,175, and provided the plaintiff, as soon as G. W. Roland should convey the latter's place to him, would mortgage it to Barber for the remaining \$1,643.75. This was carried into effect in one transaction. Barber then and there agreed with G. W. Roland, the plaintiff, and the plaintiff's wife, as had been understood prior to the execution of the papers, that he would retain the \$1,750 which it was necessary to pay to Uretta Roland on or before December 1st thereafter, and would pay it to her for G. W. Roland. Barber and G. W. Roland offered to pay the money to the attorney of Uretta Roland, but he declined to receive it, saying that he had no authority to do so, as the money was to be paid to her personally. Barber then inquired where she was, and, receiving no information, he deposited the money in the Citizens' Bank subject to her order, saying that he would get it to her before December 1, 1910. He then delivered to G. W. Roland the balance remaining after deducting the amount stated. The plaintiff relied on Barber to carry out his agreement, and hence took no further steps to see that the money was paid to Uretta Roland, except that the plaintiff reminded Barber of the matter once or twice before December 1st, and the latter assured him that he would make the payment on or before that date. Barber negligently failed to make the payment by December 1st; but, desiring

to allow the amount to remain as long as possible on deposit in the bank, of which he was the president and a large stockholder, so that the bank could use the money, he negligently delayed locating, or attempting to locate, Uretta Roland until a short while before December 1st, and then went to Florida and forgot about making the payment until after that date. After learning of the default of Barber and that Uretta Roland claimed title to the G. W. Roland place because thereof, the plaintiff filed suit, seeking to compel her to accept the money. Barber had full notice of this suit, and testified on the trial thereof. The court adjudicated that the plaintiff had lost the land by reason of the default of Barber, and the judgment was affirmed by the Supreme Court. The G. W. Roland place was worth \$4,000. By his failure to carry out said contract to pay Uretta Roland \$1,750 by December 1, 1910, Barber damaged the plaintiff.

By amendment the plaintiff alleged that Uretta Roland was easily accessible during all the time between October 22 and December 1, 1910, and that the failure to make the payment to her during that time was the result of gross negligence on the part of Barber; that Barber agreed and contracted with the plaintiff, G. W. Roland, and Nevada Roland (the plaintiff's wife), each severally, on October 22d, that he would see to it that the amount left in the bank, of which he was the president and general manager, should be paid to Uretta Roland on or before December 1st; that this agreement was made as a part of the contract by which he agreed to furnish the money for the payment, and from which contract he was to receive a profit in the value of the Nevada Roland place in excess of the price paid therefor by him, and in the interest at 8 per cent. per annum for 30 days, which was to be paid to Barber for the amount borrowed by the plaintiff from him in connection with the trade; and that this was embodied in a separate and independent, voluntary agreement made by Barber with the plaintiff, the plaintiff's wife, and G. W. Roland severally, after the contract to furnish the money had been made.

The defendant denied making any such agreement or contract as was alleged by the plaintiff, or being in default, or that any duty devolved on him to find and pay to Uretta Roland any sum whatever. The jury found for the plaintiff \$1,356.35. The defendant moved for a new trial, which was denied, and he excepted. He also assigned error on the overruling of the demurrer interposed by him to the plaintiff's petition. Other necessary facts will appear from the opinion.

J. D. McKenzie and Jas. Humphreys, both of Moultrie, for plaintiff in error. Pope & Bennet, of Albany, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. There was no error in overruling the demurrer to the petition of the plaintiff as amended.

[2] 2. A receipt for \$1,750, signed by the Citizens' Bank, through its cashier, W. S. Stokes, to G. W. Roland, was offered in evidence. It contained the clause:

"To be held [in] trust to be paid to Uretta Roland on or before December 1, 1910, in compliance with an order of the superior court, same being in full settlement of suit filed for alimony."

This was admitted over objection. There was no error in this ruling. According to the evidence introduced on behalf of the plaintiff, he, his wife, G. W. Roland, and the defendant were all present in the bank closing up the transaction, and the giving of the receipt was a part of the *res gestae*. Evidence was introduced by the defendant tending to show that no such promise was made as contended but that the amount of money was deposited by G. W. Roland, and he or the plaintiff was to bring Uretta Roland to the bank to receive it. The paper also tended to conflict with certain of the evidence introduced by the defendant.

[3] 3. While in one portion of his charge the presiding judge stated that the first question was whether the defendant agreed to pay to Uretta Roland the \$1,750 without expressly saying that the agreement must have been made with the plaintiff, yet immediately thereafter the judge, in effect, made the case turn on the questions of voluntary agency and gross negligence, and in that connection he distinctly submitted the question whether the defendant agreed with the plaintiff that he would see to the payment to Uretta Roland within the prescribed time. Upon the whole, it is highly improbable that the jury could have understood from the charge that the plaintiff could recover upon an agreement made by the defendant with any one but himself.

[4] 4. The contention of counsel for the plaintiff in error that the rule that, where mutual promises furnish the only consideration for a contract, they must be mutually binding, was applicable or controlling, is not well founded. It was not contended that the consideration, if there was one, was of that character. And, as above stated, the case was made to substantially rest on the theory that there was no valuable consideration for the agreement, but that the defendant agreed with the plaintiff to render certain services as the agent of the latter, and that he was liable for gross neglect as a voluntary agent. Civil Code 1910, § 3581.

[5] 5. The other grounds of the motion for a new trial are not meritorious.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 423)

GRIER et al. v. LOYLESS, Tax Collector.
(No. 337.)

(Supreme Court of Georgia. May 12, 1915.)

*(Syllabus by the Court.)*1. SCHOOLS AND SCHOOL DISTRICTS \S 24, 99
—“LAYING OFF OF THE COUNTY INTO SCHOOL DISTRICTS”—SCHOOL TAX—VALIDITY.

It is provided in section 1531 of the Civil Code, which relates to school districts and which is a part of the article making provision for local taxation for public schools, that “as soon as practicable, it shall be the duty of the county board of education of each county in Georgia to lay off the county into school districts.” Under a proper construction of this provision of the law, the “laying off of the county into school districts” means the laying off of the entire territory of the county, and not a part thereof. A laying out of less than the entire county into school districts is not such a division of the county into school districts as is contemplated and provided for in the act referred to; and, where there has not been such a division and laying out of the county as the act provides for, the levy and collection of a school tax by virtue of an election held in any particular district is illegal.

(a) At the time of the levy of the tax the collection of which is sought to be enjoined by the present suit, the county of Early had not been laid off in accordance with the requirements of that part of the law quoted above, inasmuch as a large part of the county was not laid off and embraced in the plan of division.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 42, 45, 47-49, 233, 234; Dec. Dig. \S 24, 99.]

2. SCHOOLS AND SCHOOL DISTRICTS \S 107—
COLLECTION OF SCHOOL TAX—INJUNCTION—
PARTIES—COUNTIES.

The county of Early, as a distinct corporate entity, was not pecuniarily interested in the tax the collection of which the petitioners seek to enjoin, and therefore was not a necessary defendant to the action.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 253-256; Dec. Dig. \S 107.]

3. SCHOOLS AND SCHOOL DISTRICTS \S 111—
TAXPAYER—DIVISION OF COUNTY—ESTOP-
PEL.

No proper division of the county into school districts having been made, the levy of the tax by virtue of an election was void, and no estoppel was raised as against any taxpayer to test the validity of the division of the county into school districts and the levy of the tax by virtue of an election held in any such district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 265-268; Dec. Dig. \S 111.]

Error from Superior Court, Early County;
W. C. Worrill, Judge.

Action by T. E. Grier and others against J. C. Loyless, Tax Collector. Judgment for defendant, and plaintiffs bring error. Reversed.

A. H. Gray, of Blakely, for plaintiffs in error. W. G. Park and Glessner & Collins, all of Blakely, for defendant in error.

BECK, J. Plaintiffs, alleging themselves to be residents and taxpayers of the Rock Hill school district in Early county, brought their petition, in behalf of themselves and all others similarly affected, against J. C. Loyless,

tax collector of Early county, to enjoin the collection of the school tax which had been levied by the board of commissioners of said county. The presiding judge refused to sanction the petition, upon which ruling error is assigned to this court.

[1] 1. In the act of August 23, 1905 (Acts 1905, p. 425), as amended by the act of August 21, 1906 (Acts 1906, p. 61), known as the “McMichael Act,” it is provided that:

“Within thirty days after the passage of this act, or as soon thereafter as practicable, it shall be the duty of the * * * board of education of each county in the state to lay off the county into school districts.”

This provision of the law just quoted manifestly contemplates the division and laying off of the entire county into school districts, not that one particular part of the county should be laid off into a school district and the division of the remaining portion of the county left in abeyance, but that the entire county as a whole should be at one and the same time laid off, so that a voter in any particular district might know how the county is laid off and what is included in the district in which he lives at the time he casts his vote authorizing a tax for the support of schools when such election is held. While a division into districts was contemplated, and certain subdivisions for taxing purposes was created, and while each of these subdivisions was a unit within itself, they were units within a system embraced in the county; and the laying off of one or more districts in which should be embraced a part of the county less than the whole did not comply with the system contemplated in that portion of the act which is quoted above. In the case of *Lansdell v. King*, 134 Ga. 536, 68 S. E. 102, it is recited as a part of the statement of facts that:

“The county board of education of Columbia county, on May 7, 1907, adopted the following resolutions: ‘After discussing at length the school district situation, motion was carried that each white school in the county be regarded as the center of the various school districts. The school districts thus regarded shall comply with the requirements of section 1 of the McMichael Act as amended in 1906. Whenever the white citizens of any school district want to supplement the said school funds by levying a special school tax, the boundaries of said district or districts shall be definitely fixed by the county surveyor under the direction of the county board of education. It was ordered that the Harlem school district be surveyed by the county surveyor and plat made.’ Under this resolution a district was laid off under the name of the Harlem school district. At other times two other school districts were laid off. But the county was never divided into school districts, and a large part of it remained undivided, including long and irregularly shaped strips of territory intervening between the districts thus laid off.”

And in regard to the situation thus created it was decided that:

“The Harlem district thus established was not a lawful school district, and an election within such district for the determination of the question of imposing a local tax therein was illegal.”

Evidently this ruling was based upon a recognition of the fact that, under a proper construction of that part of the McMichael Act above quoted, the laying off of a county into districts means the laying off of the entire territory of the county, and not a portion thereof. A laying out of less than the entire county into school districts is not such a division of the county into school districts as is contemplated and provided for in the act referred to, and it is only where there has been such a division and laying out of the county into school districts as this act contemplates and provides for that a local school tax, by virtue of an election held in any particular district, can be levied and collected for the purpose contemplated in that act. Under the allegations in this petition, the county of Early had not been laid off in accordance with the positive requirements of the act under consideration. In the case of *James v. City of Blakely*, 143 Ga. 117, 84 S. E. 431, it was held that:

"The act of December 18, 1900 (Acts 1900, p. 219) which sought to create a district lying outside of the actual corporate limits of the city of Blakely, and extending to what was termed the 'school limits,' and to prescribe for such territory regulations as to schools and taxation therefor, different from those established by the general school laws, was to that extent unconstitutional, as being a special act different from an existing general law on the subject."

That act just referred to is attacked in the petition in the present case to show that as a matter of fact the county of Early had not been laid off and divided into school districts as contemplated and provided by the McMichael Act. And under the ruling made in the case just cited, we know that the county of Early has not been divided into school districts; for a territory lying within this county of 32 square miles is not divided into school districts, nor is it included in any of the school districts as laid out. That being true, no legal division of the county into school districts has been made; and a division according to law is necessary before there can be legal taxation for the purposes contemplated in the act. It follows, therefore, that the tax, the collection of which it is sought to enjoin in the present case, was illegal, and the tax collector was without authority to collect that tax from the petitioners and other taxpayers and residents of the county.

[2] 2. The tax collector of Early county was the only necessary party defendant. The county as a distinct entity was not pecuniarily interested in this tax. The finances of the county as such would not be affected by a failure to collect it; the taxes so raised would be for a purpose outside of those for which the taxes of the county were levied and collected.

[3] 3. No proper division of the county into school districts having been made, the levy of the tax by virtue of an election was void,

and no estoppel was raised as against any taxpayer to test the validity of the division of the county into school districts and the levy and collection of the tax by virtue of an election held in any such district.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 425)

WATSON v. WATSON. (No. 336.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS \S 193 —
ORDERS SETTING APART YEAR'S SUPPORT —
RECORDING—NECESSITY—EVIDENCE.

"Where commissioners are appointed by the ordinary to set apart and assign to a widow and her minor children a year's support, and the commissioners make their return, and no objections are filed thereto, such return does not become effective as a judgment of the court of ordinary until it is recorded." And where a party who claims title to the land, derived from the widow to whom the year's support is set apart, seeks, in defense to a suit by the administrator of the estate from which the lands were carved out when set apart by the appraisers, to show a legal setting apart, it should be done by the record, and it is not sufficient to show an order granted ex parte and not at a term of the ordinary's court, correcting what is claimed to be an imperfect copy of the return, so as to make it conform to what the party taking the order contends was the actual return.

(a) If the party relying upon the proof of the actual return has such actual return in fact, he should take a nunc pro tunc order at a term of the ordinary's court, admitting the same to record, and the true return shown by the record would be competent evidence in the case.

(b) It was error to admit in evidence what purported to be an order granted by the ordinary "at chambers," correcting the record of the return of the appraisers.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. $\S\S$ 708-712; Dec. Dig. \S 193.]

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Action by Burrell Watson as administrator of the estate of P. M. Watson, deceased, against Perry C. Watson. Verdict for defendant, new trial granted, and defendant brings error. Affirmed.

Jere M. Moore, of Montezuma, and W. D. Crawford, of Buena Vista, for plaintiff in error. G. H. Howard, of Columbus, and C. W. Foy, of Butler, for defendant in error.

BECK, J. Burrell Watson, as administrator of the estate of P. M. Watson, brought suit against Perry C. Watson, to recover a certain tract of land comprising certain designated lots. Upon the trial the jury returned a verdict for the defendant. The plaintiff made a motion for a new trial, and the court upon the hearing of the same set aside the verdict, and the defendant in whose favor the verdict had been returned excepted to the grant of a new trial.

In order to determine whether the court erred in granting a new trial, it is necessary

to determine only one of the questions made by the motion, and that is, whether the court erred in admitting in evidence a certain order purporting to have been granted "at chambers" by the ordinary of the county in which the land sued for is situated. This order was granted upon an ex parte application of the defendant to have a certain record of the return of the commissioners appointed to set aside a year's support upon the application of Mrs. Martha Watson, the widow of the plaintiff's intestate, so corrected as to conform to the truth of the case and be made to show "the proper lots and districts as set apart." In the original return of the commissioners, among other property set apart were:

"Lot of land Nos. 14, 15, 16, and 19 in the 12 district of said Taylor Co. Fractional lots Nos. 290, 292, and 294 in 11 dist. Taylor Co. ½ lot No. 260 in 11 dist. Marion county."

Lots numbered 14, 15, and 16 in the Twelfth district of Taylor county are the lots sued for. It appears that there was a record of a return made by appraisers to set apart a year's support, corresponding in all respects to this original order, except that the real estate set apart in the return actually recorded is described as:

"Lot of land No. 14 in 15 dist. and 19 in 12 dist. Taylor Co. Fractional lots Nos. 290, 292, and 294 in 11 dist. Taylor Co. ½ lot No. 260 in 11 dist. Marion county."

The defendant in this case derives title from the widow to whom the year's support in question was set apart. The Code requires the report of appraisers appointed to set aside a 12-month support to a widow and minor children to be recorded by the ordinary, and "such a record has the binding force and effect of any other judgment." *Selph v. Selph*, 133 Ga. 409, 65 S. E. 881. And it was further held in that case that a return does not become effective as a judgment of the court of ordinary until it is recorded. If the document referred to in the record as the original return of the appraisers be such in fact, it should have been entered of record in the proper book kept for that purpose. If the same was erroneously recorded, as was held in the *Selph* Case, a nunc pro tunc order might have been taken, possibly, to correct the record; but a better practice would have been to take a nunc pro tunc order to enter the entire return upon the records of the ordinary kept for that purpose. Certainly it was not sufficient to take an ex parte order signed by the ordinary out of term. The ordinary was without authority in vacation to grant such an order. And all that was said in the opinion in the *Selph* Case in deprecation of shaping or establishing records by parol evidence is applicable to the shaping of records by orders of the character taken in this case by the defendant to perfect the record of the return of the appraisers. The court, therefore, erred,

upon the trial of the case, in admitting the order referred to in evidence, and properly corrected this error against the plaintiff by granting a new trial; for, with the order excluded from the evidence, no title was ever shown out of the estate of the plaintiff's intestate.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 417)

WALL et al. v. LOUISVILLE & N. R. CO.
et al. (No. 333.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. EJECTMENT \S 27—TITLE OF DEFENDANT—VENDOR AND PURCHASER—DEFECTIVE DEED.

Where a vendee of land enters into actual possession and pays the entire purchase price, he acquires a perfect equity, upon the strength of which he can successfully defend in ejectment against his vendor or subsequent grantee, although the deed may be invalid on account of an imperfect or impossible description of the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 114; Dec. Dig. \S 27.]

2. EJECTMENT \S 90—EVIDENCE—DEEDS.

The deed from the city of Milledgeville to the Milledgeville Railroad Company was admissible in evidence, as tending to prove, in connection with other evidence, certain elements of the defendant's equitable ownership of the land in dispute.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 254-277; Dec. Dig. \S 90.]

3. ESTOPPEL \S 54 — APPLICATION OF DOCTRINE—KNOWLEDGE.

The facts relied on to constitute an estoppel against the defendant attacking the plaintiff's deed were insufficient for that purpose.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 128-135; Dec. Dig. \S 54.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Ejectment by R. L. Wall and others against the Louisville & Nashville Railroad Company and others. Judgment for defendants on directed verdict, and plaintiffs bring error. Affirmed.

Hines & Vinson, of Milledgeville, for plaintiffs in error. Allen & Pottle, of Milledgeville, and Jos. B. & Bryan Cumming, of Augusta, for defendants in error.

EVANS, P. J. The case is in ejectment, and the locus is a triangular piece of land in square or block 155, in the city of Milledgeville, lying between the tracks of the Central of Georgia Railroad Company and the Georgia Railroad & Banking Company, containing about three-fourths of an acre. Both parties claim by purchase from the city of Milledgeville. The plaintiff's deed is dated July 9, 1909, and the defendant's deed is dated May 28, 1863. The defendant contends that the older deed, under which it claims, was

intended to convey the land in dispute; that its predecessor in title entered into possession of the land; that that possession, as well as the possession of its successor in title, has never been disturbed; and that, although the number of the block as contained in the description is erroneously stated, nevertheless, under the facts (which will be developed later), the deed was sufficient to convey title.

The deed from the city to the Milledgeville Railroad Company, dated May 28, 1863, recites that by virtue of the act of the General Assembly approved December 30, 1836, the mayor and aldermen of the city of Milledgeville "did advertise, for lease for the term of 1,000 years, a certain lot of land within the corporate limits of said city, known and distinguished in the plan of said city as part of square No. 158, containing three-quarters of an acre, more or less, situate, lying, and being the northwest common of said city, which said lot of land was leased in the city of Milledgeville on the 6th day of May, 1863, and was leased to Milledgeville Railway Company at the sum of \$100." In consideration of \$100 the deed purports to convey, for the term of 1,000 years, "a part of square No. 158, lying between M. & E. & M. R., containing three-quarters of an acre, more or less." It was shown that "M. & E. & M. R." meant the Milledgeville Railroad Company and the Eatonton & Milledgeville Railroad Company, and it was admitted that the defendants in the action were successors in title to the Milledgeville Railroad Company, and that the Milledgeville & Eatonton Railroad Company is now the Central of Georgia Railway Company. At the time the deed was executed the track of the Milledgeville & Eatonton Railroad was constructed, and the line of the Milledgeville Railroad Company was located, and the track was laid 5 years thereafter on the same route originally selected and marked out. Squares 155 and 158 are separated by Jackson street. Both railroads' tracks enter square 155 from Jackson street and converge to a point near the opposite side of the square, leaving in that square a triangular piece of land, which is the locus in quo. Only one of the railroads traverses square 158. An engraved map of the city of Milledgeville was received in evidence. The date of the map was not given. In this map the railroads were delineated as converging to a point on square 158, and as not touching square 155.

A surveyor introduced by the plaintiff testified that the city map did not correctly show the location of the railroads; that the map shows their intersection in 158, when as a matter of fact the two roads intersect a few feet beyond the west boundary of lot 155. It was shown that the track hands of the Georgia Railroad & Banking Company used this triangular area as a garden spot, with more or less continuity, from 1868 to the time the plaintiffs undertook to build a compress

in 1909. In 1893 the railroad company built a turntable on part of the land, and about 7 years later laid a side track on the land in dispute, extending from the apex of the triangle to Jackson street. The side track is within 50 feet of the center of the main track, and part of the turntable is within 50 feet of the center of the main railroad track. In 1909 the plaintiffs addressed a letter to the manager of the lessees of the defendant railroad company, to the effect that they had discovered that the locus in quo belonged to the railroad company, and inquired if they could secure the land for the purpose of erecting a compress. The manager of the lessees had no authority to sell any land of the Georgia Railroad & Banking Company. An employé of the lessee companies, who had no authority to dispose of land belonging to the lessees, and whose duty was to look after the right of way and make contracts for the lessee at the instance of the superintendent, came to Milledgeville and had an interview with the plaintiffs. After examining the maps and the deed, this real estate agent was of the opinion that the locus in quo did not fall within the description of the railroad's deed from the city, and so informed the plaintiffs. Thereafter the plaintiffs took the matter up with the city, who sold them the land for a consideration of \$25, and made them the deed above referred to. The plaintiffs bought the land for the purpose of erecting a compress, and were proceeding to do so when the agents of the defendants refused to permit them to enter the premises. Thereupon they brought ejectment. The foregoing facts appearing from the evidence, as submitted by both sides, the court directed a verdict for the defendants.

[1] 1. Two descriptions are contained in the deed, and they are complementary of each other. The land is described as lying between two named railroads. The limitation in the deed upon the extent of the intervening land is its location in square 158. The draftsman of the deed was probably misled by the erroneous delineation of the railroads on the city map. There is only one railroad traversing square 158, and hence the description fails for lack of definiteness. But the evidence establishes that the city conveyed to the railroad company a piece of land between two named railroads for a valuable consideration, the receipt of which was acknowledged; that the railroad company entered into possession of a tract of land lying between the railroads as being the land purchased; and that possession was not disputed by the city until its grant to the plaintiffs in 1909, more than 40 years afterwards. Thus we have a vendee in possession, with purchase money paid, under a deed containing an indefinite description, or one impossible of location. Where a vendee of land enters into actual possession and pays the entire purchase price, he acquires a perfect equity, upon the strength of which he

can successfully defend in ejectment against his vendor or subsequent grantee, although the deed may be invalid on account of an imperfect or impossible description. *Grace v. Means*, 129 Ga. 638, 59 S. E. 811.

[2] 2. The deed of 1863 to the Milledgeville Railroad Company was relevant, because of its recitals and admissions as establishing certain elements of the defendant's equitable ownership of the land in dispute.

[3] 3. The plaintiffs in error further contend that the defendants were estopped from asserting title against their deed from the city. The facts relied upon to constitute an estoppel were that in 1909 the plaintiffs, desiring to erect a compress upon the land in controversy, communicated with the general manager of the Georgia Railroad & Banking Company their desire to purchase the land; that shortly thereafter the real estate agent of the Georgia Railroad investigated the matter, examined the land and the records of the city, and declared to the plaintiffs that in his opinion, from the investigation, the railroad had no title to the land in controversy; that the plaintiffs then stated to the real estate agent that if the land belonged to the city they could probably obtain it from the city; and that after this interview with the real estate agent of the Georgia Railroad the plaintiffs purchased the land from the city of Milledgeville, went into possession, and placed upon the lot some brick and machinery, preparatory to the erection of the compress, when the agents and servants of the defendants drove the plaintiffs' servants off and took possession of the land and fenced it. The Georgia Railroad & Banking Company, the successor in title to the Milledgeville Railroad Company, had leased its property to the Louisville & Nashville and the Atlantic Coast Line Railroad Companies, who were made defendants in the action. The person with whom the plaintiffs communicated as general manager was the officer and agent of the lessee. Likewise the real estate agent with whom the plaintiffs communicated was an employé of the lessee. Neither of these officers had any authority to bind the Georgia Railroad & Banking Company by any declaration. Moreover, the plaintiffs seem to have acted upon the result of a conclusion stated by the real estate agent as to the condition of the title, from an investigation jointly made by him and the plaintiffs. Where the estoppel relates to the title to real estate, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct or declaration of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel.

Civil Code 1910, § 5737; *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 449)

JORDAN v. STATE. (No. 343.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §823—INSTRUCTIONS—CURING ERROR BY GIVING OTHER INSTRUCTIONS.

Although the statement of the defendant and the testimony of certain of the witnesses made the crime of voluntary manslaughter one of the issues in the case, and while it would have been appropriate for the judge to state to the jury that the accused contended that, if the killing occurred under circumstances which did not justify the taking of the life of the decedent, the killing was done under such circumstances as would make it voluntary manslaughter, the omission to state this in terms will not work a new trial, where the court did properly charge the jury upon the subject of voluntary manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. §823.]

2. HOMICIDE §293—INSTRUCTIONS—BURDEN OF PROOF.

The evidence presenting two conflicting theories of fact, one based upon circumstances indicating malice and tending to establish the charge of murder, while the evidence for the defendant tended to establish that the killing was justifiable homicide or voluntary manslaughter, the court did not err in instructing the jury, in effect, that, if the homicide was established by the evidence as charged, "the law would place the burden upon the defense to show mitigation or justification or excuse; and unless the evidence produced by the state against the defendant show such justification or mitigation or such excuse, if the evidence produced against the defendant shows justification or mitigation or excuse, why then no burden would rest upon the defendant."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 604; Dec. Dig. §293.]

3. CRIMINAL LAW §800—INSTRUCTIONS—DEFINITION OF TERMS.

That the court failed, in instructing the jury as to circumstances which would make the killing justifiable homicide, to define the word "felony," that term being employed in the course of his instructions, is not cause for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. §800.]

4. CRIMINAL LAW §1056—EXCEPTION BELOW—INSTRUCTIONS.

There being no exception to the court's charge upon the subject of voluntary manslaughter, a failure to inform the jury as to the legal penalty for voluntary manslaughter is not ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. §1056.]

5. CONVICTION SUSTAINED.

The evidence authorized the verdict.

Error from Superior Court, Hart County; J. B. Park, Judge.

Ab Jordan was convicted of murder, and brings error. Affirmed.

A. A. McCurry and A. G. & Julian McCurry, all of Hartwell, for plaintiff in error. Thos. J. Brown, Sol. Gen., of Elberton, Warren Grice, Atty. Gen., A. L. Henson, of Atlanta, and W. L. Hodges, of Hartwell, for the State.

BECK, J. Ab Jordan was tried under an indictment charging him with the murder of one John Teasley. The jury returned a verdict of guilty, and the defendant made a motion for a new trial, which was overruled. To this ruling he excepted.

[1] 1. The original motion for a new trial contains only the general grounds. The first ground of the amendment to the motion complains of the following charge of the court:

"He contends that while he admits that he shot the person alleged to have been shot in that bill of indictment, he contends that at that time John Teasley was endeavoring by violence or surprise to commit a felony upon his person, and he contends that [in] what he did upon that occasion that he was justified under the laws of the state of Georgia."

The only criticism upon this charge is that the court erred in not stating that it was also a contention of the defendant that if the decedent was not committing a felony on the defendant, so as to justify the shooting, he was committing an assault and battery, which would reduce the offense to voluntary manslaughter, and that the court nowhere in its charge stated this as one of the defendant's contentions. Inasmuch as the evidence authorized a charge upon the subject of voluntary manslaughter, the court should, in stating the contentions of the defendant, have informed the jury that the accused contended that, if the assault upon him was not of such a character as to justify the taking of the life of the decedent, still it was of such a character as would reduce the killing from the crime of murder to voluntary manslaughter; but the omission to state this as one of the contentions of the defendant should not work a reversal of the judgment refusing a new trial, for the court did charge the jury upon the subject of voluntary manslaughter, and there is no complaint of the instructions upon this subject. When the court charged upon the subject of voluntary manslaughter, it indicated that the evidence involved that grade of homicide; and, if the defendant had desired a more explicit statement upon the part of the court to the effect that he contended that the homicide was committed under circumstances which reduced it to voluntary manslaughter, he should have requested the court to make a statement of that kind.

[2] 2. The following charge of the court is complained of:

"I charge you, gentlemen of the jury, that while the burden of proof rests upon the state, if the state has proven to your mind by the

evidence in the case, beyond a reasonable doubt, that the defendant in the county of Hart, on or about the time alleged in the bill of indictment, did with a certain pistol kill the person alleged to have been killed, and the defendant was the perpetrator of the offense, if any offense has been proven in this case, why then the law would place the burden upon the defense to show mitigation or justification or excuse: and unless the evidence produced by the state against the defendant show such justification or mitigation or such excuse, if the evidence produced against the defendant shows justification or mitigation or excuse, why then no burden would rest upon the defendant."

The criticism made of this charge is that it is confusing in its terms, and is not a clear and explicit statement of the law in regard to the shifting of the burden of proof. It is unnecessary to discuss this criticism of a part of the court's instructions. The doctrine stated in the charge, though lacking in verbal precision, is substantially that approved in the case of *Mann v. State*, 124 Ga. 700, 53 S. E. 324, 4 L. R. A. (N. S.) 934. The same doctrine had been announced in previous decisions, which are cited and quoted in the *Mann Case*, and this latter case has been followed in more recent decisions.

[3, 4] 3, 4. Headnotes 3 and 4 require no elaboration.

[5] 5. The testimony of the witnesses for the state authorized the jury to find that the killing of the decedent by the accused was without provocation, and under this evidence the jury were authorized to find the defendant guilty of the offense of murder. Evidently the jury accepted as true the state's version of the difficulty between the accused and the decedent, which resulted in the homicide. This is shown by the verdict.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 440)

GRAHAM v. STATE. (No. 342.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §140, 141, 143—CHANGE OF VENUE—WITHDRAWAL OF APPLICATION—JUDGMENT—TRANSMISSION OF PAPERS.

Where in a criminal case an application for a change of venue was made under the act of 1911 (Acts 1911, p. 74), on the ground that there was a probability or danger of violence to the defendant, and a judgment refusing such change was brought to this court and reversed, and the change accordingly granted, the accused could not then withdraw his application, object to being tried in the county to which the change had been made, and demand a trial in the county where the indictment had been found.

(a) Where a person accused of crime applied for a change of venue under the act above mentioned, which was denied, and he excepted and obtained a reversal of the judgment, and where, on the return of the remittitur, the judgment of the Supreme Court was made the judgment of the superior court, and a county was named in the order as the place for the trial, and the clerk of the superior court of the county where the case was then pending

was directed, in terms of the statute, to transmit the papers to the county so selected, this was, in substance, a judgment changing the venue, although it was not expressly so stated.

(b) Where in a criminal case a change of venue is granted, a certified copy of the order for that purpose is required to be transmitted to the clerk of the superior court of the county to which the change is made; but the original indictment and other papers in the case are required to be sent to that county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 257, 260-263, 268; Dec. Dig. §§ 140, 141, 143.]

2. ARREST §63—POLICE OFFICER—OFFENSE COMMITTED IN OFFICER'S PRESENCE—OPERATION OF STATUTE.

Under Penal Code 1910, § 917, "an arrest may be made for a crime by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant."

(a) Under previous rulings of this court, a police officer of a city in making an arrest for an offense against the state law, or for a violation of an ordinance of a municipality, falls within the protection of the section of the Penal Code just above cited.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.]

3. ARREST §64—HOMICIDE §285—INSTRUCTIONS—POLICE OFFICER—ARREST OF PERSON COMMITTING CRIME.

By Penal Code 1910, § 921, it is declared that a private person may arrest an offender, if the offense is committed in his presence or within his immediate knowledge; and, if the offense is a felony, and the offender is escaping, or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.

(a) This section was a codification of the pre-existing law. Unless clearly so intended, it will not be construed as working so radical a change in the prior law as to authorize a private person to arrest another for a violation of a municipal ordinance committed in his presence, regardless of whether or not the act constitutes a felony or a misdemeanor.

(b) Evidence was introduced to show that the person killed was a police officer of the city of Broxton; that he was not in uniform, but had on a badge; and that he was engaged in arresting the accused when the homicide occurred. It was contended on behalf of the state that the accused was at the time violating an ordinance of the city, and also a penal law of the state, and an ordinance of the city was introduced. The charge of the court did not fully or clearly submit to the jury the issues involved.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 157-160; Dec. Dig. § 64; Homicide, Cent. Dig. § 585; Dec. Dig. § 285.]

4. HOMICIDE §300—INSTRUCTIONS—REASONABLE FEARS.

It furnishes no ground for reversal that the court, when charging on the doctrine of reasonable fears, used the expression "if the facts and circumstances were sufficient to excite in the mind of the person killing, as a reasonably self-possessed and courageous man, the fear that his life was in danger," instead of employing the statutory expression "the fears of a reasonable man."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

Error from Superior Court, Irwin County; W. F. George, Judge.

Charlie Graham was convicted of murder, and brings error. Reversed.

Charlie Graham was indicted in Coffee county for murder. He applied for a change of venue, which was refused, and he excepted. The judgment was reversed. 141 Ga. 812, 82 S. E. 282. On the return of the remittitur to the trial court, it was ordered that the judgment of the Supreme Court be entered on the minutes of the superior court "as the judgment of this court." An order was passed which recited these facts, and that it further appeared from a statement of the solicitor general and of counsel of record for the defendant that they were unable to agree on any county for the trial of the case, and declared that it was "considered, adjudged, and ordered by the court that the county of Irwin, of said state, be, and is hereby, selected by the court for the trial of the case," and directed the clerk of the superior court of Coffee county to forward to the clerk of the superior court of Irwin county a transcript of "this order for the change of venue, a list of all the witnesses subpoenaed in said case, and all other papers now of file in his office connected with said case." This order was passed on June 20, 1914. When the case came on for trial in Irwin county, the defendant filed objections to the trial proceeding there, on the grounds that the venue was in Coffee county; that it had not been changed to Irwin county; that the order did not in terms change the venue, and was insufficient for that purpose, but merely selected Irwin county as the place for the trial, and directed the clerk to transmit a copy of the order, together with the other papers to the latter county; that the original indictment and other papers in the case, except a transcript of the order, were directed to be transmitted to Irwin county, when a transcript of the indictment and other papers should have been ordered to be forwarded; that in this situation he waived his right to a change of venue, withdrew his motion therefor, and consented to be tried in Coffee county. These objections were overruled, and exceptions pendente lite were filed. The defendant was convicted. He moved for a new trial, which was refused, and he excepted.

T. A. Wallace, of Douglas, McDonald & Grantham, of Fitzgerald, and W. W. Bennett, of Baxley, for plaintiff in error. Jos. B. Wall, Sol. Gen., of Fitzgerald, M. D. Dickerson, Sol. Gen., of Douglas, Warren Grice, Atty. Gen., A. L. Henson, of Atlanta, and H. J. Quincey, of Ocilla, for the State.

LUMPKIN, J. (after stating the facts as above). [1] 1. There was no error in overruling the objections to trying the case in Irwin county. The plaintiff in error moved for a change of venue, which was refused, and he brought the case to this court, and

obtained a reversal of the judgment. 141 Ga. 812, 82 S. E. 282. After the judgment of this court had been made the judgment of the court below, and an order had been taken directing the case to be tried in Irwin county, he sought to withdraw his application, and to consent to a trial in Coffee county. Having obtained a change, he should abide it. The act of 1911 (Acts 1911, p. 74) was passed in the interest of justice, to afford a change of venue where there was a probability or danger of violence. It was not intended to give a defendant the right to shift the venue back and forth at will, with incidental delays in trying him. Taking the order which was passed by the superior court in connection with the application and the proceedings in which it was passed, the selection of Irwin county as the place of the trial and the direction of clerk to transmit the papers to that county was a change of venue, although it did not employ that exact expression. It may be the better practice in such a case to expressly direct that the venue be changed, and to designate the county to which it is changed, and where the trial shall take place. But the omission to employ such explicit words will not work a reversal, where it is entirely clear, as in this case, that the venue was, in fact, changed. Where a change of venue is granted in a criminal case, a certified copy of the order passed for that purpose is required to be transmitted to the clerk of the superior court of the county to which the change is made. But the original indictment and other papers in the case, not certified copies of them, are to be sent to that county. Penal Code 1910, §§ 965, 1158. There was no merit in the objection to the trial in Irwin county.

[2] 2. At common law certain officers, as conservators of the peace, were intrusted with power to make arrests without a warrant in certain cases. The power to arrest for a felony was different from that to arrest for a misdemeanor. As to the latter a number of authorities declare that the officer could arrest without a warrant any person who committed a breach of the peace in his presence or within his view. Relative to arresting officers the common law, with perhaps some modification, has been codified in the Penal Code 1910, § 917, which declares that:

"An arrest may be made for a crime by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant."

A police officer, in making an arrest for an offense against a law, clearly comes within this section. In making an arrest without a warrant for a violation of a municipal ordinance he has been considered as coming within its protection. *Harrell v. State*, 75 Ga. 842. In *Porter v. State*, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730, that

section was declared to be applicable alike to state and municipal arresting officers. See opinion of the majority of the court and the concurring opinion in the *Porter Case*.

[3] 3. The authority of a private person to arrest is more limited than that of an officer. Under the common law he could arrest for a felony committed in his presence. If he made an arrest for a felony otherwise, he did so at his peril. If called upon to justify his act, some courts have held that he must show that the felony had actually been committed, and that he had reasonable grounds for believing the person arrested to be guilty; while other courts have gone further, and held that he must show that the person arrested was actually guilty. As to misdemeanors, a private person could make an arrest for an affray or other breach of the peace committed in his presence, or to prevent its immediate continuance. These rules have been to a considerable extent modified by statutes and ordinances passed in pursuance of statutes. But with statutes other than our own we are not now concerned. The rule as to an arrest by a private person is thus stated in Penal Code 1910, § 921:

"A private person may arrest an offender, if the offense is committed in his presence or within his immediate knowledge; and if the offense is a felony, and the offender is escaping, or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion."

This was a codification of the pre-existing law, and not the result of a statute laying down a new rule. While municipal ordinances are in a sense laws, and, for some purposes, proceedings to punish for a violation of them are treated as quasi criminal proceedings, they are neither misdemeanors nor felonies under the laws of the state. It has been held that in municipal courts dealing with breaches of ordinances a trial by jury is not necessary; and various other differences between infractions of such regulations and violations of state laws have been recognized. This Code section does not authorize a private person to arrest for every breach of a municipal ordinance which may take place in his presence, regardless of whether it involves the commission of a misdemeanor or felony, such, for instance, as expectorating on the sidewalk, using an ash can or a garbage can not in strict accord with the municipal requirements, or even indulging in whistling or singing which the self-constituted arrester might think was too loud. To permit every person who might feel so inclined to arrest every other person whom he might consider to be violating some petty municipal regulation would be more calculated to produce disorder than to quell it. Statutes allowing arrests by private individuals, when not called upon by proper authority to act, should be strictly, rather than liberally, construed, as in derogation of the common law protecting the liberty of the citizen. The Code section last above

quoted was dealing with offenses amounting to a misdemeanor or a felony, and not with infractions of municipal ordinances as such. In order to work so radical a result as to allow private individuals to make arrests for all violations of municipal ordinances, the legislative intent to do so should be plain. *Union Depot & Railroad Co. v. Smith*, 16 Colo. 361, 27 Pac. 329; *Palmer v. Maine Central R. Co.*, 92 Me. 399, 42 Atl. 800, 44 L. R. A. 673, 675, 69 Am. St. Rep. 513; *Voorhees on Arrest*, § 112 et seq.

Generally, a person about to be arrested is entitled to know that he is arrested by lawful authority, and, if he submits to the arrest, he has a right to know the ground of his arrest. *Voorhees on Arrest*, § 78 et seq.; *Davis v. State*, 79 Ga. 767, 4 S. E. 318. But there are limitations upon this rule. Thus in *Thomas v. State*, 91 Ga. 204, 18 S. E. 305, it was held that one who saw an officer approaching him and took to flight, and continued to flee, had no right to express information that the purpose of the officer was to arrest him. Where an officer without a warrant attempted to make an arrest for a misdemeanor, and the person sought to be arrested had no notice that an attempt to arrest him was being made by lawful authority, it was held that such person had the right to resist the attempt to take him into custody. *Franklin v. Amerson*, 118 Ga. 860, 45 S. E. 698. Notice of the official character of a person making the arrest, if an officer, and that an attempt to arrest is being made, may be express or implied. *Robinson v. State*, 93 Ga. 77(3), 90, 18 S. E. 1018, 44 Am. St. Rep. 127; *Croom v. State*, 85 Ga. 718, 723, 724, 11 S. E. 1035, 21 Am. St. Rep. 179. "A citizen * * * unlawfully arrested has a right to resist force with force proportioned to that being used" to detain him. *Coleman v. State*, 121 Ga. 594(6), 599, 49 S. E. 716. An unlawful arrest is an assault; the manner in which it is made may make it an assault and battery or a graver offense. If no more than proper force is used by the person sought to be illegally arrested in resistance thereof, he is guilty of no offense. This does not mean that the mere fact of an illegal arrest will authorize the person arrested to slay the arrestor. The latter may be guilty of such conduct as to increase the wrong from a mere assault or assault and battery to a felonious assault, and render it really or apparently necessary for the person wrongfully sought to be arrested to slay the aggressor. The case is somewhat analogous to other cases of assault culminating in the homicide of the person who was the original assailant. Generally, to slay a person who without authority of law is seeking to make an arrest for a misdemeanor, where the motive of the slayer is merely to avoid an arrest, would be manslaughter, and not murder. If a person, with due notice of the facts, kills another to prevent the latter from lawfully arresting

him in a lawful way, the crime is murder. *Williford v. State*, 121 Ga. 173, 48 S. E. 962.

In the instant case the evidence introduced on behalf of the state tended to show that the accused was guilty of murder. The defendant introduced no evidence, but made a statement reciting, among other things, the following: He and his brother were walking down the sidewalk together, when they met a man who walked up to them and caught hold of them. The man had on citizen's clothes, and the defendant did not know what he was. He told them to come with him, and he carried them a short distance down the street. The defendant said to him, "Boss man, I would a whole lot rather you would tell me where you are going with us," and also, "What do you mean anyway?" The man made no reply except, "It don't know [make] any difference; you all come on." He carried them past a barber shop and motioned for some one to come out, in response to which another man came out of the shop. A proposal was made to search the defendant and his brother, and they began to do so. The man who made the arrest had no warrant, and the defendant did not think that he had the authority to do what he was doing. The defendant jerked loose. As he did so the man reached back for his pistol, and started to draw it. The defendant secured his first and fired. This occurred in the town of Broxton. The defendant had heard it described as "a rough place." He was a stranger there, and did not know anything about the people. He did not know any one, and thought probably, from the appearance of things, that they would kill him and his brother. The man killed did not tell the defendant that he had a warrant for him, or wanted to take him to the lockup, or anything like that. The defendant was only trying to protect himself the best he could. He did not think it right to let them "just do me anyway there." When the man who had hold of him reached back for his pistol, the defendant knew that the purpose was to kill him, and he shot accordingly.

Evidence was introduced by the state to show that the person killed was a police officer of the town of Broxton; that he had on no uniform, but did have on a policeman's badge. He wore a raincoat, but there was evidence tending to show that it was turned back so that the badge was visible. An ordinance of the city of Broxton was introduced which declared punishable by fine or imprisonment several specified acts, among them being intoxication to any degree, immoral or indecent conduct, and any disorderly conduct, or conduct likely to disturb the peace and tranquillity of any citizen.

The judge charged generally:

"I charge you that an officer or a private person may make an arrest for an offense committed in the presence of the officer, or the person, without the necessity for procuring a warrant."

He nowhere made any distinction between the power of a police officer and a private person in regard to making an arrest for the violation of a municipal ordinance. In a note to one of the grounds of the motion for a new trial he certified that the state at no time contended that the arrest was legal because made by an officer, but that the legality of the arrest depended solely on whether an offense was being committed by the defendant in the presence of the deceased, and not whether the deceased was uniformed, or whether the person killed was, in fact, an officer. Nevertheless, evidence was introduced, as above stated on the subject of whether the person killed was an officer, and whether he wore a policeman's badge so as to be visible to the defendant.

It was urged in this court by counsel for the state that the defendant, when arrested, was guilty of violating the municipal ordinance, and was also guilty of a misdemeanor under Penal Code 1910, § 442. That section declares it to be a misdemeanor for a person to "be and appear in an intoxicated condition on any public street or highway," or in certain other places; but it also declares that such intoxication "must be made manifest by boisterousness, or by indecent condition or acting, or by vulgar, profane, or unbecoming language, or loud and violent discourse of the person or persons so intoxicated or drunken." It will be seen that to be guilty of the misdemeanor thus defined by the Code requires something more than is necessary to constitute a violation of the ordinance of Broxton. Under the former the drunkenness must be made manifest in one or more of certain specified ways. If reliance was placed upon the contention that the defendant was committing the offense thus defined, in the presence of the deceased, regardless of the official position of the latter, that raised a different question from whether he was violating a municipal ordinance. The judge nowhere drew this distinction. While a number of the grounds of the motion for a new trial were without merit, yet some of them sufficiently raised the point that the judge, in fact, charged to some extent on the subject of an arrest and an illegal arrest, but did not sufficiently or clearly instruct the jury on the issues involved in the case touching those subjects. In so far as the defendant depended upon his statement alone as a basis for a charge, he should have made a proper request, or the omission to so charge will not cause a reversal. But, as the questions whether or not the deceased was lawfully attempting to arrest the accused or whether the accused was resisting an illegal arrest were involved, and as evidence was introduced to show the official character of the deceased and tending to show notice thereof to the accused, and an ordinance of the city of Broxton was introduced, the

charge should have given proper instructions on those subjects.

A section in the charter of Broxton declares that:

"The chief and police shall be uniformed and armed as to be readily recognized by the public as a peace officer. Such arms and uniforms to be furnished by the city and to remain the property of the city." Acts 1904, pp. 368-377.

This section primarily imposes a duty upon the city. It might be considered in connection with evidence as to whether the person seeking to make the arrest was in uniform or not, as bearing on the question whether or not the defendant knew or was put on notice of the fact that such person was an officer. But the request to charge that it was the duty of the deceased, while acting as chief of police of Broxton, to be uniformed and armed, so as to be readily recognized by the public as a peace officer, was too broad in its terms.

[4] 4. Except as indicated in this opinion, there was no merit in any of the grounds of the motion for a new trial. The ninth ground is covered by the decision in *Coleman v. State*, 141 Ga. 731, 82 S. E. 228. As the case is to be returned for a new trial, we express no opinion in regard to the evidence further than what has already been said.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 457)

JACOBS PHARMACY CO. et al. v. LUCKIE et al.

LUCKIE et al. v. JACOBS PHARMACY CO. et al.

(No. 347.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. DEDICATION \S 13 — ESTOPPEL \S 65 — RIGHT TO DEDICATE—OWNERSHIP.

A dedication or gift of land for a public use can be made only by the owner. A purchaser of land incumbered with a security deed, in possession under a bond of title, as against his vendor and incumbrancer, has no such power. But where such purchaser makes an express offer to dedicate for a public use, as against his grantee and the public, he will be estopped from denying that he is without power to dedicate because of the incompleteness of his title. *Hoole v. Attorney General*, 22 Ala. 190 (2).

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 5; *Dec. Dig.* \S 13; *Estoppel*, Cent. Dig. §§ 155-158; *Dec. Dig.* \S 65.]

2. DEDICATION \S 38—OFFER TO DEDICATE—RIGHT TO WITHDRAW—HIGHWAYS.

Where an owner of an interest in land agrees to donate to a county a strip for the purpose of widening a public highway, subject to other property owners along the highway, giving the necessary land to widen it to a certain extent, and where it appears that some of the abutters refuse to donate, and others, because of their minority, are unable to make a dedication, the landowner making the proposed dedication may formally withdraw the same, notwithstanding, on the day previous to his withdrawal.

al, the county authorities have passed a resolution accepting all donations made before that time.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. § 38.]

3. PLEADING § 248 — AMENDMENT — NEW CAUSE OF ACTION.

The court did not err in refusing to allow the amendment to the petition or in excluding the evidence offered in support thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.]

4. TEMPORARY INJUNCTION.

The court erred in granting a temporary injunction.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Injunction by E. T. Luckie and others against the Jacobs Pharmacy Company and others. Judgment for plaintiffs, and defendants bring error, and plaintiffs file cross-bill of exceptions. Reversed on main bill, and affirmed on cross-bill.

E. T. Luckie and others filed an equitable petition against Jacobs Pharmacy Company and others, to enjoin them from trespassing, erecting buildings, digging ditches, or in any other manner exercising any rights whatever upon a strip of land ten feet wide, lying and being at the east side of Roswell road at its intersection with Peachtree road, in Fulton county. The petition alleged substantially as follows: Jacobs Pharmacy Company has legally granted and conveyed to Fulton county, for road purposes, a strip of land off the western side of the lot of land described in the petition, of the width of ten feet, the entire distance of the road along the lot, and has dedicated it to road purposes; and it has been duly accepted by the county of Fulton, through its board of commissioners of roads and revenues. The conveyance and dedication are complete, and the county, the adjoining property owners, citizens, and taxpayers have acquired the title and rights and easement to the enjoyment of the strip of land for road purposes; and Jacobs Pharmacy Company has lost all right of ownership, possession, or other rights thereto. This company has caused brick to be placed upon the property adjacent to the ten-foot strip, has dug lines and trenches, and has made excavations upon the adjacent property and in part upon the ten-foot strip, and is threatening and preparing to erect a building upon the lot described, to cover, not only the adjacent property, but the ten-foot strip of land. The threatened occupation of the ten-foot strip is without lawful warrant or authority, and is contrary to the rights of the plaintiffs and the citizens and public of the county, as well as the county itself. Petitioners have a peculiar and particular interest in the dedication of the strip of land for road purposes, not only as citizens and taxpayers in common with the other residents and citizens of the county, but also as prop-

erty owners upon the roadway who will be directly affected and benefited or injured by the use or nonuser of the strip of land for road purposes, or in its use for any purpose contrary to the dedication. The use of the strip of land for other than road purposes will injure and damage petitioners in an irreparable, speculative amount, in that their damages cannot be ascertained or computed, for the reason that it will be impossible to widen the roadway as contemplated, and as passed upon by the board of county commissioners of roads and revenues of the county.

The board of trustees of Emory College and Carl Witt filed their intervention and were made parties defendant; the latter alleging that he had purchased of the former the tract of land described in the petition, and that he had the legal title thereto, etc. Jacobs Pharmacy Company filed its answer to the petition, averring, among other things, that it executed a paper to the county of Fulton, upon certain representations made by the plaintiffs, which will be later set out. When defendant ascertained that there was not enough land for defendant to erect certain contemplated buildings, and that plaintiffs refused to furnish additional ground for that purpose, as agreed, it revoked the instrument of September, 1914, by the instrument of January 14, 1915. It is not now and has never been the owner of the property. It was owned by B. F. and A. C. Burdett, who conveyed the legal title of the property to the trustees of Emory College to secure a debt. This debt has not been paid. Defendant took a bond for title from the Messrs. Burdett, giving in part compliance therewith, its obligations to pay. These obligations have not matured, and therefore have not been discharged, and the defendant does not hold a deed from either the Messrs. Burdett or from the trustees of Emory College. The trustees of the college did not consent to the proposed dedication, and have filed a formal protest against it; and the Messrs. Burdett (who are still liable upon their debt to the trustees) also have protested against the transaction and have declined to consent to the proposed dedication. No legal title vested in respondent prior to its revocation of the attempt to donate. It had on January 14, 1915, and now has, the legal right to revoke said dedication, and thus decline to continue to go on with the proposed attempt to donate the land. The dedication and revocation of dedication are as follows:

"Atlanta, Ga., Sept. 19, 1914. Georgia, Fulton County. We hereby agree to donate, set aside, and assign to Fulton county a strip ten feet wide from the west side of our lot at the intersection of Peachtree road and Roswell road at Buckhead, for the purpose of widening Roswell road from fifty feet to seventy feet between Peachtree road and the intersection of Plaster's Bridge road. This donation is made subject to the other property owners along Roswell road between the above-mentioned points giving the necessary land to widen said road as above set

forth. Jacobs Pharmacy Company. By Jos. Jacobs, Pres."

"Atlanta, Georgia, January 14, 1915. Honorable Board of County Commissioners, Atlanta, Ga. Dear Sir: I beg to notify you that the paper signed by Jacobs Pharmacy Company, per myself, bearing date of September 19, 1914, was procured from me without a consideration and under circumstances which render the same invalid. We do hereby revoke said instrument, decline to donate said ground, or make a deed thereto; and notify you that no work must be attempted with reference to this property. Yours very truly, Jacobs Pharmacy Company. Per Joseph Jacobs, President. Joseph Jacobs."

The defendant by amendment alleged: On January 4, 1915, 9 days before the action of the county commissioners in accepting the dedication, and 26 days before the restraining order was issued in this case, defendant entered upon the ten-foot strip on the west side of the lot and began the construction of four stores. Brick, sand, and other building materials were hauled out, and the front part of the lot lying near the triangle was excavated. The cellar was walled up on all four sides; the southern point being about 10 feet in width, the two east and west sides being from 25 to 30 feet in width, etc. These cellar brick walls were substantially built; and defendant has expended a total of \$532.15 paid out on its pay roll, which does not include the cost of material itself which has been actually used in the cellar walls, etc., all prior to the grant of the restraining order. The proposal to donate the ground was entirely conditional, and was made subject to the owners of all the remaining property between Peachtree road and the intersection of Plaster's Bridge road donating land sufficient to make Roswell road 70 feet in width between the points named; and until the other owners duly and legally complied with the condition, and duly and legally dedicated the additional ground, this defendant had the right to withdraw and revoke its attempted dedication. When the board of county commissioners attempted to accept the proposals to dedicate then before the board, the condition in the defendant's proposal to dedicate had not been complied with, and the owners of the land between the points mentioned had not dedicated or attempted to dedicate a very large part of the ground. Many of the persons who attempted to dedicate were not owners of the land and had no power to dedicate. For these reasons, the attempt on the part of the commissioners to accept the dedications was futile. And all the true owners of the frontage on the road had not dedicated at the time of the acceptance. A number of the owners who have failed to dedicate, or are unable from lack of title to do so, are set out, including the name of Mrs. C. S. (or Ida T.) Honour, who it is alleged is not the owner of any property on the street, she being vested with a life estate in certain property thereon, the remainder interest being vested in her children in fee;

and the remainder interest has never been dedicated, or attempted to be dedicated.

During the trial the plaintiffs, with A. C. Walters intervening, tendered to the court an intervention and amendment in substance as follows: In the year 1897 the administratrix of the estate of W. P. Humphrey platted the property which was owned by the estate in land lot 99, and on October sales day of that year held a sale. The Humphrey estate owned at the time a tract of land at the junction of Peachtree and Roswell roads, and the plat showed a curve at that junction instead of an angle or point, and the curve was a distance of about 150 feet from the present point of the roads. The land contained in the point and outside of the curved line was used for many years prior thereto as a part of Peachtree and Roswell roads, and the land became dedicated for public road purposes. The property outside of the curve, as herein described, includes all of the ten-foot strip of land contended for in this suit, and Jacobs Pharmacy Company and other claimants of the title hold the same subject to the rights herein set forth and the previous dedication to road purposes. W. P. Humphrey during his life, by permitting same to be used, dedicated said strip outside of said curve to road purposes, and the plat prepared by his administratrix was an affirmation, ratification, and dedication of the same, so that no person whomsoever has any legal right or title to any part of the property, etc. The defendant objected to this amendment and intervention on the ground that it set forth a new and distinct cause of action. The court sustained the objection, and excluded certain evidence offered in support of the amendment, which rulings were the basis of the plaintiffs' cross-bill of exceptions. At the conclusion of the hearing the court made an order enjoining the defendants from performing any act upon the ten-foot strip described in the petition, which would interfere with the opening of the street by the county, and restraining Carl Witt from levying upon or selling this ten-foot strip, to which judgment Jacobs Pharmacy Company, Moise De Leon, Carl Witt, and the board of trustees of Emory College excepted.

Chas. T. & L. C. Hopkins, of Atlanta, for plaintiffs in error. Moore & Pomeroy, of Atlanta, for defendants in error.

HILL, J. (after stating the facts as above).

[1] 1. The first headnote requires no elaboration.

[2] 2. Did Jacobs Pharmacy Company have the legal right, and did its act of attempted revocation on January 14, 1915, amount to a revocation of the dedication previously proposed by it, although the board of commissioners of roads and revenues of Fulton county accepted the dedication on the day previous to the revocation? It appears from the foregoing statement of facts that Jacobs

Pharmacy Company on September 19, 1914, agreed to donate a strip of land ten feet wide at the intersection of Peachtree road and Roswell road for the purpose of widening the Roswell road from 50 feet to 70 feet: "This donation is made subject to the other property owners along Roswell road between the above-mentioned points giving the necessary land to widen said road as above set forth." On January 13, 1915, the board of commissioners of Fulton county, after reciting that it had checked the donations of land tendered the county for the purpose of widening the road, adopted a resolution to the effect that all such donations and conveyances be accepted and dedicated to road purposes for the county and the citizens thereof. On January 14, 1915, Jacobs Pharmacy Company addressed a communication to the county commissioners, notifying them that the paper bearing date September 19, 1914, and signed by Jacobs Pharmacy Company, was procured without consideration, and that, under the circumstances, the same was considered invalid. "We do hereby revoke said instrument, decline to donate said ground, or make a deed thereto; and notify you that no work must be attempted with reference to this property." It will be seen that the dedication was a conditional one. This strip of land was donated on condition that the other property owners would likewise give the necessary land to widen the road. The dedication would not therefore become complete until all the conditions precedent had been complied with. It appears that, at the time of the acceptance of the proposed dedication by the county, all the other property owners had not dedicated the necessary land. Some owned their land and would not dedicate; others owned, but were under legal disability and could not dedicate. Still others had dedicated, but the dedications contained conditions similar to the one contained in the dedication of the defendant. In some instances the land was donated on condition that the county would open and build roadways to the residences of the owners, and in others that the houses of the owners were to be moved back, or replaced, as the case might be. It will be observed that the county had no absolute dedication from the Jacobs Pharmacy Company. The donation was a conditional one, without consideration, and the public had not acted upon it. No work had been done by the county in widening the road. About four months had elapsed, and no apparent effort was made by the county to secure a dedication from all the remaining landowners. Indeed, it may be doubted whether the county could comply with some of the conditions contained in some of the dedications, such as building roadways and moving houses for private citizens. The county would have a reasonable time within which to comply with these conditions; but where the county could not

comply (for instance, in securing a dedication from the guardian to property of a minor), the question of reasonable time could cut no figure. Guardians have no right to bind the property of their wards by contract. 6 Michie's Dig. Ga. R. 849 (2). And, if they have no authority to bind by contract, surely they would have no right to donate it or give it away, on the theory that it might enhance the remaining property of the ward. In these circumstances, where the conditions accompanying the dedications had not been complied with by the county, and could not be complied with as to some of the proposed dedications, a dedicatory who had donated on such conditions could formally withdraw and revoke the conditional dedication previously made by him. 13 Cyc. 490; *People v. Williams*, 64 Cal. 498, 2 Pac. 393, 396. The owner of property, proposing a dedication of land for public purposes on condition that the adjacent owners will make a like dedication, has the right to withdraw the same on the ground of the refusal of some of the adjacent owners, and the disability of others, to dedicate. And the agreement of some of the others to dedicate, made subsequently to the withdrawal of the offer to dedicate, can have no effect on the status of the case. In view of what has been said, the court erred in granting the temporary injunction.

[3] 3. The cross-bill of exceptions alleges error on the part of the court in disallowing the amendment set out in the foregoing statement of facts, and in rejecting evidence offered by the plaintiffs in support of the amendment. We think that the amendment sets up a new and distinct cause of action, and that the court did not err in refusing to allow it, and in rejecting evidence offered in support of it.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 436)

DAVIS v. BUCKEYE COTTON OIL CO.
(No. 340.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS—§821—OBSTRUCTION OF SIDEWALK—PERSONAL INJURIES—QUESTION FOR JURY.

A warehouseman engaged in the purchase and storage of cotton seed adopted a contrivance to convey the seed from his warehouse over the sidewalk in a city to cars, by placing benches on the sidewalk and laying planks on them, over which the seed was carried in wheelbarrows. When not in use the contrivance was taken down and the benches were placed on the edge of the sidewalk. On the day of the plaintiff's injury the benches were observed by him to have been placed on the edge of the sidewalk. A rainstorm of not unusual severity, with wind blowing sufficiently strong to move the benches to the middle of the sidewalk, occurred about dark, and the electric street lights were extinguished. About 9 o'clock the plaintiff, while

walking on the sidewalk, and on account of darkness not being able to see the benches, which lay in the middle of the sidewalk, fell over them and was injured. Upon these facts being made to appear, it was for the jury to say whether negligence of the warehouseman was the cause of the injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. ¶821.]

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Action by C. D. Davis against the Buckeye Cotton Oil Company. Judgment for defendant, and plaintiff brings error. Reversed.

H. E. Coates and W. L. & Warren Grice, all of Hawkinsville, for plaintiff in error. Miller & Jones, of Macon, for defendant in error.

EVANS, P. J. C. D. Davis brought suit against the Buckeye Cotton Oil Company to recover damages for a personal injury, and sustained a nonsuit. It appeared that the defendant maintained, on the western side of Houston street, between First and Second streets, in the city of Hawkinsville, its place of business for the purpose of buying, weighing, and shipping cotton seed, its storage house being near the sidewalk. The track of the railroad company runs along near the edge of the sidewalk. The defendant adopted a contrivance to convey seed from its seedhouse to the railroad cars, by placing benches on the intermediate space on the sidewalk and laying planks on them, over which the seeds were conveyed in wheelbarrows. When not in use the contrivance was taken down, and the benches were put on the edge of the sidewalk, near the drain. On the day of the injury the plaintiff, while en route to his business, passed the seedhouse and observed the benches on the "side of the sidewalk." About dark that afternoon there was a rainstorm which caused the electric lights to be extinguished. There was considerable wind. About 9 o'clock the plaintiff started home, and while traveling on the sidewalk, while it was dark, fell over the benches, which were in the middle, or beaten track, of the sidewalk, and sustained certain injuries.

It is contended by the plaintiff that the defendant was negligent in storing on the sidewalk its contrivance for unloading seed from its seedhouse into the cars, and that it is immaterial whether the benches were left upon the sidewalk where they were when the plaintiff fell over them, or were left on the edge of the sidewalk and blown over by the wind, which was not so unusual as not to be anticipated. The sidewalks of a municipality are intended for the use of the public, and must not be so obstructed as to deprive them of that use. In front of a warehouse they may be used temporarily so as to pass over the sidewalk commodities from the warehouse to wagons or cars stationed on the

other side of the walk, in the absence of a valid prohibitive ordinance. If the warehouseman conveys his commodity over a temporary gangway, constructed by laying planks on benches, he has no right to permanently store the benches on the sidewalk when the contrivance is not in use. Whether the placing of the contrivance on the edge of the sidewalk when not in use be regarded as a permanent or temporary obstruction, if the warehouseman so negligently place it that the whole or a part of it is liable to be blown by wind into the middle of the sidewalk, he will be liable to a pedestrian who, in the exercise of due care, is injured by falling over the obstruction on a dark night. *Maddox v. Cunningham*, 68 Ga. 431, 45 Am. Rep. 500; *Bowen v. Smith-Hall Co.*, 141 Ga. 721, 82 S. E. 23. It does not affirmatively appear how the benches got to the middle of the sidewalk—whether left there by the agents of the company or some one else, or blown by the wind from the edge of the sidewalk. The evidence indicates that the benches were of such weight they may have been blown over by the wind. The storm does not appear to have been extraordinary or unusual, and it was the province of the jury to determine whether the benches were in the middle of the sidewalk as a result of the negligence of the defendant. The night was dark, and the plaintiff testified that he was unable to see the bench, and was not aware that it was in the place it was until he came in contact with it. Hence it cannot be said as matter of law that he was guilty of contributory negligence. We think the court erred in withdrawing the case from the jury.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 476)

ALLEN et al. v. MITCHELL et al. (No. 354.)
(Supreme Court of Georgia. May 13, 1915.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS ¶697—ALLEYS—REMOVAL OF OBSTRUCTION—INJUNCTION—PARTIES.

The plaintiffs in the court below filed their petition seeking an injunction against a municipality, to restrain the latter from removing certain obstructions in an alley which the petitioners claimed to be a private alley. The municipality filed a demurrer and a plea putting in issue the material allegations in the petition. When the case came on for trial, the plaintiffs in error filed their written application, adopting the plea of the municipality as their own, and showing an interest in the subject-matter of the suit, growing out of their possession and ownership of property abutting on the alley. The court refused the application. *Held*, that the court erred in refusing to permit the plaintiffs in error to be made parties defendant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. ¶697.]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by W. E. Mitchell and another against the Mayor and City Council of Americus. Judgment for plaintiffs, and Lee Allen and others, having been denied the right to be made parties defendant, bring error. Reversed.

W. E. Mitchell and the Commercial City Bank brought their petition against the mayor and city council of Americus, alleging that they are owners and in possession of a lot of land in the city of Americus, on a part of which is located a cotton warehouse and on another part a bank and office building; that there is an alley lying between the warehouse and other buildings upon the land; that this alley is not a public alley but is a private alley, and is the property of petitioners; that they have been in the uninterrupted, peaceful, quiet, and adverse possession of the same, claiming it as their property, for more than 20 years; that it had not been used by others, except by permission of petitioners; and that the defendant named in the petition is threatening to remove from said alley certain obstructions placed there by petitioners, and to throw the same open for the use of the public. Injunction and other relief was sought. A temporary restraining order was granted, and the case was set down for interlocutory hearing upon a date named. To the petition the defendant filed a demurrer and a plea. Whether there was an interlocutory hearing or not does not appear, but the case came on in course for trial in term time; and when called for trial Lee Allen and Allen Fort, as executor of the estate of Mrs. Allen Fort, deceased, the plaintiffs in error here, filed their written motion to be made parties defendant in the case. They alleged that they owned property abutting on the alley in controversy, and that it was the only way of ingress and egress to and from the rear of their property; and they adopted as true the answer previously filed by the municipality, in which it was denied that the alley was a private alley, and in which it was asserted that the same was a public alley; and they averred that the petitioners did not have the right to close it up, but, on the contrary, the municipality had the right to open it and keep it open as a way of ingress to and egress from certain buildings. The court refused to allow the motion of the plaintiffs in error to be made parties defendant, and error is assigned upon this refusal. The municipality withdrew both its plea and demurrer; and a verdict and decree were taken without objection, making the injunction permanent. The motion of the plaintiffs in error to be made parties defendant was presented by the same counsel who had been representing the municipality, and who withdrew the plea and demurrer of the latter.

Shipp & Sheppard and Hollis Fort, all of Americus, for plaintiffs in error. E. A. Hawkins and W. P. Wallis, both of Americus, for defendants in error.

BECK, J. (after stating the facts as above). The plaintiffs in error, who sought to have themselves made parties defendant in the court below, show clearly an interest in the suit. While they would not be concluded by the verdict in this case, they were legally entitled, under the showing which they made, to be made parties defendant and to have the rights which they set up adjudicated in the equitable suit which the petitioners were prosecuting against the municipality. The petitioners had voluntarily gone into a court of equity and invoked there a verdict and decree establishing their contention that the alley in question was a private alley. The municipality against which the suit was brought filed pleadings putting in issue this contention of the petitioners. The plaintiffs in error, who sought the right to intervene in the court below, had some interest in common with the municipality. They were interested directly in having the alley declared one open for the use of the public, or at least to abutting owners, who use it as a way of ingress and egress to and from their property, and they had a right to join as parties defendant in the litigation over the question made. They might have stood by and have allowed the city to contest the rights of the plaintiffs, as asserted in their petition, but they had also a right to take part in the legal fight which the plaintiffs had precipitated. They might well have thought that the contest would be waged more vigorously against the plaintiffs if they were permitted to maintain their own side of the question. It would seem that subsequent events justify this view. Our Code provides that:

"All persons interested in the litigation should be parties to proceedings for equitable relief." Civil Code, § 5417.

Some exceptions to this rule are stated in the section referred to; but it is not necessary to consider them, as the parties here fall within none of the exceptions. In equity it is the general practice to permit strangers to a litigation, who claim and show an interest in such a matter, to intervene and assert and have established rights which would be affected by the decree in the case. 11 Enc. Pl. & Pr. 498 et seq. The broad rule laid down in the work last cited has probably been, to a certain extent, deduced from judicial construction of statutes in certain states in reference to the subject of intervention, and may be somewhat broader than the rule in this state; but, under our Code provision quoted above, the rule here is not so narrow as to exclude parties showing a direct interest in the subject-matter of the suit, which is set up by the plaintiffs in error here. Generally a court of equity will extend to one, who is not a party to the bill, the privilege of becoming a party, at his own instance, when, from the case made, it appears that the ends of justice would be subserved by it. Phillips v. Wesson, 16 Ga. 137; Blaisdell v. Bohr, 68 Ga. 56.

The fact that the municipality, subsequently to the refusal of the court to allow plaintiffs in error to intervene and be made parties, dismissed the plea and demurrer which had been filed, did not affect the rights of the complaining parties. They sought to become parties defendant before the municipality had dismissed its plea and demurrer. They adopted the plea of the municipality as their own, and showed in their written application to the court an interest in the subject of the suit. The verdict and decree complained of must be set aside, and the plaintiffs in error here be afforded the opportunity of contesting the petitioners' right to that decree.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 421)

PARKER v. CRAMTON. (No. 334.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. COVENANTS \S 115 — BREACH OF WARRANTY—PLEA—SUFFICIENCY.

In a suit for a breach of warranty of title to real estate, a plea which set up that the plaintiff could, for a small stated amount, have settled a suit brought by third parties against him to recover an undivided one-third interest in the land, and that the warrantor should not be held liable for a sum greater than such amount, was demurrable.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 203-208; Dec. Dig. \S 115.]

2. COVENANTS \S 130 — BREACH OF WARRANTY—ENHANCEMENT IN VALUE—RIGHT TO BENEFIT.

If title to land was warranted in a conveyance thereof, and there was a breach of warranty as to an undivided one-third interest, by reason of a recovery of such an interest from the warrantee by third parties, in a suit for the breach it furnished no defense to plead that the defendant was informed that the plaintiff "finally adjusted the matter" by selling the property at an advance of \$20,000 over what he had paid for the land, so that he lost nothing. Enhancement in value accrued to the benefit of the vendee, not that of the vendor.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 245-253, 255-257; Dec. Dig. \S 130.]

3. COVENANTS \S 115 — BREACH OF WARRANTY—PLEA—SUFFICIENCY AGAINST DEMURRER.

In a suit for breach of warranty of land, a plea which set up that the plaintiff had settled with the warrantor of the defendant for a stated sum, and that this operated to release the defendant from liability on his warranty, but which did not show for what amount the person settled with would have been liable, or the extent of the injury, if any, done to the defendant by the making of such settlement, was demurrable.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. \S 203-208; Dec. Dig. \S 115.]

4. EVIDENCE \S 348 — RECORD OF JUDICIAL PROCEEDINGS — AUTHENTICATION UNDER SEAL.

If a record of a judicial proceeding in a foreign state is certified in accordance with Civ. Code 1910, \S 5824 (following the provisions as

the act of Congress in regard to certifying court records or judicial proceedings from one state to another), it is admissible in evidence in this state, although it is not authenticated under the great seal of the other state, under section 5819.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1361-1383; Dec. Dig. \S 348.]

5. TRIAL \S 141 — DIRECTION OF VERDICT—EVIDENCE.

None of the other grounds of the motion for a new trial require a reversal, and there was no error in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 336; Dec. Dig. \S 141.]

Error from Superior Court, Greene County; J. B. Park, Judge.

Action by F. J. Cramton against W. J. Parker. Judgment for plaintiff, and defendant brings error. Affirmed.

F. J. Cramton brought suit against W. J. Parker, alleging, in substance, as follows: On January 25, 1905, Parker executed to the plaintiff a warranty deed to certain real estate in Alabama, for which the plaintiff paid \$10,250. On December 25, 1905, certain persons brought suit in equity against Cramton in the city court of Montgomery, Ala., a court having proper jurisdiction, claiming a one-third undivided interest in the property under a paramount title. Notice of the suit was served on Parker, and a demand was made that he defend the title. He failed and refused to do so. In this he acted in bad faith, after having for a valuable consideration covenanted so to do; and he has caused the plaintiff unnecessary trouble and expense. Protracted litigation resulted. Under an interlocutory decree, the property was sold, and the proceeds placed in the hands of a trustee to stand in lieu of it. Finally a decree was rendered against the plaintiff in the present suit, awarding to the complainants in that suit an undivided one-third interest in the proceeds in lieu of the land. The plaintiff sought to recover, on account of the breach of warranty, one-third of the purchase price paid by him to the defendant for the land, with interest from the date of the deed, \$500 attorney's fees alleged to have been necessarily expended by him in defending the action in Alabama, and the sum of \$526.09 costs of court. It was alleged that by the law of Alabama, where a warrantor of title to real estate is notified of the filing of a suit attacking it, the judgment or decree in such case is conclusive against him on his warranty.

The defendant answered. The thirteenth and fourteenth paragraphs of the answer were as follows:

"Further answering, this defendant says that the plaintiff had the opportunity of settling with the claimants to the one-third interest in the property for \$50; and, having failed and refused to do so, this defendant in no event would be liable for more than \$50. Defendant is informed, and upon information and belief alleges, that plaintiff finally adjusted the matter by selling the property at an advance of some \$20,-

000 over what he paid for it, and that has lost nothing on account of the transaction."

By amendment the defendant alleged as follows:

"The measure of plaintiff's damage, if anything, would be the difference between what he paid for the land and what he got for it. That in point of fact plaintiff realized more for the land than he paid for it, and therefore sustained no damage."

On demurrer, these paragraphs were stricken, and exceptions pendente lite were filed. At the close of the evidence, the presiding judge directed a verdict for the plaintiff. A motion for a new trial was denied, and the defendant excepted.

Noel P. Park, of Greensboro, and John J. & Roy M. Strickland, of Athens, for plaintiff in error. Ball & Samford, of Montgomery, Ala., and F. B. Shipp and Jos. P. Brown, both of Greensboro, for defendant in error.

LUMPKIN, J. [1] 1. The defendant pleaded that the plaintiff had an opportunity to settle with the claimants of the one-third interest in the property for \$50, but failed and refused to do so, and therefore that the defendant was not, in any event, liable for more than that sum. This is an effort to apply the rule that, where one is injured by a breach of contract, he is bound to lessen the damages, as far as practicable, by the use of ordinary care and diligence (Civil Code 1910, § 4398), to a case to which it is not applicable. When sued, the warrantee was not bound to compromise. Had he done so without the agreement of the warrantor, the latter would doubtless have declined to be bound by it, and set up that there was no right to recover against him because there was no ouster, but a voluntary settlement to which he was a party.

[2] 2. If there was a breach of warranty as to an undivided interest in the land, that the balance may have enhanced in value and may have been sold by the warrantee at an advanced price would furnish no defense to the warrantor in a suit for the breach. Increase in value after the sale and warranty is a benefit accruing to the vendee, not to the vendor. The paragraph of the plea which set up that the defendant was informed "that plaintiff finally adjusted the matter by selling the property at an advance of some \$20,000 over what he paid for it, and that he has lost nothing on account of the transaction," was properly stricken.

[3] 3. The defendant pleaded that, after the plaintiff had made claim against him for a breach of warranty, the plaintiff settled with the warrantor of the defendant for \$1,000, and released him, and that this operated to release the defendant. This plea was properly stricken. The case was not one of releasing one of two joint contractors, and thereby releasing the other. The defendant, as warrantor of the plaintiff, and the warrantor of the defendant, were not joint contractors. Each was liable to the extent of

his warranty. But this might be in different amounts. The amount of the purchase money paid to the defendant and covered by the warranty from his vendor was not alleged. If settling with him would operate as a release of the defendant on his warranty, on the ground that there would be a liability over to the extent of the former warranty, it would only be a release pro tanto. If the liability of the former warrantor was only for \$1,000, it certainly should not release the defendant for a greater breach. The plaintiff conceded a credit to the extent of \$1,000, the amount collected by him.

[4] 4. A record of a judicial proceeding of another state, certified in accordance with Civil Code 1910, § 5824, is admissible in evidence in this state, although the great seal of the other state is not attached. The section cited and section 5819 have been held not to conflict with each other. *Sloan v. Wolfsfeld*, 110 Ga. 70, 35 S. E. 344.

[5] 5. None of the other grounds of the motion require a new trial. If the fifth ground of the amended motion for a new trial is sufficient in form to raise a legal question, which is doubtful, it is apparently controlled in principle by the decision in *Chattanooga, Rome & Columbus R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109.

Objection was made to including attorney's fees in the verdict; but the presiding judge certified that it was admitted by counsel for the defendant that, if defendant was liable at all, he was also liable for attorney's fees, as claimed. Moreover, there was evidence as to the law of Alabama, where the land was situated, and where the warranty deed was made, touching the measure of recovery in such a case. The defendant introduced no evidence. There was no error in directing a verdict.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(148 Ga. 456)

WILLIAMS v. STATE. (No. 345.)
(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There were no errors of law committed on the trial of this case. The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Spalding County; Robert T. Daniel, Judge.

Proceeding between Moye Williams and the state. From the judgment, Williams brings error. Affirmed.

W. H. Connor, of Griffin, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 469)

CITY OF ROME v. WRIGHT. (No. 350.)

(Supreme Court of Georgia. May 13, 1915.)

*(Syllabus by the Court.)***CHANGE OF STREET GRADE.**

This was an action by an owner of abutting land against a municipality for damages accruing from the change of grade in a street, causing special injury to the plaintiff's property. The evidence was sufficient to show ownership in the plaintiff, and that her property was damaged in the sum assessed by the jury. The several grounds of the motion for new trial are without merit, and the judge did not err in refusing a new trial.

Error from Superior Court, Floyd County; Geo. A. H. Harris, Judge pro hac.

Action by Addie Wright against the City of Rome. Judgment for plaintiff, and defendant brings error. Affirmed.

Max Meyerhardt, of Rome, for plaintiff in error. Dean & Dean, of Rome, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 464)

BARRETT v. MASON. (No. 348.)

(Supreme Court of Georgia. May 13, 1915.)

*(Syllabus by the Court.)***1. PLEADING — 249 — PETITION — AMENDMENT — DIFFERENT FORM OF ACTION.**

C. R. Mason instituted an action of trover against Webb Barrett, to recover a described check on a bank, signed by plaintiff and made payable to defendant, alleged to be of the value of \$50, and a described promissory note signed by plaintiff and made payable to defendant, which was alleged to be of the value of \$150. In connection with the petition the plaintiff made the statutory affidavit for the purpose of requiring defendant to give bail. At the trial term the plaintiff offered an amendment to his petition, which alleged "that since bringing this suit he has sold the mare received from defendant in consideration of said note and check sued for at and for the sum of \$100, which was her market value. Plaintiff further shows that he demanded of defendant his check and note, and tendered to defendant said mare, which was refused by defendant. Plaintiff sues for the difference between \$200 check and note and price of mare." Held, that the allowance of the amendment over objection was erroneous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 707, 708, 710-729; Dec. Dig. — 249.]

2. APPEAL AND ERROR — 1041 — GROUND FOR REVERSAL — AMENDMENT TO PETITION — BAIL TROVER.

The error allowing the amendment entered into the further trial of the case; and the plaintiff having recovered a verdict, and the defendant having made a motion for new trial and filed a bill of exceptions, assigning error upon the judgment refusing a new trial, and upon the judgment allowing the petition amendment, the judgment of the trial court is reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4100-4109; Dec. Dig. — 1041.]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by C. R. Mason against Webb Barrett. Judgment for plaintiff, and defendant brings error. Reversed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. J. G. B. Erwin, of Calhoun, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 473)

WOODY v. MILLEDGEVILLE TELEPHONE CO. (No. 352.)

(Supreme Court of Georgia. May 13, 1915.)

*(Syllabus by the Court.)***INTERLOCUTORY INJUNCTION.**

Under the evidence in the case there was no abuse of discretion on the part of the court below in granting the interlocutory injunction.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by the Milledgeville Telephone Company against N. A. Woody. Judgment for plaintiff, and defendant brings error. Affirmed.

D. S. Sanford and Hines & Vinson, all of Milledgeville, for plaintiff in error. Allen & Pottle, of Milledgeville, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 484)

BUTLER v. STATE. (No. 357.)

(Supreme Court of Georgia. May 13, 1915.)

*(Syllabus by the Court.)***1. CRIMINAL LAW — 784 — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.**

Where a defendant is on trial for murder, and the state relies partly upon circumstantial evidence for conviction, and the defendant in his statement to the jury admits killing the deceased, but seeks to justify himself, and there is also evidence tending to show admissions of the defendant to the same effect, it is not error to omit to instruct the jury on the law of circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. — 784.]

2. HOMICIDE — 300 — INSTRUCTIONS — READING OF STATUTE — VOLUNTARY MANSLAUGHTER.

The statute defining voluntary manslaughter contains the declaration that "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crimes of murder." The reading by the court of the entire section definitive of voluntary manslaughter (Pen. Code 1910, § 65), containing the quoted language, while charging on the subject of voluntary manslaughter, was not subject to the

criticism that by so doing the court entrenched upon the law of justifiable homicide, in that the reading of the section tended to convey to the jury the implication that they could not consider threats accompanied by menaces, as defined in *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, as sufficient cause to arouse the fears of a reasonable man that his life is in danger or that a felony is about to be perpetrated upon him. *Price v. State*, 137 Ga. 72 (7), 74, 72 S. E. 908.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.]

3. CRIMINAL LAW § 762—HOMICIDE § 300
—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER—EXPRESSION OF OPINION—"SERIOUS PERSONAL INJURY."

While instructing the jury, after charging section 65 of the Penal Code of 1910, on the subject of voluntary manslaughter, it was not error on the part of the court to add: "Serious personal injury," as used in this connection, means an injury greater than a provocation by mere words, and less than a felony." *Buchanan v. State*, 24 Ga. 282. Nor did this instruction amount to an expression of opinion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762; *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.

For other definitions, see *Words and Phrases*, First and Second Series, *Serious Bodily Harm or Injury*.]

4. HOMICIDE § 297—INSTRUCTIONS—JUSTIFIABLE HOMICIDE.

It was not error, under the facts proved, for the court to charge: "The idea of prevention must enter into all cases of justifiable homicide. No one can legally slay another when it is apparent that there is no imminent danger at the time of the killing, or the danger is over. To deliberately kill another in revenge for a past wrong, however heinous, cannot be justified."

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 611; Dec. Dig. § 297.]

5. HOMICIDE § 308—INSTRUCTIONS—MURDER.

To charge the jury that, "if the slayer kills his adversary, not because of any fears in his mind that his adversary is about to kill him or commit a felony on his person, but solely because of passion excited by mere words or verbal threats, or mere menaces, then such killing would be murder," is not open to the criticism that "words, threats, menaces, and contemptuous gestures may be sufficient to justify the killing."

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 642-647; Dec. Dig. § 308.]

6. HOMICIDE § 300—INSTRUCTIONS—JUSTIFIABLE HOMICIDE.

After charging the law on the subject of justifiable homicide as contained in Pen. Code 1910, § 72, it was not error to add: "You will note, from the definition of justifiable homicide just given, that it is not justifiable to kill a human being to prevent a misdemeanor being committed upon the slayer's person, but justifiable only when such killing is done to prevent a felony being committed upon the person of the slayer. The law does not justify a killing by one who believes that he has grounds to fear that he will be injured, without regard to the extent of the injury. If it is apparent that the assailant intends to commit a trespass or a misdemeanor only it would not be justifiable to kill him. And, to be justifiable, the killing must be done in good faith in defense of the person."

Crawford v. State, 90 Ga. 701, 17 S. E. 628, 85 Am. St. Rep. 242.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

7. INSTRUCTIONS—EVIDENCE.

The evidence in this case was of such a character as to authorize the following charge: "To constitute justifiable homicide, the slayer must not have brought on himself the necessity to kill the deceased. If the defendant provoked and brought on the difficulty by his own fault, and brought upon himself the necessity to kill the deceased, such killing would not be justifiable homicide. If one provokes a difficulty and makes no effort to decline it, but kills his adversary in the contest, it is not justifiable homicide. One cannot create an emergency which renders it necessary for another to defend himself, and then take advantage of the effort of the other person to do so." See *Buchanan v. State*, 24 Ga. 282 (2).

8. CRIMINAL LAW § 1064½—APPEAL—NEW TRIAL—GROUNDS OF MOTION—VERIFICATION.

Grounds of a motion for a new trial which are not verified by the judge will not be considered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2876, 2887, 2948; Dec. Dig. § 1064½.]

9. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to support the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Laurens County; E. D. Graham, Judge.

S. D. Butler was convicted of crime, and brings error. Affirmed.

See, also, 142 Ga. 286, 82 S. E. 654.

John R. Cooper, of Macon, and R. Earl Camp and H. P. Howard, both of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(142 Ga. 414)

LOUISVILLE & N. R. CO. v. MORELAND.
(No. 328.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. RAILROADS § 478—DAMAGES FROM FIRE—PETITION—SUFFICIENCY AGAINST DEMURREER.

In a suit for damages against a railroad company, the petition alleged that the plaintiff had been damaged by the defendant in the sum of \$1,000, on account of facts "hereinafter stated." It then proceeded to set forth damages resulting: First, from a wrongful diversion of water, thereby causing it to flow upon plaintiff's land; and, second from fire alleged to have been set out and communicated to plaintiff's land by means of sparks emitted from an engine on defendant's railroad. Relatively to the first claim for damages, the petition as amended described the land and the manner in which the defendant had caused the water to be diverted and to flow upon it. Other allegations were that the effect of the diversion was to cause the water "to run over the strip

of land aforesaid and flow into and over the said land and flood the ditches and drains on petitioner's said land, and cause the water to permeate said land and render the same unfit for cultivation, in fact almost destroyed six acres of petitioner's said land last year for farming purposes, and will extend to other lands of petitioner as the overflow continues from year to year and the nuisance is continued"; and also "that prior to said flooding and overflowing of petitioner's said land it was very valuable for farming purposes; that the year previous to said turning the water on, as aforesaid, petitioner gathered 39 bushels of corn per acre off of said land, and that said land is not worth anything for this purpose, and petitioner has been damaged in the sum of \$600 on this account for said year of 1912." *Held*, that the averments as to damages are subject to demurrer on the ground that they are "indefinite and insufficient, in that it does not appear whether the plaintiff is seeking to recover" damages for the year 1912 or for permanent damages to the land.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1698-1705; Dec. Dig. ¶478.]

2. RAILROADS ¶478—DAMAGES FROM FIRE—PETITION—SUFFICIENCY AGAINST DEMURRER.

Relatively to the second claim for damages, the petition as amended alleged that on a named date the defendant's engine emitted "cinders, sparks, and live coals and set fire to the grass and other combustible material on the right of way of said defendant and Georgia Talc Company's property, which was communicated to the land of petitioner and burned a certain "levee" and "hedge," thereby causing special damage amounting to \$200. Another allegation was that "plaintiff is unable to state the engine of defendant which burned said levee and hedge." *Held*, that this part of the petition does not plainly and distinctly set forth the ground of complaint in such manner as to put the defendant on notice of what engine it is claimed emitted the sparks, so that it might be prepared to show, if it could, that any emission of sparks was not due to negligence in the equipment and operation of the engine. Under the circumstances it was erroneous to overrule a ground of special demurrer which complained that the petition failed to allege "at what time of day the fire occurred."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1698-1705; Dec. Dig. ¶478.]

3. DEMURRER—AMENDMENT.

Other grounds of demurrer were met by amendment.

4. ASSIGNMENTS OF ERROR.

As the judgment of the trial court is reversed on account of errors in ruling upon questions raised by demurrer, we will not deal with the assignments of error based on the grounds of the motion for new trial which complain of matters that may not occur on another trial.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by T. H. Moreland against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. N. King, of Spring Place, and D. W. Blair, of Marietta, for plaintiff in error. W. C. Martin and Wm. E. Mann, both of Dalton, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 413)

ALABAMA GREAT SOUTHERN R. CO. v. CURETON. (No. 329.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The court did not err in stating the contentions of the defendant, and the evidence was sufficient to authorize the verdict.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action between the Alabama Great Southern Railroad Company and W. B. Cureton. From the judgment, the Railroad Company brings error. Affirmed.

Payne & Hale, of Chattanooga, Tenn., for plaintiff in error. B. T. Brock, of Trenton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 419)

ALABAMA GREAT SOUTHERN R. CO. v. TATUM. (No. 331.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The evidence was sufficient to authorize the verdict, and there was no error in refusing to grant a new trial.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action between the Alabama Great Southern Railroad Company and W. N. Tatum. From the judgment, the Railroad Company brings error. Affirmed.

Payne & Hale, of Chattanooga, Tenn., for plaintiff in error. B. T. Brock, of Trenton, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 416)

FLEMISTER v. ALACULSEY LUMBER CO. (No. 332.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. NEW TRIAL ¶165 — REINSTATEMENT OF MOTION—NATURE AND EFFECT OF ORDERS.

In the case of John Doe ex dem. Ida Caloway Flemister v. Richard Roe, casual ejector, and Alaculsey Lumber Company, tenant in possession, a verdict was returned in favor of the plaintiff at the May term of court, 1914. A motion for new trial was duly filed. The judge passed an order nisi, setting the hearing of the motion for a designated day in vacation, in a different county. An additional order was granted, allowing time for the filing of a brief of evidence and otherwise perfecting the motion for new trial. On the day set for the hearing of the motion for new trial the movant failed to appear, and, on motion of counsel for respondent,

ent, the motion for new trial was dismissed. The order of dismissal was dated June 29th. On the 2d day of July next ensuing, the movant presented a petition to the judge to have the order dismissing the motion for new trial vacated, and the motion reinstated, upon facts set forth in the petition. The judge thereupon passed an ex parte order, vacating the order dismissing the motion for new trial, and reinstating the motion, reciting that the motion for new trial was to be heard and tried by the court at such time and in such way as the same could have been heard and tried if such order of dismissal had not been granted. On the 15th day of July the respondent presented to the judge exceptions pendente lite to the order last mentioned, which were duly certified. It is recited in the bill of exceptions that the said petition and order to reinstate the motion for new trial came on to be heard at the regular August term, 1914, at which time respondent's counsel urged objections which they called a demurrer to the motion to reinstate, and the same were overruled. The bill of exceptions also recites that "the case then proceed to trial," and, upon consideration of the evidence, the judge passed the following order: "After hearing evidence and argument on motion of respondent to vacate the order reinstating the motion for new trial, granted July 2, 1914, said motion is refused, and the order granted July 2, 1914, reinstating the motion for new trial, is hereby confirmed and the motion for new trial reinstated." Error is assigned upon the judgment last mentioned, as also upon the exceptions pendente lite filed July 15, 1914. *Held*, the orders passed by the court reinstating the motion—that is, the one passed in vacation and the order passed in term confirming that order—were not final, but were interlocutory in their nature, and, if valid, have the effect of putting the case again in court, where it is now pending.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 334, 335; Dec. Dig. ¶165.]

2. APPEAL AND ERROR ¶66—BILL OF EXCEPTIONS—PREMATURITY.

As the case has not finally been disposed of and is pending in the court below, a direct bill of exceptions complaining of the decision in the case could not be sued out to this court; and the direct bill of exceptions seeking to bring that ruling to this court for review is premature.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 329-331, 335-343; Dec. Dig. ¶66.]

3. APPEAL AND ERROR ¶337—BILL OF EXCEPTIONS—PREMATURITY—DISMISSAL.

The direct bill of exceptions having been sued out prematurely, it is dismissed; but, in view of all the circumstances, it is directed that the plaintiff in error, who was the respondent in the motion for new trial, have leave to withdraw the official copy of this bill of exceptions of file in the court below, and to file the same as exceptions pendente lite.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1877, 1878; Dec. Dig. ¶337.]

Error from Superior Court, Murray County; A. W. Flite, Judge.

Action between I. C. Flemister and the Alaculsey Lumber Company. From the judgment, Flemister brings error. Writ of error dismissed, with instructions.

J. J. Bates, of Spring Place, and Hendricks & Hendricks, of Nashville, for plaintiff in error. W. E. Mann and W. C. Martin, both of Dalton, and C. N. King, of Spring Place, for defendant in error.

ATKINSON, J. Writ of error dismissed, with direction. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 426)

HUSON ICE & COAL CO. v. CUNNINGHAM. (No. 835.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

LAW OF THE CASE.

This case was tried with that of *Huson Ice & Coal Company v. T. R. Thornton*, the pleadings in both cases presenting the same issues. A verdict was returned for the defendant in each case, and the plaintiff separately moved for new trials, which were refused, and it sued out a writ of error in each case. On a review of the Thornton Case this court held that no error of law was committed and affirmed the verdict. *Huson Ice & Coal Co. v. Thornton*, 143 Ga. —, 84 S. E. 969. The assignments of error are the same in both records, and the decision in that case is controlling in this. The evidence in the case sub judice is sufficient to support the verdict.

Error from Superior Court, Greene County; J. B. Park, Judge.

Action by the Huson Ice & Coal Company against D. B. Cunningham. Judgment for defendant, and plaintiff brings error. Affirmed.

Rogers & Knox, of Covington, for plaintiff in error. Lewis, Davison & Lewis, of Greensboro, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 415)

ALABAMA G. S. R. CO. v. DAWKINS et al. (No. 330.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. RAILROADS ¶103 — REPAIR OF CATTLE GUARD—NOTICE.

Where a railroad company builds a cattle guard on the dividing line between adjacent land of different owners, it is bound to maintain it, and Civ. Code 1910, § 2699, does not require the landowner to give the railroad company 30 days' notice to repair the same.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 315-319, 762, 763, 767, 769, 772; Dec. Dig. ¶103.]

2. RAILROADS ¶103—CATTLE GUARDS—EXTENT.

The cattle guard required by Civ. Code 1910, § 2699, is intended to protect the adjacent land from the trespass of live stock going over the railroad right of way; and the contrivance must be sufficiently extensive to embrace the entire width of the right of way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 315-319, 762, 763, 767, 769, 772; Dec. Dig. ¶103.]

3. RAILROADS ¶103 — CATTLE GUARDS — FENCES—DUTY OF LANDOWNERS.

Civ. Code 1910, § 2702, does not require landowners to extend their fences across the entire railroad right of way, in order to connect

with the cattle guard on the track of the railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315-319, 762, 763, 767, 769, 772; Dec. Dig. ¶103.]

4. VERDICT SUSTAINED.

The evidence authorized the verdict.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action between the Alabama Great Southern Railroad Company and Martha Dawkins and others. From the judgment, the Railroad Company brings error. Affirmed.

Payne & Hale, of Chattanooga, Tenn., for plaintiff in error. J. P. Jacoway and B. T. Brock, both of Trenton, Ga., for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 431)

COLLUM v. STRANGE et al. (No. 338.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶1078 — GROUNDS FOR NEW TRIAL—ABANDONMENT—BRIEF.

Grounds of a motion for new trial, not argued in the brief, will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. ¶1078.]

2. TRIAL ¶129—ARGUMENT—STATEMENTS IN REPLY.

Counsel for defendant, in an action to compel specific performance of a contract for the sale of land, in his argument said that a man would live a long life of honor, but when the first opportunity offered itself he would take advantage of it to take another's land, and that he had known the plaintiffs for a long time, since they were boys. Counsel for the plaintiffs in his argument referred to the remarks of defendant's counsel, and said: "You know the plaintiffs. Did you ever hear of them trying to steal anybody's land, or of them having a lawsuit, trying to steal anybody's land?" Counsel for defendant moved the court to rebuke the plaintiffs' counsel for this remark. The court ruled that he would not hold such to be improper, if made only in reply to the statement of defendant's counsel. Held, that a new trial is not required on account of the foregoing occurrence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 310; Dec. Dig. ¶129.]

Error from Superior Court, Schley County; Z. A. Littlejohn, Judge.

Action by E. W. Strange and others against M. E. Collum. Judgment for plaintiffs, and defendant brings error. Affirmed.

Geo. P. Munro, of Buena Vista, and J. B. Hudson and J. A. Hixon, both of Americus, for plaintiff in error. J. H. Cheney, of Ellaville, and Shipp & Sheppard, of Americus, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 446)

SIMPSON v. DU PONT POWDER CO. et al. (No. 349.)

(Supreme Court of Georgia. May 13, 1915.)

(Syllabus by the Court.)

1. NUISANCE ¶4, 5—ACTION FOR DAMAGES—PETITION—MAINTENANCE OF POWDER MAGAZINE.

The court did not err in sustaining the demurrer to the petition.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 6, 26-34; Dec. Dig. ¶4, 5.]

(Additional Syllabus by Editorial Staff.)

2. NUISANCE ¶1—"NUISANCE PER SE."

A "nuisance per se" is an act which is a nuisance at all times and under any circumstances, regardless of location or surroundings.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 1, 3; Dec. Dig. ¶1.]

For other definitions, see Words and Phrases, First and Second Series, Nuisance Per Se.]

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by G. M. Simpson against the Du Pont Powder Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Simpson brought suit against Du Pont Powder Company and Etna Powder Company for damages from the maintenance of an alleged nuisance. The substance of the petition is as follows: Plaintiff is the owner of and resides upon lot of land No. 104 in the ninth district and fourth section of Walker county. The defendants are maintaining, upon certain land adjoining and about 1,100 feet from petitioner's land, five or more magazines in which are being stored "a large quantity of dynamite, powder, nitroglycerine, and other high and dangerous explosives. Such explosives are liable to be exploded at any time, caused by improper handling, lightning, or other causes, in the event of which persons who may be residing upon the property of petitioner would be subjected to the danger incident to such explosion, which renders the property of petitioner undesirable for residence property, or other uses, greatly deteriorating the value thereof." On account of the proximity of the magazines to petitioner's land about 70 acres of land are affected as above indicated, "and the same is reasonably worth in the market \$35 per acre, and was worth said amount prior to the construction of said magazines and the storage therein of such explosives, and said land has been rendered practically worthless and has no market value with said dangerous erection and maintaining of magazines on the property as aforesaid." The defendants demurred, both generally and specially. The demurrer was sustained, and the plaintiff excepted.

W. H. Payne, of Chattanooga, Tenn., for plaintiff in error. Williams & Lancaster and Garvin & Cantrell, all of Chattanooga, Tenn., for defendants in error.

HILL, J. [1] "A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance." Civil Code 1910, § 4457. A private nuisance is one limited in its injurious effect to one or a few individuals, which may injure either the person or property or both; and in either case a right of action accrues. Sections 4454, 4456. From the section first above quoted it follows that not every hurt, inconvenience, or damage caused by one to another is a nuisance. The expression "may otherwise be lawful" shows the the act complained of, in so far as it causes "hurt, inconvenience, or damage to another," must be unlawful—that is, a violation of some right of plaintiff—to constitute a nuisance. Nuisance being an indirect tort, there is no presumption of damages from its maintenance; and the plaintiff, in order to recover in this case, must show the fact of the nuisance and consequent damages to her. The first question, therefore, for decision, is whether the storage by the powder companies of a "large quantity of dynamite, powder, nitroglycerine, and other high and dangerous explosives" is a nuisance per se.

[2] "A nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstance, regardless of location or surroundings." 29 Cyc. 1153. See Joyce, *Law of Nuisances*, § 16. "By far the larger class of nuisances is that which may be termed nuisances in fact or nuisances per accidens, and consists of those acts, occupations, or structures which are not nuisances per se, but may become nuisances by reason of the circumstances or the location and surroundings." 29 Cyc. 1154. By the act of 12 Geo. III, c. 61 (29 Stat. at Large, 166), entitled "An act to regulate the making, keeping, and carriage of gunpowder, within Great Britain, and to repeal the laws heretofore made for any of those purposes," we find the manner of keeping, the amount to be stored, the place of location of magazines, and the regulation of its transportation provided for, with penalties fixed for the violation of its provisions. And in *People v. Sands*, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296, Thompson, J., said:

"The English statute and the statute of this state, regulating the manner of keeping and carrying gunpowder, are not declaratory acts, but contain new provisions and restrictions, which afford an inference that the common law stood in need of some aid to guard against the evils apprehended from the keeping of gunpowder. 4 Bl. Com. 168."

See the opinion of Kent, C. J., in the same case. It would seem, therefore, that at common law the right to own, possess, keep, and store explosives (dynamite and nitroglycerine not being then known), like other articles of property, was established, and that the statutes enacted from time to time in recognition of its dangerous characteristics, regulating its manner of use, and providing penalties for

the violation of their provisions, were merely directory or regulative, and not declaratory or creative of new rights. Having seen that the right to deal in explosives was recognized at common law, the next question is: Is there a statute prohibiting its storage in this state? By Civil Code 1910, § 1655, it is provided:

"The several incorporated towns or cities of this state, within their corporate limits, and the ordinaries within their respective counties (out of said corporate limits) have authority to make and enforce all needful rules and regulations touching the keeping of gunpowder, so as not to endanger the lives and property of the citizens."

Sections 2745 and 2746 regulate the method of its transportation. There is no statute prohibiting its use or storage. Hence, instead of being classified with houses of ill fame and blind tigers, and outlawed, we find that the business of dealing in explosives has been expressly recognized as legal by the Legislature of this state, by thus regulating its use and storage. The business itself being legal, it only becomes a nuisance when conducted in an illegal manner, to the hurt, inconvenience, or damage of another. In the case of *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 47 N. E. 2, 37 L. R. A. 381, 62 Am. St. Rep. 532, it was said:

"A nuisance per se, as the term implies, is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway or to a navigable stream. But a business lawful in itself cannot be a nuisance per se, although, because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. Certain kinds of business or structures, as powder houses or nitroglycerine works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughterhouses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference on the part of those who, in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation."

In *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, it is said:

"The keeping or manufacturing of gunpowder or of fireworks does not necessarily constitute a nuisance per se. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used."

See *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800, 68 Am. Dec. 750; note to *Henderson v. Sullivan*, 16 L. R. A. (N. S.) 691, and cases cited (159 Fed. 46, 86 C. C. A. 236, 14 Ann. Cas. 590). In the case of *Bacon v. Walker*, 77 Ga. 336(a), involving the erection of a jail near the residence of plaintiff, this court said:

"Nothing that is lawful in its erection can be a nuisance per se."

See *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505. In the case of *Long v. City of Elberton*, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363, where suit was brought against the city by an owner of adjoining property for damages for erection of a jail, it was held that the action was not maintainable. Mr. Justice Little said:

"The simple erection of a necessary prison building cannot, without more, so injure adjacent property as to entitle the owner to have damages for such erection. No one is so hindered in the use of his property, and so restricted as to the character of buildings he shall put upon it, as to make it necessary to consult adjacent lot owners in reference to the improvements to be made. The lot being his own property, the owner may put it to such use as he sees proper, provided the buildings and improvements made by him do not infringe the legal right of his neighbor to the similar enjoyment of his own property. A log house on a fashionable street may be built alongside of a palace, and by its erection the value of the latter may be depreciated, but that depreciation is *damnum absque injuria*. The owner of the lot has as much right to erect the hut as the other has to build his palace—no more, no less: but if the hut or the palace be so used as to interfere in the lawful enjoyment of his property by the other, there the damage with a right to compensation exists."

The maintenance of magazines for the storage of explosives upon one's land, being lawful, is not a nuisance per se.

The next question is: Do the allegations of this petition show such facts as make the storing of the explosives a nuisance in fact? The demurrer admits only facts well pleaded. The only allegations that would tend to show that in this case the storage of the explosives is a nuisance as being unlawful in fact are that:

"Such explosives are liable to be exploded at any time, caused by improper handling, lightning, or other causes, in the event of which persons who may be residing upon the property of petitioner would be subjected to the danger incident to such explosion, which renders the property of petitioner undesirable for residence property, or other uses, greatly deteriorating the value thereof," and that the magazines are erected within 1,100 feet of plaintiff's land.

The foregoing amounts to nothing more than a statement of the explosive character of the substances stored, with a conjectural conclusion of the pleader that, if some one were residing upon the 70-acre area alleged to be affected by the magazines located 1,100 feet from her land, and in the zone of a probable explosion caused by "improper handling, lightning, or other causes," such an one would be subjected to danger. It is not alleged that the magazines are not properly constructed, or that the explosives are improperly stored or guarded, in violation of any rule or regulation which the ordinary of Walker county is authorized to prescribe.

It follows, therefore, that the allegations failed to make out a case of the maintenance of a nuisance which is forbidden by law; and any damage to the plaintiff's property by reason of the manner in which the defend-

ants are conducting their business is *damnum absque injuria*. The petition set forth no cause of action, and the court properly sustained the demurrer.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 451)

NUNN v. STATE. (No. 344.)

(Supreme Court of Georgia. May 12, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 463—NONEXPERT TESTIMONY—COMPETENCY.

Where an issue in a criminal case is whether bullet wounds on the back and in front of the body of the deceased were inflicted by the same or different bullets, it is not error to allow a nonexpert witness, in describing the wounds, to testify that "the shot that entered from the front and went in the back couldn't have possibly been the same shot."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1052; Dec. Dig. \S 463.]

2. CRIMINAL LAW \S 407—EVIDENCE—DECLARATION IN DEFENDANT'S PRESENCE—IMPLIED ADMISSION.

On the trial of one for murder, a declaration by his wife, on being informed by him that he had killed the deceased, that "I begged you never to do that," to which the husband made no response, is admissible in evidence as tending to show malice, under the principle that silence, when the circumstances require an answer or denial, may amount to an admission.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 898-902, 949, 968, 970, 971; Dec. Dig. \S 407.]

3. CRIMINAL LAW \S 823—INSTRUCTIONS—MALICE.

An instruction that, if the defendant unlawfully and with the intent to take the life of the decedent slew him under circumstances which excluded mitigation or justification, he would be guilty of murder will not require a new trial on the ground that such instruction excluded malice as an essential element in the crime of murder, where the court in immediate context had defined murder and malice in the language of the Code.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1992-1995, 3158; Dec. Dig. \S 823.]

4. HOMICIDE \S 309—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER—COOLING TIME.

Where the court charges the law of voluntary manslaughter, an omission to state affirmatively that the jury are the judges of "cooling time" will not require a new trial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 649, 650, 652-655; Dec. Dig. \S 309.]

5. HOMICIDE \S 309—INSTRUCTIONS—MANSLAUGHTER.

The court read to the jury the clause in Pen. Code 1910, \S 65, that in all cases of voluntary manslaughter there must be some actual assault upon the person killed, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, etc. He followed it up with an instruction that if the jury should find that "the killing was unlawful and brought about by reason of an endeavor on the part of the deceased to commit a serious personal injury

upon the person of the accused, or you find there were other equivalent circumstances sufficient to justify the excitement of passion and to exclude all idea of deliberation and malice, either express or implied, * * * you will be authorized to find the defendant guilty of voluntary manslaughter." This charge will not require a new trial under the facts of the case on the ground that the instruction omitted a reference to an "actual assault," as furnishing a basis for the reduction of an unlawful homicide from murder to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 300.]

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Joe Nunn was convicted of murder, and brings error. Affirmed.

L. J. Cowart, of Lyons, and Hines & Jordan, of Atlanta, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

EVANS, P. J. Joe Nunn was convicted of the murder of J. M. Taylor. He moved for a new trial, which was refused. The evidence for the state tended to show that a short time before the homicide the decedent and the defendant had a dispute on the public streets of Vidalia, and the former threatened to slap the defendant's face. The defendant stated to others that he intended to avenge the insult by killing the decedent whenever he caught him out of town. On the day of the homicide the defendant, who was traveling along a public road in a buggy, stopped to converse with an acquaintance, and while thus engaged in conversation the decedent passed by, traveling in a buggy. The defendant remarked to the man with whom he was conversing that he intended to kill the decedent. The defendant overtook the decedent and shot him in the back, without warning. After the first shot the decedent pleaded with him not to shoot again, but, with an oath, he fired four more shots from a pistol. The defendant's version of the tragedy, as detailed in his statement, was substantially this: When he caught up with the decedent he made an effort to pass him on the road, but the decedent would cut his buggy across the road in an effort to prevent him. He succeeded in passing, and remarked to the decedent, "By the way you are doing it looks like you intend to slap my poor old jaws again." The decedent replied, "God damn you, I want to stamp your God damned liver out," and commanded the defendant to stop. Decedent jumped out of his buggy and caught hold of the top of defendant's buggy, and started to catch hold of his knees, and the defendant commanded him to get away from the buggy. The decedent stepped back, and the defendant drove on. The decedent then jumped into the buggy and came on, cursing the defendant, and said that he was

going to prosecute the defendant for drawing a pistol on him and raising a row with him on the public road. The defendant replied that he had not raised any row, and had not drawn any pistol, but when he did, the decedent "would see the smoke of it." Whereupon the decedent used a vile epithet to the defendant and stooped down in his buggy for something, and the defendant raised up his pistol and shot.

[1] 1. A witness was allowed to testify, in describing the wounds on the body of the deceased, that "the one in the front and the one in the back could not have possibly been the same shot." Objection was made to this testimony on the ground that it was a mere conclusion or opinion of the witness. Where a nonexpert witness has observed the matter in issue, and from the nature of the circumstances he cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness' place and enable them to equally well draw the inference, it is allowable for the witness to give his inference, in connection with the facts upon which it is predicated. *Taylor v. State*, 135 Ga. 622, 70 S. E. 237.

[2] 2. One of the defendant's witnesses on cross-examination testified:

"I heard a statement made by Mr. Nunn's wife, in Mr. Nunn's presence, just after he got home that day. After Mr. Nunn said that he had killed that 'God damn Mell Taylor,' she said: 'Dear! Dear! I begged you never to do that.'"

The defendant made no response to his wife. Where a defendant is on trial for crime, and a statement is made in his presence bearing on his complicity in the crime, or involving his guilt, and he fails to make a reply, his silence may amount to an admission, if the facts and circumstances are such as to require an answer or denial. Penal Code 1910, § 1029. This testimony was relevant as tending to show that the defendant had harbored malice against the decedent and had threatened to kill him; and it was for the jury to say whether, under the circumstances attending the making of the statement, the defendant was called upon for an answer or denial. The circumstance that the statement was made by the wife does not exclude it on the ground that communications between husband and wife are privileged. *Knight v. State*, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17.

[3] 3. Several grounds of the motion complain of an instruction to the effect that if the defendant unlawfully and with the intent to take the life of the decedent slew him under circumstances which excluded mitigation or justification, he would be guilty of murder. The criticism is that such an instruction excluded malice as an essential ingredient in the crime of murder. The court defined murder and malice in the language of

the Code. It clearly appeared from these definitions that malice was an essential element of the crime of murder. The instruction of which complaint is made, in connection with the context, will not require a new trial, for the reason that the court distinctly informed the jury that they would not be authorized to convict of murder where there were circumstances of mitigation or justification. *Worley v. State*, 136 Ga. 231, 71 S. E. 153.

[4] 4. In charging on the law of voluntary manslaughter an omission to state affirmatively that the jury are the judges of "cooling time" will not require a new trial, where the instruction on voluntary manslaughter as given by the court did not undertake to limit the jury's function and province in this respect. *Worley v. State*, supra.

[5] 5. The court read to the jury the words of Penal Code, § 65, that in all cases of voluntary manslaughter there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, etc. He followed it up with an instruction that if the jury should find that—

"the killing was unlawful and brought about by reason of an endeavor on the part of the deceased to commit a serious personal injury upon the person of the accused, or you find there were other equivalent circumstances sufficient to justify the excitement of passion and to exclude all idea of deliberation and malice, either express or implied, and you find that the accused took the life of the deceased under such circumstances, not being justifiable under the law of justifiable homicide, which will be shortly given to you, then you will be authorized to find the defendant guilty of voluntary manslaughter."

It is contended that this charge excluded from the jury's consideration any assault by the decedent upon the defendant. We do not commend the excerpt which is criticized as being an accurate statement of the law. We recognize that the statute provides that an assault may be sufficient to arouse the passion so as to reduce the homicide from murder to manslaughter, but we do not think the omission to include an actual assault in the instruction complained of should require a new trial under the facts of the case. The defendant's theory, as presented by his statement and evidence, was that the decedent was stooping down as if to get a weapon from his buggy, in execution of a threat which he had just made against the defendant. Certainly, if his version was the truth of the matter, the decedent was undertaking to commit an assault as well as a serious personal injury upon him. The charge of the court could not have been understood by the jury otherwise than as having relation to the actual occurrence as being sufficient to justify the excitement of passion and to exclude

all idea of deliberation or malice, either express or implied.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(16 Ga. App. 375)

ENZOR v. HOLMES & LUCKIE. (No. 6196.)
(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR §1011, 1075—ASSIGNMENTS OF ERROR—ABANDONMENT—VERDICT—CONFLICTING EVIDENCE.

It is conceded by counsel for the plaintiff in error that the only question involved in the determination of the case sub judice is, "Was the plaintiff in error, under the facts and circumstances, a tenant of defendants in error, or was he a purchaser?" Or, in other words, "Did the relation of landlord and tenant exist, or did the relation of vendor and vendee exist between the parties?" Other grounds upon which the judgment rendered in the municipal court might be erroneous must therefore be treated as abandoned. And since there was ample evidence to authorize a finding that the actual relation between the parties was that of landlord and tenant (though the evidence upon that subject was in conflict), it cannot be said that the trial judge erred in overruling the motion for a new trial, or that the appellate division of the municipal court erred in sustaining that finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989, 4253; Dec. Dig. §1011, 1075.]

Error from Municipal Court of Atlanta.

Action between R. H. Enzor and Holmes & Luckie. From the judgment, Holmes & Luckie bring error. Affirmed.

J. V. Poole, of Atlanta, for plaintiff in error. T. A. Perry, Jr., of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(18 Ga. App. 361)

CENTRAL OF GEORGIA RY. CO. v.
DAUGHTRY. (No. 6154.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. TRIAL §171—DIRECTION OF VERDICT.

It is never error to refuse to direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 396; Dec. Dig. §171.]

2. APPEAL AND ERROR §1005 — VERDICT—EVIDENCE.

The plaintiff sued the defendant for the value of 7 cattle killed in transportation by the defendant (the value being fixed by the price at which the cattle were purchased), as well as for the difference between their cost price and the market price at the point of destination, and also for a feed bill and for the damage incident to injuries received by 51 other head of cattle, alleged to have been delivered in a damaged condition at destination. The jury, by finding a verdict in favor of the plaintiff for only the cost price of the 7 head of cattle which were killed, sustained the defendant's contention as to all the other items of damage; and, since the verdict is fully sup-

ported and is approved by the trial judge, it cannot be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3880-3876, 3948-3950; Dec. Dig. § 1005.]

Error from City Court of Macon; Robert Hodges, Judge.

Action by G. O. A. Daughtry against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jordan & Lane, of Macon, for plaintiff in error. Arthur H. Codrington and T. R. Gress, all of Macon, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 342)

GOLDIN et al. v. ADLER BROS. (No. 5828.)
(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. COURTS § 190—MUNICIPAL COURTS—DISCRETIONARY RULING—NEW TRIAL—HEARING ON MOTION.

Where in the municipal court of Atlanta, under the provisions of Acts of 1913, pp. 187, 188, § 42 (a), upon the rendition of a verdict by a jury, or upon the announcement of judgment by the court in a case tried without a jury, a party to the case or his counsel makes an oral motion for a new trial in that court, this court will not seek to control the discretion of the trial judge to whom the motion is made, as to the extent of the hearing or the amount of argument permitted to either side.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190; Appeal and Error, Cent. Dig. § 103.]

2. LANDLORD AND TENANT § 74, 80½—SUBSTITUTION OF TENANT—CONTRACT.

One tenant may replace another by virtue of an express contract of substitution, or such a contract may be created, as may any other similar contract, by a mutual course of conduct that indicates a mutual agreement to effect such a substitution, as well as by spoken or written words. *Cuesta v. Goldsmith*, 1 Ga. App. 48-55, 57 S. E. 983.

(a) There was evidence for the defendants in error from which the jury were authorized to infer (since they evidently accepted as true the evidence to this effect rather than that to the contrary) that there was an express agreement between the original parties to the lease contract that another person should be substituted as a tenant; and there were many circumstances supporting this inference, as, for instance, the known and sole occupancy, for several months thereafter, of the premises by the tenant alleged to have been substituted, the payment by him of the rent as it matured, the making of repairs to the rented building by the landlord in accordance with the views of the later occupant and to meet his requirements, the failure to call upon the original tenants for the payment of rent for many months after the apparent substitution, and the fact that they were so called upon by the landlord only after the tenant substituted in their stead had entered into bankruptcy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 221, 231; Dec. Dig. § 74, 80½.]

3. INSTRUCTIONS—LAW OF PARTNERSHIP.

There was no written request to charge the jury touching the law as to partnership, or the obligations created thereby, and the release

of any partner from such obligations, and it does not appear that any specific instructions upon this line were demanded by the pleadings and the evidence in the case.

4. DENIAL OF NEW TRIAL.

There was no error requiring the grant of a new trial.

Error from Municipal Court of Atlanta.

Action between D. Goldin and others and Adler Bros. From the judgment, the parties first mentioned bring error. Affirmed.

Samuel A. Boorstin and Jesse M. Wood, both of Atlanta, for plaintiffs in error. Hewlett, Dennis & Whitman, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 376)

BENJAMIN v. STATE. (No. 6233.)
(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW § 552—SUFFICIENCY OF EVIDENCE—PRESENCE AND FLIGHT.

The evidence did not authorize a conviction of gaming. It was not proved that the defendant was engaged in a game of cards, or that he played or bet for money, or that he had in his hands or near him either cards or money. "Evidence that the defendant was present at a game of cards, and ran, upon the approach of officers armed with pistols, is not * * * sufficient to establish the guilt of such defendant beyond a reasonable doubt, within the meaning of Pen. Code 1910, § 1010. Neither presence nor flight, nor both together, without more, is conclusive of guilt." *Griffin v. State*, 2 Ga. App. 534, 58 S. E. 781.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.]

Error from City Court of Macon; Robert Hodges, Judge.

J. G. Benjamin was convicted of gaming, and brings error. Reversed.

Walter De Fore and Chas. H. Garrett, both of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

RUSSELL, C. J. To our minds, the decision in this case is controlled absolutely by the decision in the case of *Griffin v. State*, supra. On a rainy Sunday afternoon an officer suddenly entered a barber shop, the door of which was not fastened, and went into a room in the rear of the shop, where the defendant carried on the business of cleaning and pressing clothes. There were eight men in the room, some seated upon, and some standing near or around, a large table. On the table were a deck of cards and some money. Upon the entry of the officer with a pistol in his hand, all the persons in the room undertook to run, but were arrested and charged with gaming. The officer testified that he did not see a card played or a cent of money exchanged, and only got a glimpse of the room before he entered, flourishing his pistol. Outside of this evi-

dence there was nothing whatever to connect the defendant with any game of any kind. He was not seen with a card or with any money. In behalf of the defendant, there was evidence from more than one witness that the deck of cards which were on the table were cards kept in the shop for the entertainment of customers; that no card game was played there on the Sunday afternoon in question; that those in the room had gathered there out of a rain, and were simply sitting around waiting for the rain to cease. Conceding the undoubted right of the judge to disbelieve the testimony for the defense, and conceding that the evidence authorized the conclusion that an unlawful game of cards was being played, the burden devolved upon the state to show, in addition to this, that the defendant was actually a participant, and not a mere spectator; and yet the one supposition is just as reasonable as the other. We think what was said in the case of *Griffin v. State*, supra, is peculiarly applicable to the present case, except that in that case it was shown that gambling was going on, while in the present case there was no evidence to show this, except circumstantially. While the proved facts may be consistent with the hypothesis of guilt, it certainly cannot be said that they exclude every other reasonable hypothesis. This being true, the judgment of conviction, being based solely on circumstantial evidence, was unwarranted.

Judgment reversed.

(16 Ga. App. 377)

CRIDER v. CITY SUPPLY CO. (No. 6239.)
(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. PAYMENT ¶35—"RECEIPT"—FORM.

A receipt is a written admission or acknowledgment of payment or delivery. It is not required by law to be in a particular form (citing Words and Phrases, Receipt).

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 15; Dec. Dig. ¶35.]

2. PAYMENT ¶70—EVIDENCE—ADMISSIBILITY—RECEIPT.

The fact that an acknowledgment of payment is in the form of an affidavit does not render it inadmissible when offered in evidence as a receipt.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 203, 204, 206-218; Dec. Dig. ¶70.]

Error from Superior Court, Paulding County; Price Edwards, Judge.

Action between D. C. Crider and the City Supply Company. Certiorari refused, and Crider brings error. Reversed.

C. D. McGregor, of Dallas, for plaintiff in error. C. B. McGarity, of Dallas, for defendant in error.

RUSSELL, C. J. With a single exception, none of the points which the plaintiff

in error sought to have adjudicated by certiorari are so presented as to permit them to be considered. A number of rulings which, according to the allegations of the petition for certiorari, were prima facie erroneous, were not referred to in the answer of the magistrate who tried the case. If the petitioner in certiorari had wished these points to be considered by the judge of the superior court, timely exceptions to the answer of the magistrate should have been filed as to each of the assignments of error in the petition as to which the answer was silent. If the magistrate's reply to these exceptions had sustained the allegations of the petition as to the errors alleged, the judge of the superior court would have been in position to rule upon the points presented; and if the magistrate's answer to the exceptions denied the truth of the statements of the petition, the petitioner would have had his right of traverse. The plaintiff in certiorari cannot complain of error on the part of the judge of the superior court in overruling the grounds of error alleged in the petition for certiorari as to which the answer of the magistrate is silent, for it is his duty to see that the justice makes a full and correct answer, and if he fails to do so, the petition for certiorari should be dismissed or the writ of certiorari overruled. *High Co. v. Ga. Ry. & Power Co.*, 12 Ga. App. 505-506, 77 S. E. 588.

[1] There is one assignment of error in the petition for certiorari which is verified by the answer of the magistrate, and we think the judge of the superior court erred in overruling this ground of the certiorari, and that the error complained of is of such materiality as to have required that a new trial be granted by an order sustaining the certiorari. As appears from the answer of the magistrate:

"A certain paper was offered as a receipt by the defendant. Said paper read as follows:

"Georgia, Carroll Co.

"Personally appeared before me V. B. Hesterly, who, being duly sworn, says he sold D. C. Crider groceries for the City Supply Co., of Carrollton, Ga. Deponent further swears that D. C. Crider paid deponent for said Supply Co. This May 6, 1913.

"[Signed] V. B. Hesterley.

"Sworn to and subscribed before me this May 7, 1913.

"[Signed] W. M. Talley, J. P."

"The court ruled out above paper, as it was not in the form of a receipt, and had been before the court before as an affidavit, and not as a receipt."

"A receipt is an acknowledgment of the fact of payment or other settlement between debtor and creditor." *Dobbin v. Perry*, 1 Rich. (S. C.) 32, 33. A receipt is not a contract; it is a mere admission in writing. *Ryan v. Ward*, 48 N. Y. 204, 208, 8 Am. Rep. 539; *Sargeant v. National Life Ins. Co.*, 159 Pa. 341, 41 Atl. 351. Under our Code, a receipt is only prima facie evidence of payment, and is subject to explanation. Civil Code, § 5795. "In 1 Greenleaf, Ev. § 305, it is said

that receipts may be either mere acknowledgments of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony. But, in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol. *Thompson v. Williams*, 30 Kan. 114, 1 Pac. 47, 48; *Cass v. Brown*, 68 N. H. 85, 44 Atl. 86." 7 Words and Phrases, 5989.

The paper offered in the present case did not contain any semblance of a contract, and was in effect a mere acknowledgment on the part of the signer that the defendant had paid him, for the plaintiff, for the goods purchased by the defendant. The statement therein that the payment was made for the plaintiff amounts to no more than that the signer assumed to sign as agent for the plaintiff; and the proof of agency would have to be established by other evidence in the case. To our minds, the scope and effect of the paper is not different from what it would have been if the language employed had been:

"May 6, 1913. Received of D. C. Orider payment in full for groceries sold him by me for the City Supply Company. [Signed] V. B. Hesterley, Agent City Supply Company."

The paper in question being merely a written acknowledgment of the receipt of money, not containing an affirmative obligation upon either party to it—a mere admission in writing of a fact of payment—and there being evidence in the record which would have authorized an inference that the person whose name was signed to it was an agent of the plaintiff, it should have been admitted, to be considered by the jury in connection with the evidence of agency. If the jury found that Hesterley was an agent authorized to collect for the City Supply Company, and believed the paper containing admission to be genuine, they might have been authorized to find in favor of the defendant's plea that the account in suit had been fully paid. In a case in which the controlling issue for the determination of the jury is whether the account which is the basis of the suit has or has not been paid, and where the evidence upon this subject is in conflict, it is error to exclude a written acknowledgment of payment of the account by the defendant purporting to have been signed by one whom some of the testimony showed to have been an authorized agent of the plaintiff, merely because the written acknowledgment of payment is in the form of an affidavit, and notwithstanding the paper might previously have been offered as an affidavit and rejected.

The paper was offered as a receipt, and,

though verification by oath is not essential to the validity of a receipt, it does not necessarily invalidate a paper which, without such verification, could properly be construed as an acknowledgment of payment, and therefore included within the definition of a receipt. While the fact that a receipt is sworn to does not add to the weight of the acknowledgment of payment, verification of the admission does not affect its classification as mere prima facie evidence, subject to be varied or explained by parol.

Judgment reversed.

(16 Ga. App. 341)

HANDY v. STATE. (No. 5809.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. INSTRUCTIONS.

The instructions given the jury are not subject to exception upon the ground that they did not set forth the contentions or defense of the defendant, or because they were not adjusted to the facts, and did not apply either the law to the facts or the facts to the law. A written request, made at the proper time, might have required fuller instructions, but, in the absence of such request, the charge was sufficiently full, and was fair and adjusted to the issues and evidence.

2. CRIMINAL LAW — § 668, 1153—APPEAL — DISCRETIONARY RULING — PERMISSION TO MAKE ADDITIONAL STATEMENT.

The law of Georgia does not entitle a defendant in a criminal case to make more than one statement at his trial, as a matter of right. Permission to make an additional statement is a matter addressed to the discretion of the trial judge, and, unless there is a manifest abuse of this discretionary power, this court will not interfere therewith. There was no such abuse in the present case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1584-1590, 3061-3066; Dec. Dig. § 668, 1153.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence supports the verdict, and we find no error in the judgment refusing a new trial.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

John Handy was convicted of crime, and brings error. Affirmed.

Shelby Myrick, of Savannah, for plaintiff in error. W. C. Hartridge, Sol. Gen., of Savannah, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 355)

BENTLEY v. CITY OF ATLANTA.

(No. 6227.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS — § 223 — UNLAWFULLY KEEPING AND CARRYING—VIOLATION OF ORDINANCE—PROOF OF PURPOSE.

In prosecutions for violations of municipal ordinances, which prohibit the keeping on hand of intoxicating liquors for unlawful sale, or

which forbid any person to carry intoxicating liquors on his person or about the streets for the purpose of sale, the purpose for which the liquor is kept or carried is the chief ingredient—an element so essential that a conviction is not supported unless it be established beyond a reasonable doubt that the keeping, or the carrying, as the case may be, was for the purpose of illegal sale. Pen. Code 1910, § 1010; *Chester v. City of Atlanta*, 7 Ga. App. 597, 67 S. E. 688; *Daniel v. City of Atlanta*, 7 Ga. App. 598, 67 S. E. 683; *Williams v. State*, 13 Ga. App. 685, 79 S. E. 763.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 263-274; Dec. Dig. 223.]

2. INTOXICATING LIQUORS 236 — CONVICTION—SUFFICIENCY OF EVIDENCE.

If the evidence be construed most strongly against the accused, a bare suspicion of his guilt may be created, but suspicion is not evidence, and a conviction based on suspicion alone is not authorized by law. The judge of the superior court erred in overruling the petition for certiorari.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. 236.]

Broyles, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

W. F. Bentley was convicted of violating a municipal ordinance of the City of Atlanta, and, a petition for certiorari being overruled, he brings error. Reversed.

Munday & Cornwell, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., dissents.

(16 Ga. App. 381)

MATHIS v. STATE. (No. 6380.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW 829 — REFUSAL OF INSTRUCTIONS COVERED—INSANITY.

The charge of the court touching the defense of insanity was, under the evidence, sufficiently clear and full, and there was no error in refusing to give in charge the lengthy and somewhat argumentative request preferred by counsel for the accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. 829.]

2. CRIMINAL LAW 517 — EVIDENCE — CONFESSION.

The court did not err in admitting the testimony setting up a confession alleged to have been made by the accused, since it appeared to have been freely and voluntarily made, and not to have been induced by the slightest hope of reward or fear of punishment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1146-1156; Dec. Dig. 517.]

3. CRIMINAL LAW 786 — INSTRUCTIONS — STATEMENT OF ACCUSED.

The court sufficiently instructed the jury as to the legal effect and value of the defendant's statement to the court and jury, and clearly advised them that they might "believe it in

preference to the sworn testimony," or might "disregard it entirely," or "take it in consideration along with the testimony in the case; that is a question left entirely with the jury, to say what credit to give the statement."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1787, 1895-1901, 1900, 1984; Dec. Dig. 786.]

4. CRIMINAL LAW 1172—HARMLESS ERROR—INSTRUCTIONS.

There is no merit in the exception that the court erred in charging the jury that they might find the defendant guilty, if they believed from the evidence that he committed the crime charged against him in the accusation on the day therein alleged, "or within two years prior to the date of filing" the said accusation, notwithstanding that the accusation was filed on November 16, 1914, and the affidavit upon which the accusation was based was dated October 17, 1914, and alleged the commission of the crime on October 16, 1914, since all the proof showed that the wire fencing alleged to have been stolen was actually taken and carried away on the 16th of October, 1914, and not at any date subsequent to the making of the affidavit, and between the time when the affidavit was made and the accusation based thereon was filed in the court. No possible harm could have resulted to the defendant by this instruction, since under the undisputed facts in the case the error was harmless. In *Shealey v. State*, 16 Ga. App. —, 84 S. E. 839, it was held that one may not be convicted of a crime shown by the testimony to have been committed after the making of the affidavit on which the accusation was based. Here the evidence showed the commission of the crime prior to the date of the affidavit, and there was nothing to indicate the possibility that the crime was committed after the making of the affidavit.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. 1172.]

5. CRIMINAL LAW 1059—APPEAL—EXCEPTION TO INSTRUCTION—SUFFICIENCY.

The exception to the charge of the court on the question of sanity, that "it is confusing and hard to comprehend by a jury because of the redundancy of the language," appears to us to be without merit, and the further exception, that the charge on this subject "is not a full legal charge upon the question of sanity," cannot be considered by this court, since the exception does not attempt to indicate wherein the charge complained of is defective, or to suggest the particular language or instruction necessary to make it "a full legal charge upon the question," which was omitted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2671; Dec. Dig. 1059.]

6. CRIMINAL LAW 1159—APPEAL—VERDICT—EVIDENCE.

The evidence authorized the verdict, and since the jury are the sole judges of all questions of fact, where there is evidence to sustain their finding, it must be allowed to stand.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. 1159.]

Error from City Court of Nashville; C. A. Christian, Judge.

John Mathis was convicted of crime, and brings error. Affirmed.

Lovett & Story, of Nashville, for plaintiff in error. J. H. Gary, Sol., of Nashville, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 369)

REAGAN v. STATE. (No. 6169.)

(Court of Appeals of Georgia. May 17, 1915.)

*(Syllabus by the Court.)***WEAPONS §9 — "PLACE OF BUSINESS" — LANDLORD AND TENANT.**

Premises rented by a landlord to a tenant are, during the continuance of the lease contract, legally within the control and possession of the tenant, and are not to be considered the "place of business" of the landlord, so as to come within the exception named in the act of 1910 (Acts 1910, p. 134), which prohibits a person from having a pistol in his manual possession "outside of his own home or place of business."

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 8; Dec. Dig. §9.

For other definitions, see Words and Phrases, First and Second Series, Place of Business.]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Henry Reagan was convicted of being unlawfully in the possession of a pistol, and brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error. B. T. Castellow, Sol. Gen., of Outhbert, and R. R. Arnold, of Atlanta, for the State.

RUSSELL, C. J. 1. As aptly put by counsel for the plaintiff in error, the only point insisted upon in this case is that it is not unlawful for a landlord to have in his manual possession a pistol, without having taken out a license therefor, on the land or in a house rented to and occupied by his tenant. The defendant subleased or subrented to one Emory Colson a house and a part of certain land under an inclosure, which the defendant had previously rented or leased from other parties. The tenant was living in the house and was cultivating the portion of the land rented to him. The remainder of the land in the same field was being cultivated by the defendant. The defendant made no statement at the trial, and it is undisputed in the evidence that he did have a pistol in his manual possession in the house above referred to, which the tenant at the time occupied as a residence. It was contended that this was not a violation of the law, and that the premises above described were a part of the defendant's "place of business."

It has been uniformly held in Georgia that during the continuance of a lease the sole right to the possession, use, and enjoyment of the leased premises is vested in the tenant. This court has given to the act under which the defendant was convicted (Acts 1910, p. 134) a very liberal construction, but a case exactly similar in facts to this has never before been before the court. To hold that under the facts here presented a conviction could not be legally had would to our minds be giving the law an unreasonable construction. The cases relied upon by counsel are totally different in their facts from the present. In the case of Coker v. State,

12 Ga. App. 425, 76 S. E. 103, 991, the defendant had a pistol on a farm of which he was "in charge as an overseer." It was his place of business. In Miller v. State, 12 Ga. App. 479, 77 S. E. 653, the defendant had a pistol on a farm on which he was "employed as a farm laborer," his place of business. In Franklin v. State, 12 Ga. App. 483, 77 S. E. 653, the defendant was on a farm where "he lived and worked, and which he owned in common with others," his home and place of business.

The leased premises described in the present case certainly cannot be said to be the defendant's home or his place of business. He had no possession, nor did he have a right of possession (at that time) to the premises occupied by his tenant; nor had he any right to the use and enjoyment thereof so long as the tenancy existed. The tenant had the right of exclusive use and possession, it was both his home and his place of business, and the defendant had no right to enter to carry a pistol there during the life of the tenancy. It was a violation of the law. If there had been made to appear that there was some special contract whereby the defendant reserved the right and privilege of superintending, or controlling, or overseeing the premises, a different question would be presented. Judgment affirmed.

(16 Ga. App. 380)

NEWELL v. STATE. (No. 6256.)

(Court of Appeals of Georgia. May 17, 1915.)

*(Syllabus by the Court.)***LARCENY §9, 55 — SUFFICIENCY OF EVIDENCE — OWNERSHIP OF PROPERTY — RIGHT OF POSSESSION.**

The evidence did not authorize a conviction of larceny. Ordinarily one cannot be legally convicted of the larceny of property, the title to which and the right of possession were in himself at the time of the alleged larceny, even though he may have previously parted with actual possession of the property.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 201½, 152, 164, 165, 167-169; Dec. Dig. §9, 55.]

Error from City Court of Newnan; W. A. Post, Judge.

Laman Newell was convicted of larceny, and brings error. Reversed.

T. G. Farmer, Jr., of Newnan, for plaintiff in error. W. L. Stallings, of Newnan, for the State.

RUSSELL, C. J. The defendant was hired by the prosecutor as a laborer on his farm. Before contracting to do the work the defendant had purchased from a firm of merchants a suit of clothes upon which he owed a balance of \$11 or \$13. The prosecutor paid the balance due on the clothes for the defendant. The defendant worked one month at 75 cents per day, was paid \$5, ordered to bring the clothes to the prosecutor, and was

giving a cursing and told to leave the place at once. The clothes were left by the prosecutor at the house of another of his employes. Later the defendant returned and got his clothes. Upon seeing the defendant wearing the clothes, the prosecutor had him arrested and prosecuted for larceny.

The defendant said that he got them with the prosecutor's consent. The prosecutor denied this. It matters not whether he got them with or without the consent of the prosecutor. The defendant had bought the clothes and had them in his possession. The fact that the prosecutor paid a balance due on the purchase money did not per se transfer to him any title; nor did the fact that the defendant, upon being ordered to do so, either willingly or unwillingly left his clothes with the prosecutor, pass the title out of himself. It is not contended that the defendant sold the clothes to the prosecutor. Unless he did sell them, or make some contract whereby he passed the title or the right of possession out of himself, he cannot be convicted of larceny of the clothes. This case is very similar to the case of *Love v. State*, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234. The court erred in overruling the motion for a new trial.

Judgment reversed.

(16 Ga. App. 351)

SNEED v. STATE. (No. 5929.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION ⚡59 — LARCENY ⚡28 — SUFFICIENCY — CATTLE STEALING.

The Code section which denominates cattle-stealing as "simple larceny," and directs that it shall "be so charged in the indictment" (Pen. Code 1910, § 156), is complied with by an indictment for cattle stealing which charges the offense of simple larceny in the terms and language of the Code, though in that part of the indictment which precedes the allegations thus describing the offense it is entitled simply as "larceny" (Pen. Code 1910, § 954). "The true character of a criminal accusation is not fixed by the denomination given it by the pleader, but by its allegations." *McKissick v. State*, 11 Ga. App. 721, 76 S. E. 71; *Camp v. State*, 3 Ga. 419; *O'Halloran v. State*, 31 Ga. 206, 208; *Disharoon v. State*, 95 Ga. 351 (1), 356, 22 S. E. 693. The designation "larceny," construed with the subsequent allegations in the indictment which are amply descriptive of the offense of simple larceny, means simple larceny, and cannot be understood as denominating any other offense. In view of the variance in the Code definitions of different species of larceny, descriptive averments which are sufficient to accurately define any particular species of larceny necessarily differentiate it from any other species of that offense.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 180, 181; Dec. Dig. ⚡59; *Larceny*, Cent. Dig. §§ 58, 59, 62, 99, 101; Dec. Dig. ⚡28.]

2. CRIMINAL LAW ⚡534, 535—CONFESSION—CORROBORATION—PROOF.

Proof of the corpus delicti may afford sufficient corroboration of a plenary confession to

warrant a conviction for crime. However, a confession alleged to have been made by the accused that he took the cow which was alleged to have been stolen and sold her to a named person is not corroborated by proof that the cow was found in the possession of another and entirely different person from him to whom the accused confessed he had sold it, nor by uncontradicted testimony of the person in possession of the cow that he did not buy her from the person to whom the defendant confessed he sold and delivered the cow, and that he himself raised the cow; nor is the confession corroborated by the positive and unconditional testimony of the person who, according to the alleged confession, bought the cow from the accused, to the effect that he never bought the cow or ever at any time had it in his possession; nor was the proof as to the tracks of the defendant sufficient to corroborate the confession. It was not shown that the tracks led in the direction of the home or pasture of the person to whom, according to the alleged confession, the cow was sold. The tracks were found several miles from the place where the cow was discovered, and the proof of the tracks is of itself too inconclusive to afford corroboration. It follows that the conviction of the accused, which necessarily depends solely upon the confession, is therefore contrary to law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1202-1205, 1222-1226; Dec. Dig. ⚡534, 535.]

Error from Superior Court, Upson County; R. T. Daniel, Judge.

Nora Sneed was convicted of larceny, and brings error. Reversed.

J. Y. Allen, of Thomaston, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, and W. Y. Allen, of Thomaston, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 382)

COLLIER v. BLAKE. (No. 5784.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES ⚡283 — FORECLOSURE—EXECUTION—"FINAL PROCESS."

Unless an execution issued upon the foreclosure of a chattel mortgage be arrested by a counter affidavit, it is final process. *Ford v. Fargason*, 120 Ga. 606, 48 S. E. 180; *Bank of Forsyth v. Gammage*, 109 Ga. 222, 34 S. E. 307, and cases cited. No counter affidavit filed in this case.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 569, 572; Dec. Dig. ⚡283.

For other definitions, see *Words and Phrases*, *Final Process*.]

2. CHATTEL MORTGAGES ⚡284 — CLAIM — RIGHT TO AMEND.

When an execution is levied upon mortgaged property, and a claim is interposed thereto, the claimant cannot, upon the trial of the claim, amend the same by alleging that the mortgagor is not indebted to the mortgagee, nor will he be allowed to introduce testimony tending to show it. *Ford v. Fargason*, supra; *Wash v. Bank*, 99 Ga. 592, 27 S. E. 167. Consequently the court did not err in overruling the amendment offered.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 573; Dec. Dig. ⚡284.]

3. DOCTRINE OF SUBROGATION.

Under the facts in this case the doctrine of subrogation is not applicable.

4. EVIDENCE ⇨271—FORECLOSURE—EXECUTION—TRIAL OF CLAIM—DECLARATIONS OF MORTGAGOR.

The declarations of the mortgagor that he has paid the mortgage are inadmissible as evidence on the trial of a claim for the mortgaged property. *Shaw v. McDonald*, 21 Ga. 395 (3).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. ⇨271.]

5. EXECUTION ⇨195—CLAIM CASE—DISMISSAL OF LEVY—TENDER OF ISSUE.

The rule of court, requiring the plaintiff in a claim case to tender an issue within five minutes after the case is called was repealed by the judges of the superior courts in convention assembled, December 19, 1911. Accordingly there is no merit in the complaint that the court erred in overruling the claimant's motion to dismiss the levy because no issue had been tendered within five minutes after the call of the case.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 575; Dec. Dig. ⇨195.]

6. IRRELEVANT EVIDENCE.

The court did not err in excluding the testimony offered by the plaintiff, set out in the sixth ground of the amended motion for a new trial. This evidence was clearly irrelevant and immaterial.

7. DIRECTION OF VERDICT.

The evidence demanded a finding that the property was subject to the levy, and the court did not err in so directing the verdict, or in overruling the motion for a new trial.

Error from City Court of Zebulon; E. F. Dupree, Judge.

Action between J. O. Collier and A. S. Blake. From the judgment, Collier brings error. Affirmed.

E. C. Armistead, of Barnesville, for plaintiff in error. Wm. H. Beck, of Griffin, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 353)

ATKINSON et al. v. YARBOROUGH.
(No. 5946.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇨1001—VERDICT—EVIDENCE.

When this case was formerly before this court upon the question of the correctness of a judgment overruling a general demurrer to the plaintiff's petition (13 Ga. App. 781, 80 S. E. 29), the court said: "The question of comparative negligence raised by the pleadings presents issues of fact which can properly be determined only by a jury." The plaintiff offered testimony to sustain all the material allegations of her petition, and, the jury having returned a verdict in her favor, this court cannot interfere therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ⇨1001.]

Error from City Court of Fitzgerald; D. E. Griffin, Judge.

Action between H. M. Atkinson and others,

receivers, and Caroline Yarborough. From the judgment, the parties first mentioned bring error. Affirmed.

Bolling Whitfield, of Brunswick, and Elkins, Wall & Koplin, of Fitzgerald, for plaintiffs in error. Haygood & Cutts, McDonald & Grantham, and U. J. Bennett, all of Fitzgerald, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 349)

PERUVIAN GUANO CORPORATION v. MCGHEE COTTON CO. (No. 5877.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

TRIAL ⇨139—NONSUIT—EVIDENCE.

Under the pleadings and the evidence in this case, a verdict for the full amount sued for was strongly authorized (if not demanded), and the court erred in granting a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

Error from City Court of Floyd; J. H. Reece, Judge.

Action by the Peruvian Guano Corporation against the McGhee Cotton Company. Judgment of nonsuit, and plaintiff brings error. Reversed.

Lipscomb & Willingham and Nathan Harris, all of Rome, for plaintiff in error. M. B. Eubanks, of Rome, for defendant in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 342)

HARRIS v. GAY. (No. 5811.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. TRIAL ⇨203—INSTRUCTIONS—CONTENTION OF PARTIES—REVERSAL.

The contentions of both parties to a suit should, in the court's charge, be presented with equal fullness. *Seaboard Air Line Ry. v. Sikes*, 4 Ga. App. 7(6), 12, 60 S. E. 868. Where A. buys a horse from B., and gives his promissory notes for the purchase money, and afterwards complains to B. that the horse is unsound, and B. gives a credit of \$50 to A., and upon the trial the contention of B. is that this amount was to be credited on A.'s notes, as completely covering the defects of the horse, and the contention of A. is that the amount was not to be credited on his notes as entirely covering the defects of the horse, but that it was given only for the loss of the services of the horse up to the time the credit was given, this contention of A., as well as the contention of B., should be charged by the court. In this case the court failed to state the contention of the defendant to the jury as outlined above, and the case must therefore be reversed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. ⇨203.]

2. ASSIGNMENTS OF ERROR.

The other assignments of error are without merit.

Error from City Court of Ft. Gaines; B. M. Turnipseed, Judge.

Action between J. A. Harris and J. M. Gay. From the judgment, Harris brings error. Reversed.

Rambo & Wright, of Blakely, for plaintiff in error. P. C. King, of Ft. Gaines, and Smith & Miller, of Edison, for defendant in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 345)

JONES v. BLACKWELDER. (No. 5370.)
(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS § 21 — **LANDLORD'S LIEN—ENFORCEMENT—DISTRESS WARRANT.**

The provision embodied in subsection 2, § 3366, Civil Code 1910, that the liens on personal property therein referred to "must be prosecuted within one year after the debt becomes due," does not apply to the prosecution and enforcement by distress warrant of a special or general claim or demand by a landlord for rent. Only the general statutes of limitation apply as to the enforcement of such demands.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90-99; Dec. Dig. § 21.]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by C. W. Jones against D. F. Blackwelder. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 85 S. E. 122.

Maddox & Doyal, of Rome, for plaintiff in error. M. B. Eubanks, of Rome, for defendant in error.

WADE, J. On January 17, 1913, C. W. Jones made an affidavit before a justice of the peace that D. F. Blackwelder was justly indebted to him in the sum \$201.84—

"for rent of what was formerly known as the Van Dyke farm, now owned by C. W. Jones and being in the Vans Valley district of Floyd county, Ga., for the year 1911."

Upon this affidavit a distress warrant was issued on the same day against the defendant's property, "both real and personal," which was levied on January 25, 1913, upon 650 bales of hay, more or less, as the property of the defendant. Counter affidavit and bond were filed by the defendant, and the case was returned to the city court of Floyd county, and at the June term, 1914, upon motion by counsel for the defendant, the presiding judge dismissed the distress warrant—

"On the ground that the same was an effort to foreclose a lien on personal property; that all such liens were required to be prosecuted within one year after the debt became due, that said distress warrant shows that the same is for rent for the year 1911, while the same was issued on January 17, 1913, more than one year after the debt became due."

To this ruling and order dismissing the distress warrant, the plaintiff in error excepted.

Section 3340 of the Civil Code provides that:

"Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes, to which they shall be inferior, and shall also have a general lien on the property of the debtor, liable to levy and sale, and such general lien shall date from the time of the levy of a distress warrant to enforce the same."

Section 3342 provides that:

"Landlord's special liens for rent shall be enforced by distress warrant in the same manner as the general liens for rent are enforced, and no further allegations in the affidavit to procure a distress warrant to enforce a special lien for rent shall be necessary than is necessary to enforce the landlord's general lien for rent."

So, under our statutes, a special lien exists for rent on the crops made on the rented land, and a general lien on any property of the debtor liable to levy and sale, and both liens "shall be enforced by distress warrant." It has been repeatedly ruled, in effect, as in *Almand v. Scott & Co.*, 83 Ga. 402 (1), 11 S. E. 653, that:

"Rent, whether resting on general or special lien, may be collected by distress warrant. Code, § 1977 (Civil Code 1910, § 3342). And whatever the process may be called, when it is such warrant in substance, it is such in fact and law."

Section 5390 of the Civil Code declares that "any person who may have rent due" may obtain a distress warrant for the sum claimed to be due, which may be levied "on any property" belonging to the debtor, "whether found on the premises or elsewhere." The Code, § 3348, also provides for a lien in behalf of landlords furnishing supplies, etc., to make crops, and explicitly declares that such a lien shall only attach as liens to the crops of the year in which the advances are made. Section 3366 declares how "liens on personal property, not mortgages, when not otherwise provided, shall be foreclosed," and among the requisites of foreclosure named are the following: (1) There must be a demand and a refusal to pay, and such demand and refusal must be averred, except under certain conditions mentioned. (2) The lien must be prosecuted within one year after the debt becomes due. (4) An execution shall issue instantan against the person owing the debt, "and also against the property on which the lien is claimed, or which is subject to said lien."

It has been distinctly held by the Supreme Court that a landlord's lien for supplies must be foreclosed under section 3366, and cannot be foreclosed by a distress warrant. *Mackenzie v. Flannery & Co.*, 90 Ga. 590 (3), 16 S. E. 710; *Ware v. Blalock*, 72 Ga. 804-806. In fact section 1978 of the Code of 1882, section 2800 of the Civil Code of 1895, and section 3348 of the Civil Code of 1910, all explicitly declare that the liens arising in favor of landlords for supplies furnished to make crops shall be foreclosed in the mar-

ner provided by section 1991 of the Code of 1882, section 2816 of the Civil Code of 1895, or section 3366 of the Code of 1910. But nowhere is there any explicit provision in our statutes, nor has there been any ruling to that effect by the Supreme Court or this court, that a distress warrant issuing in behalf of the landlord for rent, whether issued to enforce the landlord's special or general lien therefor, must be foreclosed in accordance with the provisions of section 3366. To the contrary, it has been distinctly held in *Berry v. Powell*, 77 Ga. 79(1), and in *Colclough & Co. v. Mathis*, 79 Ga. 394, 4 S. E. 762, that liens for rent shall be enforced by distress warrant, and not under the section now embodied in the Civil Code of 1910, as section 3366, as provided for other liens. In *Berry v. Powell*, supra, the Supreme Court said:

"The affidavit in this case is full, and contains all the allegations necessary to authorize a distress warrant for rent, and also to show that the landlords had a special lien on the crops made on the land rented by them to the tenants, and a general lien on the property of the debtors; and such lien may be enforced by distress warrant for rent under section 1977 of the Code, and not under section 1991, as provided for other liens. (a) Semble that, when the affidavit of the landlord is sufficiently full, his general and special lien may be enforced by distress warrant for rent under section 1977 of the Code."

Section 1991, referred to therein, is section 3366 of the Civil Code of 1910. "The special liens of landlords on the crops made on land rented from them are to be enforced by distress warrants, and not in the manner provided in section 1991 of the Civil Code for the enforcement of liens on personalty." *Colclough & Co. v. Mathis*, supra. It might be concluded, from the holdings of the Supreme Court last referred to, that the provisions of section 3366, declaring how liens on personal property, not mortgages, when not otherwise provided, *shall be foreclosed*, and what requisites must exist before such liens may be enforced legally, were not intended to apply to distress warrants. To further confirm this view, it is only necessary to advert to several essentials to the enforcement of the liens referred to and covered by section 3366, which are not requisite to the proper enforcement of a landlord's special or general lien for rent by distress warrant. To enforce a lien on personalty under section 3366, it is necessary to make a demand, and such a demand and a refusal must be averred. "The affidavit to obtain a distress warrant for rent, whether on a general or special lien, need not allege demand. *Colclough v. Mathis*, supra. Demand unnecessary now by express statute. Acts of 1887, p. 34." *Almand v. Scott & Co.*, 83 Ga. 402, 11 S. E. 653, "When rent is due and unpaid, the landlord is entitled to a distress warrant against the tenant without having previously made a demand upon the latter for the payment of the rent." *Henley v. Brockman*, 124 Ga. 1059 (3), 53 S. E. 672.

Paragraph 4 of section 3366 provides also that where the proper affidavit has been filed with the clerk of the superior court, it shall be the duty of such clerk to issue an execution instantan against the person owing the debt, and also "against the property on which the lien is claimed or which is subject to said lien," which execution shall be levied "on such property subject to said lien," etc.

A distress warrant, even for the enforcement of the landlord's special lien, need not describe the precise nature of the crops against which the landlord seeks to enforce the same; and where it is sought to foreclose only a general lien for rent, it is not essential that the affidavit or the execution should describe or identify in any way the property of the defendant to be levied upon, but the execution proceeds against "any property belonging to said debtor," and the landlord has a general lien against all property of every kind and character belonging to the tenant.

These specific differences to which we have called attention, when taken in connection with the positive rulings of the Supreme Court that landlord's liens for rent, whether special or general, are not to be foreclosed under the provisions of section 3366, applying to the foreclosure of liens on personalty as therein provided, make it clear to our minds that the limitation provided in section 3366 that the liens on personalty therein referred to must be prosecuted within one year after the debt becomes due does not relate to or include distress warrants, and does not therefore limit the time within which a landlord may foreclose his lien for rent against a tenant. While it is true that statutes creating liens in derogation of the common law must usually be construed with strictness, it is also true that statutes of limitation, prescribing a time within which a right must be exercised or a privilege enjoyed, may not generally be extended to include more than is warranted by their precise terms.

Not only does section 5890 of the Civil Code of 1910 provide that "any person who may have rent due" may have a distress warrant issued in his behalf against his tenant, but in many decisions of the Supreme Court and of this court it has been apparently recognized that this right exists in behalf of any person *having rent due*. See *Scruggs v. Gibson*, 40 Ga. 511-519, 520; *Davis v. De Vaughn*, 7 Ga. App. 324, 325, 66 S. E. 956, and many other decisions.

The precise point whether one must prosecute his lien for rent by issuing a distress warrant therefor within one year after the debt becomes due does not appear to have been passed upon by the Supreme Court or by this court, so far as our diligence has been able to discover. In the case of *McCray v. Samuel*, 65 Ga. 740, cited by counsel in this case, it was held that the court below erred in dismissing two distress warrants issued at the same time for consecutive years, which, it appears from the record, were

each issued more than a year after the rent had become due. The court held that:

"Where a landlord has two demands for rent, due for consecutive years, the amounts being liquidated, he is not compelled to unite the demands in one distress warrant, although he has the option to do so."

While the holding of the Supreme Court that these warrants should not have been dismissed may seem inferentially to recognize the right to issue a distress warrant more than a year after the rent became due, it does not appear from the record that any question as to that right was specifically raised in that case.

We hold that a landlord may foreclose a lien for rent at any time within the period fixed by the general statutes of limitation, without regard to the special provision in section 3366 that the liens therein referred to must be prosecuted within one year from the time when the debt becomes due. The trial judge, therefore, erred in sustaining the motion to dismiss the distress warrant in this case.

Judgment reversed.

(16 Ga. App. 355)

LONG v. CLARK. (No. 6033.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT \S 246, 265, 269, 270—DISTRESS WARRANT—RIGHT TO REMEDY—CROPS—SUBTENANT—"FINAL PROCESS."

A distress warrant is final process, unless arrested by the interposition of a counter affidavit (Withers v. Hopkins Place Savings Bank, 104 Ga. 89-100, 30 S. E. 766), and "a crop produced on any part of the rented premises is liable for the whole rent of the entire premises, and whether produced by the tenant or his subtenant, unless the landlord assented to the subletting or ratified it whilst owner of the rent contract, or the transferee of the contract did so after acquiring his title." Andrew v. Stewart Bros., 81 Ga. 53 (3), 7 S. E. 169.

(a) Nothing can be recovered in a distress warrant proceeding unless the relation of landlord and tenant exist (Bonds v. Brown, 133 Ga. 451, 66 S. E. 156), though "a landlord, in the absence of any contract to the contrary, may adopt a tenant of his tenant as his own, and distrain the crop of the subtenant to enforce the collection of rent primarily due him by his tenant." Nash v. Orr, 9 Ga. App. 33 (1), 70 S. E. 194.

(b) Where the owner of land rented it to one who afterwards moved away from the premises, and another person took possession of the land and raised a crop on it, and the landowner sued out a distress warrant against the former tenant, which was levied on the crop as the property of the defendant, and a claim to the property was interposed by the person in possession, the fact that no counter affidavit was filed by the defendant was not such an estoppel as would render him incompetent to testify, as a witness for the claimant, that he himself did not rent the premises from the plaintiff for the year in which the crop in question was raised, did not make any crop thereon or exercise any rights as a tenant during the year, and did not sublet or subrent the place to the claimant or to any one else for that year.

(c) There being evidence from which the jury

was authorized to infer that there were no contractual relations between the person who was in possession of the premises and who raised the crop thereon and the alleged tenant, a verdict sustaining a claim to the crops levied upon under and by virtue of a distress warrant against the alleged tenant was not contrary to law; for if the crop levied upon was not raised by the defendant named in the distress warrant, or by any person or persons renting from or holding under him, or acting under and by virtue of his authority, such crops could not be subjected to a distress warrant against him.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 991-1002, 1062-1074, 1083-1123, 1125, 1126, 1128-1139, 1146, 1148; Dec. Dig. \S 246, 265, 269, 270.

For other definitions, see Words and Phrases, Final Process.]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The several assignments of error on the admission of testimony and on the charge of the court do not require the grant of a new trial. The jury passed upon the substantial issues of fact, and no sufficient reason appears why their finding should be set aside.

Error from City Court of Sparta; R. W. Moore, Judge.

Action between A. S. Long and B. J. Clark. From the judgment, Long brings error. Affirmed.

T. L. Reese, of Sparta, and M. L. Felts, of Warrenton, for plaintiff in error. L. D. McGregor, of Warrenton, and T. M. Hunt and Lewis & Culver, all of Sparta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 370)

PASCHAL v. STATE. (No. 6184.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \S 67—LABOR CONTRACT ACT—PROSECUTION—DEFENSE.

The fact that one is already under contract to perform services for another will not negative the presumption of fraudulent intent on his part in case he obtains advances from a third person upon a promise to perform services for the latter for a period of time wholly or partly concurrent with that embraced in the first contract, and not afford such an excuse, within the contemplation of section 716, Pen. Code 1910, as will relieve him from performing the later contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 75; Dec. Dig. \S 67.]

2. MASTER AND SERVANT \S 67—LABOR CONTRACT ACT—RETURN OF MONEY—TENDER.

The provision of section 716, Pen. Code 1910, as to a return of the money advanced by the hirer, with interest thereon, at the time the labor of the employé was to be performed, is sui generis, and is not subject to the general rule applicable to a tender, which requires that a tender shall be for the exact amount admitted to be due. In prosecutions for the violation of the statute commonly known as the "Labor Contract Act," it is for the jury to say whether a present offer (made by a third person on behalf of one accused of violating the act) to pay instantaneously whatever amount had been advanced by the hirer to his employé, if declined by the

hirer, is or is not equivalent to a return of the amount advanced, within the purview of the act. Even in civil cases the law does not require the vain formality of actually tendering money to one who states that he will not accept it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. ¶67.]

3. MASTER AND SERVANT ¶67—LABOR CONTRACT ACT—PRESUMPTION OF INTENT TO DEFRAUD.

Under the provisions of section 716, Pen. Code 1910, satisfactory proof of the contract made by the accused, the procuring thereon of money or other thing of value, the failure to perform the services agreed to be performed, or failure to return the money with interest, without good and sufficient cause, resulting in loss and damage to the hirer, constitutes presumptive evidence of the intent to defraud which is essential to a conviction under section 715, Pen. Code 1910. However, the presumption that a fraudulent intent actuated the accused in procuring the advances, dependent upon proof of the facts enumerated in section 716, may be rebutted by any circumstance presented in the case which might lead the jury to entertain a reasonable doubt as to whether the fraudulent intent actually influenced the accused in obtaining the advances. In other words, the statutory presumption is by no means conclusive, and a charge which, in effect, instructs the jury that such is the case is reversible error.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. ¶67.]

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Harvey Paschal was convicted of violating the Labor Contract Act (Pen. Code 1910, § 715), and brings error. Reversed.

Colley & Colley, of Washington, Ga., for plaintiff in error. R. C. Norman, Sol. Gen., and J. M. Pitner, both of Washington, Ga., for the State.

RUSSELL, C. J. The accused was convicted of a violation of section 715 of the Penal Code. The accusation contained two counts. The first count alleged fraudulent intent in obtaining \$7 at the time the contract was alleged to have been made, and the second alleged the fraudulent intent in obtaining \$2.50 on the day following that on which the contract was made. The evidence developed the fact that the first advance was made in Richmond county, and the prosecution was proceeding in Lincoln county, and for that reason, of course, the state insisted upon a conviction under the second count only. Aside from the fact that the prosecutor did not testify that the advance of \$2.50 was made upon the faith of the contract, his evidence would have authorized a conviction of the accused. The only other witness for the state testified to facts relating to the contract made in Augusta, in Richmond county. The defendant made no statement at the trial, but one Butler, testifying in his behalf, swore that the defendant had worked for him on halves in the year preceding that which was the subject of the contract in question, and that prior to the defendant's meeting with the prosecutor in Augusta, the witness had made a contract with the accused for

the year 1914 (the period embraced by the contract alleged to have been fraudulently entered), and had advanced to the accused \$4.50 in money on his contract for 1914, as well as allowed the defendant under the contract 15 days' work which the latter was owing him. This witness testified that the defendant lived on his place and asked him to let him off for a week or ten days to go to Augusta. When the defendant got back from Augusta he told the witness of his arrangement with Walton, and he (the witness) at once got in his buggy and took the defendant over to Walton's place to explain the matter to Walton. Walton said—

"he had been to great expense in going to Augusta, board, etc. I asked him if he went to Augusta for the negro. He said, 'No,' but he wanted his expenses."

The witness further testified that the defendant told him to pay Walton all that the defendant owed Walton, and, in accordance with this request, the witness offered to pay Walton his expenses and all else that the defendant owed him, if Walton would tell him the amount, but Walton refused to "take anything, and also refused to state his bill." Under the testimony in behalf of the defendant, the jury might have acquitted him, although, as already stated, the testimony for the state would have authorized his conviction, and, in this view of the case, it is only necessary to deal with the exceptions to the charge of the court.

[1] The court charged the jury to the effect that if they found that at the time of the making of the contract the defendant was under contract with Butler to work for him at the same time, the fact that he was under a contract that might have prevented him from working for Walton would not be such an excuse as is contemplated by the law and as would excuse him from performing his contract with Walton. It was contended that this was error, because, if the accused—"was under a valid legal contract with Butler, made prior to the Walton contract, he was in law called upon to perform the same, and it would have been wrong and criminal for Walton to have interfered with the same."

There is no merit in this exception. The fact that one is already under contract to perform services for another will not negative the presumption of fraudulent intent in case he obtains advances from a third person upon a promise to perform services for the latter for a period of time wholly or partially concurrent with that embraced in the contract previously entered into by him, nor afford such an excuse, within the contemplation of section 716 of the Penal Code, as would relieve one accused of a violation of section 715 from performing the second contract. So far from excusing one who is already under contract to perform services for another from the imputation of a criminal fraudulent intent, the making of the second contract would tend to magnify and impress

the presumption that he intended to defraud; and the gist of the offense penalized by the Labor Contract Act is the intent to defraud.

As to the additional exception that the language used in the charge referred to was an expression of opinion upon the recited evidence, it is only necessary to say that, while the learned trial judge, in effect, stated that the contract alleged in the indictment was made, the testimony that the defendant had made the contract was uncontradicted, and, no doubt, the existence of the contract with Walton was admitted by counsel for the accused in their argument. The court cannot tell the jury that any fact material to the guilt or innocence of one accused of crime has or has not been proved, unless the fact has been admitted. But we are quite sure that no one would be further from attempting to improperly influence the finding of a jury than the learned and able judge who presided at this trial; and, even if in the pressure of the trial, he was subject to a lapsus linguae, it is not likely to recur upon a subsequent investigation.

[2] 2. We think the learned trial judge erred, however, in instructing the jury as follows:

"I charge you also, in this connection, that they would have had to tender whatever was due; that they would not have had to rely upon Mr. Walton as to the amount due, and also the interest at 7 per cent. from the time such advances to the time of the tender, to excuse him under the tender."

The evidence on behalf of the defendant, already referred to, showed that the witness went to see Mr. Walton to explain the matter, and at the defendant's request offered to pay him any amounts advanced to the accused, as well as the expenses of Walton's trip to Augusta. Naturally the defendant did not know the amount of the expenses attached to Walton's trip, and for that reason the tender of the exact amount of that demand could not be made. There is no evidence that the amount advanced to the accused by Walton was in dispute, or that this had previously been the case. If it had been, the offer of the witness in behalf of the defendant would have elicited that fact. The provision of section 716 of the Penal Code as to a return of money advanced by the hirer, with interest thereon at the time the labor of the employé was to be performed, is *sui generis*, and is not subject to the rule applicable to a tender which requires that a tender be for the exact amount admitted to be due. In prosecutions for the violation of the statute commonly known as the "Labor Contract Act," it is for the jury to say whether a present offer (made by a third person on behalf of one accused of violating the act) to pay instantan whatever amount had been advanced by the hirer to his employé, if declined by the hirer, is or is not equivalent to a return of the amount advanced within the purview of the act. Even in civil cases the law does not require the vain formality of tendering mon-

ey to one who states that he will not accept it. As to the offer of the witness in behalf of the defendant to pay the money claimed by the prosecutor, which embraced an indefinite amount of personal expenses for a trip to Augusta, it must be said that the greater includes the less, and therefore when the request, made in behalf of the defendant, that the amount of the defendant's indebtedness be stated, accompanied by a present offer to pay the entire bill, was met with a refusal, not only to make a statement but to take anything, it was within the power of the jury to have found that but for the defendant's own act he would not have been subject to that loss which is also essential to conviction.

[3] 3. We think also that the court erred in instructing the jury that if they found, from the evidence, facts, and circumstances of the case, that the accused did not perform the services as he agreed to do in his contract (if they found that there was any such contract), and that Mr. Walton suffered loss and damage by reason of having made any advances to the defendant upon the faith of the contract, they should find the defendant guilty, unless the jury found that he returned the money or other thing of value alleged in the second count of the indictment, or unless he had good and sufficient cause not to perform the contract, in case the jury found that he did not perform it. Section 716 of the Penal Code prescribes, merely as a rule of evidence, that:

"Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section."

The instructions of the learned trial judge left the jury no option as to their verdict, provided proof of the circumstances mentioned in the Code section were satisfactory, whereas the law declares these circumstances to be merely presumptive evidence of that intent which is "the paramount, controlling, ever essential element of the offense" which must be proved to have been coexistent either with the contract or the creation of the debt, as the case may be. *Patterson v. State*, 1 Ga. App. 782 (1), 58 S. E. 284. In contemplation of the statute, the facts enumerated raise the presumption of an intent to defraud. Under the instructions of the court in the present case, the jury would naturally assume that proof of the facts recited absolutely concluded the question of the defendant's guilt. While the proof of facts recited constitutes presumptive evidence, this presumption may be rebutted by any circumstance presented in the case which might lead the jury to entertain a reasonable doubt as to whether the fraudulent intent actually influenced the accused in obtaining the advances. In other words, the statutory pre-

assumption is by no means conclusive, and a charge which, in effect, instructs the jury that such is the case is reversible error.

Judgment reversed.

(16 Ga. App. 350)

ODUM v. RUTLEDGE et al. (No. 5912.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶302, 724—ASSIGNMENTS OF ERROR—GROUNDS FOR NEW TRIAL.

Under the rulings of this court and of the Supreme Court, this court will not search through the record to find errors, when they are not specifically pointed out in the assignments of error or in the grounds of the motion for a new trial. The rule is that each ground of the motion for a new trial must be complete in itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752, 2997-3001, 3022; Dec. Dig. ¶302, 724.]

2. APPEAL AND ERROR ¶302—PRESENTATION FOR REVIEW—GROUNDS FOR NEW TRIAL—INSTRUCTIONS.

Grounds of a motion for a new trial, complaining that certain excerpts from the charge of the court are not adjusted to the evidence or to the contentions of either of the parties, without specifying wherein they are not so adjusted, are not sufficiently specific to be considered. The first and second grounds of the motion for a new trial, for this reason, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. ¶302.]

3. APPEAL AND ERROR ¶302—TRIAL ¶259—INSTRUCTIONS—MEASURE OF DAMAGES—GROUNDS FOR NEW TRIAL.

The complaint, in the third ground of the amended motion for a new trial, that "the charge as a whole totally fails to set forth the measure of damages by which the plaintiff, if at all, should recover from the defendant," and the complaint, in the fifth ground, that "the charge failed to give the jury a definite and correct rule by which to compute what sum, if any, was due by the defendant to plaintiff," are too general, vague, and indefinite to be considered. However, we think that the charge in this case clearly and fully submitted to the jury all the issues in the case, and all the material contentions of the parties, and, if any fuller charge was desired upon the measure of damages and the rule of computing the same, counsel, by timely written request, should have invoked a charge thereon. See *Thomas v. Parker*, 69 Ga. 283 (5).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. ¶302; Trial, Cent. Dig. §§ 648-650; Dec. Dig. ¶259.]

4. APPEAL AND ERROR ¶1195—LAW OF THE CASE—FORMER APPEAL—INSTRUCTIONS.

The assignment of error in the fourth ground is without merit, as the pleadings in the former trover case of *Odum v. Rutledge* show that the only issue decided in that case was the title to the cotton crop, the relation of landlord and cropper existing (the amount of the cotton not being in issue); and hence the court's charge to that effect was not erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. ¶1195.]

5. APPEAL AND ERROR ¶728—ASSIGNMENT OF ERROR—ADMISSION OF EVIDENCE.

The question and answer set out in the sixth ground, standing alone and without explanation, are not sufficiently intelligible to enable this court to determine whether they were prejudicial to the plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. ¶728.]

6. WITNESSES ¶144—COMPETENCY—TRANS-ACTION WITH PERSON SINCE DECEASED.

The seventh ground, complaining that the court refused to allow the plaintiff in error to testify what his testimony was on the trial of the former trover case, as to the contract between himself and Rutledge (the defendant in that case), is without merit, since it appears that the latter was deceased, and that his administrator was the defendant in the instant case, and the effect of the admission of such testimony would, by indirection, have been to permit the witness to testify as to transactions had with the deceased. Civil Code 1910, § 5853, par. 1.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625-643; Dec. Dig. ¶144.]

7. APPEAL AND ERROR ¶302—ASSIGNMENT OF ERROR—GROUND FOR NEW TRIAL—ARGUMENTATIVE RECITAL.

The eighth ground of the amended motion for a new trial presents no specific assignment of error for the court to pass on, and is merely an argumentative recital that the verdict was not authorized by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. ¶302.]

8. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The verdict was authorized by the evidence, and the judgment overruling the motion for a new trial is affirmed.

Error from City Court of Ashburn; R. L. Tipton, Judge.

Action by J. H. Odum against J. D. Rutledge and others, administrators. Judgment for defendants, and plaintiff brings error. Affirmed.

J. A. Comer and J. H. Pate, both of Ashburn, for plaintiff in error. J. T. Hill, of Cordele, and John B. Hutcheson, of Ashburn, for defendants in error.

BROYLES, J. Affirmed.

(16 Ga. App. 362)

CANBY v. MERCHANTS' & MINERS' TRANSP. CO. (No. 6167.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. SHIPPING ¶141—LOSS OF SHIPMENT—CONTRACT EXEMPTION FROM LIABILITY—VALIDITY.

A carrier engaged in interstate commerce by water can so stipulate in a contract of carriage as to exempt itself from liability in case the shipment is destroyed by fire, provided the fire is not occasioned by the carrier's negligence, or the destruction of the shipment by fire is not the result of the carrier's negligence after the fire is discovered. In the present case it is not

alleged that the loss by fire was the result of the carrier's negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.]

2. CARRIERS § 154, 163—LOSS OF SHIPMENT—CONTRACT EXEMPTION FROM LIABILITY—CONSIDERATION—BURDEN OF PROOF.

In order to support a reasonable stipulation of exemption from liability in an interstate contract of carriage, it is not essential that there be an independent consideration apart from that expressed in the bill of lading, nor is it necessary that an alternative contract be presented to the shipper for his choice. If the contract contains a lawful provision for exemption, and if it has been shown that the damage resulted from the excepted cause, the burden is on the plaintiff to show that the loss was occasioned by the carrier's own negligence, from which it could not be exempted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 641-645, 667, 722-725; Dec. Dig. § 154, 163.]

3. CARRIERS § 76—BREACH OF SHIPMENT CONTRACT—PARTIES—ASSIGNEE OF BILL OF LADING.

The assignee or transferee of a bill of lading may sue upon any cause of action which is supported by the terms of that contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 256-271, 363; Dec. Dig. § 76.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by H. M. Canby against the Merchants' & Miners' Transportation Company. Judgment for defendant, and plaintiff brings error. Affirmed.

David S. Atkinson, of Savannah, for plaintiff in error. Adams & Adams, of Savannah, for defendant in error.

RUSSELL, C. J. Canby brought suit against the Merchants' & Miners' Transportation Company for the value of a shipment of lumber which it was alleged was destroyed by fire after its delivery to the carrier. By demurrer the defendant compelled the plaintiff to file an amendment, by which the bill of lading covering the shipment was set forth and virtually became the groundwork of the action. The bill of lading contained the following clause:

"Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exceptions provided by statute, and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from vermin, leakage, chafing, breakage, heat, frost, wet, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or apparatus, whether existing prior to, at the time of, or after sailing; or unseaworthiness; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage," etc.

We quote from the brief of counsel for the plaintiff the further and additional state-

ment of facts necessary to an understanding of the record:

"The rate charged was \$3.75 per ton. The steamship company published with the Interstate Commerce Commission this rate of \$3.75 per ton on shipments of lumber from Savannah, Ga., to Wilmington, Del., with this statement: 'Marine Insurance. The rates here shown are not insured'—and with this further explanation: 'Marine Insurance. Traffic handled by this company under tariffs that do not include marine insurance may be insured, at the request of either shippers or consignees, against marine risk while in possession of this company subject to and in accordance with the open policies held by this company, at the rate of twelve and one-half (12½) cents per one hundred dollars (\$100.00) valuation, subject to the minimum premium of ten (10) cents based on the invoice value of the property.' This is the only rate published, and the rate governing this shipment."

To the petition, as amended, the defendant interposed both special and general demurrers, and the petition was finally dismissed by the judgment of the trial judge sustaining the general demurrer. The trial court ruled also upon the special demurrers, sustaining them in part and overruling them in part; but, since the ruling upon the general demurrer is controlling, it is unnecessary to deal with the special demurrers.

We cannot agree with the able and indefatigable counsel for the plaintiff as to the pertinency of the question whether the fire on the wharf before the lumber was consigned to the ship as cargo was a marine risk, nor is there any difference, in our opinion, between the exemption from liability for fire loss, contained in the bill of lading, as referable to a loss which marine insurance would cover and exemption from liability from loss by fire which marine insurance would not cover. Conceding that the defendant in the court below is a common carrier and liable as an insurer, unless exempted by statute or by contract, and that the lumber in question, not having been loaded on board ship nor consigned to any particular ship as cargo, was not subject to marine insurance, and did not fall within the exemption provided by section 4282 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 8020), in case of fire on board ship, still the inquiry as to whether the lumber in question was a marine risk or an ordinary fire risk is immaterial, since the plaintiff alleges that he had delivered the lumber to the defendant for immediate transportation, and that the defendant had accepted it for that purpose. The bill of lading was issued in pursuance of this delivery to the carrier for immediate transportation. If the stipulation in the contract of affreightment which we have quoted above had been confined to fire on shipboard or to loss by fire after the shipment had been assigned to a particular cargo, the fact that the lumber was destroyed on the wharf of the defendant might affect the question; but the language employed in the stipulation by

which the carrier sought to relieve itself from damage occasioned by fire is general and sweeping, and includes any loss due to a fire after the delivery of the shipment to the carrier, and until the carrier had given the notice to the consignee at destination as required by law. The carrier issued the bill of lading "subject to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire"; and as pointed out in *Jennings v. Clyde Steamship Co.*, 148 App. Div. 615, 135 N. Y. Supp. 298, 302 (4), by Clarke, J. (whose opinion was adopted and the judgment affirmed by the Court of Appeals of New York [210 N. Y. 570, 104 N. E. 1132]), if the transportation company had not assumed the relation of a common carrier with reference to the lumber, "it certainly was the party in possession."

[1, 2] 1, 2. The controlling question in the case is whether a carrier engaged in interstate commerce by water can so stipulate in a contract of carriage as to protect itself from liability in case the cargo which has been delivered to it for carriage is destroyed by fire after it has been accepted for shipment. It is to be borne in mind that the usual presumption of negligence applicable to railroads does not extend to carriers engaged in transportation by water. So that a consideration of the presumption of negligence is aside from the question here presented. If the defendant in the court below had been charged with the loss of goods delivered for an intrastate shipment (since it could not defend against proof of loss of the goods in its custody, except by showing that the loss was due to the act of God or the public enemy), proof of the loss would shift upon the defendant carrier the burden of showing that it had not been guilty of negligence. However, the petition in the instant case that shows an interstate shipment is involved, and in our opinion the rule as to the burden of proof in interstate shipments differs from that which has just been stated to be applicable to intrastate shipments. It is conceded, and must be conceded, that, since the passage of the Carmack amendment to the Hepburn Act (Act June 29, 1906, c. 3591, § 7, para. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1913, § 8592]), the federal regulations are paramount and controlling. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. The federal regulations superseded state statutes and decisions upon the question of liability under a bill of lading covering interstate shipments. To use the language of Justice Lurton in the *Croninger* Case, supra:

"Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state legislation with reference to it."

As said by Judge Pottle, speaking for this court, in *A. C. L. R. Co. v. Thomasville Live*

Stock Co., 13 Ga. App. 102-108, 78 S. E. 1019, 1022:

"The federal act and the decisions of the Supreme Court of the United States construing it are binding upon the state courts, without reference to the carrier who may be proceeded against for any damage which may have been sustained."

It is true that the precise ruling in *Adams Express Co. v. Croninger*, supra, was confined to a holding that while, under the provisions of the act of Congress, the carrier could not exempt himself from negligence, still he might, by a fair and reasonable valuation, limit the amount recoverable by the shipper to an agreed valuation for the purpose of reducing the rate of freight. And it is insisted by the plaintiff in error in the case at bar that the instant case does not fall under the rule in *Adams Express Co. v. Croninger*, for the reason that the shipper in this instance had only one rate of freight offered to him; that there was only one rate prescribed by the Interstate Commerce Commission; and that therefore the exemption from liability sought to be obtained under the provisions of paragraph 9 of the contract of affreightment is without consideration. As to this, just as in relation to the burden of proof, there is a difference between the rulings of the state courts and the federal decisions. However, under the explicit provisions of our Constitution, statutes of the United States take precedence over ours; and the construction placed upon these statutes by the Supreme Court of the United States must be controlling, and we must be governed by the adjudications of that tribunal. The precise point now before us seems to have been decided in *Cau v. Texas & Pacific Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053. It is true the *Cau* Case was decided prior to the Hepburn Act, but it was approved and followed in *Arthur v. Texas & Pacific Ry. Co.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590, which was decided after the Carmack amendment to the Hepburn Act, and consequently the similarity of the facts in the *Cau* Case and the case at bar (considered in connection with the principles announced in *Arthur's Case*, supra) evidences that the rule announced in *Arthur's Case* was considered by the Supreme Court of the United States as applicable to just such a state of facts as are detailed in the petition now before us. The ninth section of the bill of lading, under which the shipment in the present case was made, provides that the shipment is accepted, "subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire." In *Cau's Case* the suit was against a railroad for the loss of cotton destroyed by fire. The cotton had been delivered to the railroad (as the lumber in the present case was delivered to the ship), as a common carrier, and was actually in possession of the compress company, but

in the custody of the railroad company at the time of the fire. The bill of lading contained an exemption from liability for loss caused by fire. There was but one rate of freight, and the Supreme Court of the United States ruled as follows:

"While primarily the responsibility of a common carrier is that expressed by the common law, and the shipper may insist upon such responsibility, he may consent to a limitation of it; and, so long as there is no stipulation for an exemption which is not just and reasonable in the eyes of the law, the responsibility may be modified by contract. It is not necessary that an alternative contract be presented to the shipper for his choice. A bill of lading is a contract, and knowledge of its contents by the shipper will be presumed, and a provision therein against liability for damages by fire is not unjust or unreasonable. It is not necessary that there be an independent consideration, apart from that expressed in the bill of lading, to support a reasonable stipulation of exemption from liability. While the burden may be on the carrier to show that the damage resulted from the excepted cause, after that has been shown the burden is on the plaintiff to show that it occurred by the carrier's own negligence, from which it could not be exempted."

As we have already said, the rule in *Cau v. Texas & Pacific Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053, as to the binding effect of agreements in bills of lading exempting carriers from fire loss, was followed in *Arthur v. Texas & Pacific Ry. Co.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590, although in the latter case there was a claim that the agreement was forced upon the shipper by duress and without consideration. Mr. Justice Peckham, in delivering the opinion of the court, does not so much as discuss the court's ruling upon this point, and contents himself with merely remarking that the contention that the third clause of the bill of lading (which was practically the same as that in the bill of lading now before us) was answered and overruled in the case of *Cau v. Texas & Pacific Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053, and that it need not be further discussed. The court further held that, with the fire clause in force, it became necessary for the plaintiffs to show that the defendant had received the cotton, and that it was destroyed through negligence of the defendant or its agents, as the exemption would not apply in case of loss not occurring through such negligence. It is to be noted that in the case at bar there was no allegation that the fire and the consequent loss of the lumber were due to any negligence on the part of the defendant. It is true there is an allegation that the defendant was negligent in not loading the lumber upon one of its ships which cleared the port before the fire, but (doubtless for the reason that there is a stipulation in the contract which permitted the carrier to select the ship upon which it would load the lumber) this allegation of negligence is not insisted upon. In our opinion, the inclusion of the exemption from liability for loss in case of fire, in the contract of affreightment which was accepted by the

shipper, presents an insuperable obstacle to any recovery on the part of the plaintiff, and for that reason the trial judge correctly sustained the general demurrer to the petition. It matters not that there was no alternative contract which could be presented to the shipper, and that he did not sign the contract in question in order to obtain the benefit of a lower rate of freight. The carrier could not have offered any lower rate of freight than that prescribed by the rule filed with the Interstate Commerce Commission without subjecting itself to the penalties provided by law. But the shipper, in entering into the contract, knew that insurance upon the shipment was expressly excluded, and voluntarily entered into the contract with that knowledge, although there was filed, with the rate for transportation, a price or rate at which insurance might be obtained. In other words, the shipper had the option to ship at the rate approved by the Interstate Commerce Commission without insurance, or, by paying for insurance, to ship it at that rate with the shipment insured, and he preferred to take the risk himself. The very cheapness of the rate may have been of itself sufficient to have supplied consideration for the exemption which was agreed to by the shipper. In other words, the rate may have been so cheap that the shipper may have considered that he could afford to carry his own insurance, as is so often done by owners of other property.

[3] 3. We take it to be well settled that the consignee in a bill of lading is the proper party to maintain an action arising upon a breach of the contract of carriage, and the lower court would have been authorized to sustain the general demurrer in the present case, for the reason that the shipment was consigned to the order of Heard Lumber Company, with direction to "notify Henry M. Canby," if nothing more than this had appeared. *Raleigh & Gaston R. Co. v. Lowe*, 101 Ga. 331, 28 S. E. 867. However, the insistence of counsel for the defendant upon this point cannot be sustained, and the merit of the judgment of the trial court must rest entirely upon the exempting condition of the contract which we have already considered, since an inspection of the record discloses that the bill of lading was indorsed in blank by "Heard Lumber Company, by C. W. March, Attorney."

"The transferee of a bill of lading may maintain an action ex contractu against the carrier for failure to deliver to him all or any portion of the goods specified in the bill of lading; and this is true whether the loss of the goods or the shortage occurred before or after he acquired title to the bill of lading." *Askew v. Southern Railway Co.*, 1 Ga. App. 79, 58 S. E. 242.

The court did not err in sustaining the general demurrer, because the stipulation in the contract relative to fire expressly relieved the carrier from liability for loss occasioned by fire; and it is not affirmatively alleged in the petition that the fire or the consequent

destruction of the shipment directly resulted from that negligence on the part of the carrier (either in causing the fire in the first instance, or in omitting proper efforts to save the shipment after the fire was discovered), from the results of which the law will not permit a carrier to exempt itself by contract. Judgment affirmed.

(16 Ga. App. 352)

RUDOLPH v. STATE. (No. 6009.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1109—BILL OF EXCEPTIONS—DISMISSAL—HEADING.

A bill of exceptions which recites that a certain cause was tried "at the August term, 1914, of the city court of St. Mary's," before a person named who was actually at that time judge of the city court of St. Mary's, in Camden county, Ga., and who signed as "judge of the city court of St. Mary's" the statutory certificate, reciting that the "foregoing bill of exceptions is true," etc., and directing "the clerk of the city court of St. Mary's" to certify and send up the record in the case to the Court of Appeals of Georgia, and whose certificate to the bill of exceptions is headed "Georgia, Camden County," will not be dismissed merely because the bill of exceptions itself is headed "Georgia, Chatham County."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2897, 2898, 2906, 2902, 3204; Dec. Dig. \S 1109.]

2. COURTS \S 217—OPINION—STARE DECISIS—SUPREME COURT.

Instruction from the Supreme Court will not be sought upon a question which has already been settled by adjudications of that court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 536-538; Dec. Dig. \S 217.]

3. CRIMINAL LAW \S 553—CREDIBILITY OF WITNESS—IMPEACHMENT—WHAT CONSTITUTES.

In contemplation of law a witness is never successfully impeached until a mental conviction that he is unworthy of credit is produced upon the mind of the jury by competent proof (*Powell v. State*, 101 Ga. 9 [5], 29 S. E. 309, 65 Am. St. Rep. 277); and the jury may believe a witness notwithstanding any effort which has been made to impeach him, or any testimony offered for that purpose, and even though he be not corroborated (*Solomon v. State*, 10 Ga. App. 469 [3], 73 S. E. 623; see, also, *Rice v. Eaton*, 15 Ga. App. 505, 88 S. E. 868).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1252; Dec. Dig. \S 553.]

4. BASTARDS \S 21—PROSECUTION OF FATHER—SECURITY FOR MAINTENANCE—EXCUSE.

Though it must appear in a bastardy case that the defendant has refused or failed to give security for the maintenance, etc., of the child (Pen. Code 1910, \S 682, 683, 1332), before he can be found guilty, it is wholly immaterial for what reason he so refused or failed to give the bond (*York v. State*, 68 Ga. 551). The court therefore did not err in refusing a request to charge the jury that, if the defendant was unable to give the bond to support the child, he should be acquitted.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. \S 39-43; Dec. Dig. \S 21.]

5. BASTARDS \S 21, 56 — PROSECUTION OF FATHER—FAILURE TO GIVE SECURITY—"REFUSAL."

The court did not err in admitting in evidence the orders of the justice of the peace, one of which required the defendant to give bond in a stated sum for the maintenance and education of the bastard until he should arrive at the age of 14 years, and the other reciting that the defendant had "failed to give the bond and security required" in the preceding order, and directing that he give bond for his appearance at the next term of the city court of St. Mary's. It was not necessary that the latter order should state that the defendant "refused" to give the bond. See *Watts v. State*, 12 Ga. App. 850, 77 S. E. 206. The statute provides that, "if the putative father shall fail to give such security, the justice shall bind him over," etc. Pen. Code 1910, \S 1332. A failure to give bond when required to do so is equivalent to a refusal.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. \S 39-43, 155, 156; Dec. Dig. \S 21, 56.]

For other definitions, see Words and Phrases, First and Second Series, Refusal.]

6. BASTARDS \S 59—WITNESSES—IMPEACHMENT OF PROSECUTRIX—PROSECUTION OF FATHER—EVIDENCE.

There was no error in excluding evidence that the prosecutrix was pregnant at the time of the trial. Her condition as to pregnancy could not throw light on the question as to the paternity of the bastard already born, and she could not be impeached as a witness by proof as to specific acts. *Johnson v. State*, 61 Ga. 305; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. \S 161-164; Dec. Dig. \S 59.]

7. WITNESSES \S 340—IMPEACHMENT—REPUTATION FOR CHASTITY.

The court did not err in refusing to admit testimony that the "reputation for chastity" of the mother of the bastard was bad, or that her "general reputation and character for chastity prior to March 25, 1912" (about the time the bastard must have been begotten), was bad.

(a) The mode of impeaching a witness by proof of character or reputation is laid down in the Code. Pen. Code 1910, \S 1063; Civ. Code 1910, \S 5882. The Code specifies the questions to be propounded, and "impliedly exclude all others." *Barnwell v. Hannegan*, 105 Ga. 400, 31 S. E. 116. See, also, *Gordon v. Gilmore*, 141 Ga. 348 (7), 349, 350, 80 S. E. 1007. It provides for impeachment by proof that the "general character" of a witness is bad, and that from that character the impeaching witness would not believe him on oath; it does not provide for impeachment by proof as to a special kind of character, such as character for chastity, or even veracity. *Barnwell v. Hannegan*, supra. The Supreme Court has held that a woman cannot be impeached as a witness by proof of her reputation as a common prostitute. *Smithwick v. Evans*, 24 Ga. 461. Expressions in the decisions of the Supreme Court in *Weathers v. Barksdale*, 30 Ga. 888, and *Black v. State*, 119 Ga. 746, 47 S. E. 370, not in harmony with that decision, are merely obiter. In both of those cases the court was dealing with exceptions to testimony as to specific acts of lewdness, and held that the testimony was not admissible. The case last cited was a prosecution for rape; and it is held that in such cases, "independently of the question of the woman's credibility as a witness, the jury may properly consider evidence of her previous * * * character for chastity, in determining whether or not she really consented to the sexual intercourse which she testifies

was had against her will." *Seals v. State*, 114 Ga. 518, 520, 40 S. E. 731, 732, 88 Am. St. Rep. 33. See also *Camp v. State*, 3 Ga. 420, 421. In *Oripe v. State*, 4 Ga. App. 832, 62 S. E. 567, no question was raised in regard to the admissibility of the evidence introduced as to reputation for lewdness. The sole question presented for decision was whether the evidence was sufficient to support the verdict, and it was held that the jury might believe a female witness, notwithstanding proof of her reputation for lewdness.

(b) While it has been held that, in a prosecution for bastardy, proof of specific instances of sexual intercourse between the mother of the bastard and other men than the accused, at and near the beginning of the period of gestation, when the bastard must have been conceived, is admissible, not for the purpose of impeaching her character, but as tending to show that some other person than the accused may have begotten the child (1 Wig. Ev. § 133, pp. 195, 196; 5 Oyc. 681; 3 R. C. L. § 44, p. 763; *State v. Roderick*, 77 Ohio St. 301, 82 N. E. 1082, 14 L. R. A. [N. S.] 733), proof of the reputation or character of the woman is not admissible for the purpose of showing this fact.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1116, 1117, 1119, 1121; Dec. Dig. § 340.]

8. BASTARDS § 72—DELIBERATIONS OF JURY—TAKING LETTERS TO JURY ROOM.

There was no error in permitting the jury to take to their room certain letters of the accused to the prosecutrix, admitted in evidence without objection and read to the jury, in which he admitted the paternity of the child. As to such evidence the rule is different from that applied to depositions. 2 *Thomp. Trials*, § 2575; *Shedden v. Stiles*, 121 Ga. 637 (4), 49 S. E. 719.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 183; Dec. Dig. § 72.]

9. ADMISSION OF EVIDENCE—VERDICT SUSTAINED.

There is no merit in any of the exceptions to the rulings on the admission of testimony, for any reason assigned, and the evidence was ample to support the verdict.

Error from City Court of St. Mary's; Emmett McElreath, Judge.

Ben Rudolph was convicted of crime, and brings error. Affirmed.

David S. Atkinson, of Savannah, for plaintiff in error. S. C. Townsend, Sol., of St. Mary's, for the State.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 356)

YOUNG v. BROYLES. (No. 6149.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. CERTIORARI § 14, 36—RIGHT—DECISIONS REVIEWABLE—NEW TRIAL.

The right of certiorari is a constitutional right, and may be used to review any judgment of an inferior judiciary. It may be exercised without moving for a new trial in the court in which the case was tried, or it may be used as a means of reviewing the judgment upon a motion for a new trial; and the right

is unaffected by anything that may have transpired in the lower court, if the remedy is pursued in due time.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 19, 51, 52; Dec. Dig. § 14, 36.]

2. COURTS § 190—MUNICIPAL COURTS—REVIEW—CUMULATIVE REMEDIES.

The right of certiorari being a constitutional right, the statutory privilege of moving for a new trial, provided in the act creating the municipal court of Atlanta (Acts 1913, p. 167), is merely cumulative, and a complaining party may avail himself of the privilege in the first instance, or not, as he chooses. The grant of the latter remedy does not debar one from resorting to certiorari as a means of reviewing a judgment which is final unless set aside.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 190.]

Error from Superior Court, Fulton County: Geo. L. Bell, Judge.

Action by A. B. Young against Arnold Broyles. Judgment for defendant, and, petition for certiorari being dismissed, plaintiff brings error. Reversed.

Simmons & Simmons and R. J. Jordan, all of Atlanta, for plaintiff in error. Harvey Hatcher, of Atlanta, for defendant in error.

RUSSELL, C. J. Young brought suit against Broyles in the municipal court of Atlanta. The petition was dismissed upon demurrer, and the plaintiff sued out a writ of certiorari to review the judgment. The presiding judge of the superior court dismissed the petition for certiorari, upon the ground that:

"The plaintiff in certiorari had not exhausted his remedies provided by the act establishing the municipal court of Atlanta, he not having entered an appeal to the appellate division of the municipal court, but having taken a certiorari direct from the judgment of the individual judge trying said case."

[1, 2] The single question, therefore, presented for our consideration, is whether one who complains of the judgment of the particular judge of the municipal court who has tried his case, and seeks to have it reviewed, must first appeal to the appellate division of the court before he is entitled to certiorari, or can in the first instance seek a review by certiorari. We are of the opinion that the ruling upon this question is controlled by the decision of this court in *Marks v. State*, 8 Ga. App. 283, 68 S. E. 951, in which this court held that:

"The right of certiorari is a constitutional right, and may be used to review any judgment of an inferior judiciary. It may be exercised without moving for a new trial in the court in which the case was tried, or it may be used as a means of reviewing the judgment upon a motion for new trial; and the right is unaffected by anything that may have transpired in the lower court, if the remedy is pursued in due time."

This being true, the judge of the superior court erred in sustaining the motion to dismiss the petition for certiorari.

If the right of review were limited and confined to that provided by the act creating

the municipal court of Atlanta (Acts 1913, p. 145), errors committed by a trial judge might be corrected in the appellate division, and the necessity for a review by the superior court be obviated; and if we were influenced by the argument *ab inconvenienti* we might be inclined to hold that a litigant in the municipal court of Atlanta is not entitled to certiorari until he has exhausted the remedy provided by the act creating the court. However, the ruling in Marks' Case, *supra*, was made after the writer had carefully examined the cases cited in Hood v. State, 4 Ga. App. 347, 62 S. E. 570, as well as the rulings of the Supreme Court in Roach v. Sulter, 54 Ga. 458, Archie v. State, 99 Ga. 23, 25 S. E. 612, Stewart v. State, 98 Ga. 202, 25 S. E. 424, Hayden v. State, 69 Ga. 731, and Maxwell v. Tumlin, 79 Ga. 573, 4 S. E. 858. In Archie v. State, *supra*, Justice Lumpkin said:

"The right of certiorari being a constitutional one, the privilege of moving for a new trial is merely cumulative; and a complaining party could avail himself of that in the first instance, or not, as he chose."

In that case the plaintiff in error had filed a motion for a new trial in the city court of Cartersville and had dismissed it, and the court ruled that:

"Unquestionably, the dismissal of that motion rendered the judgment of the city court final, and terminated the jurisdiction which that court had over the case. A writ of certiorari having been applied for within the time prescribed by the statute, it ought to have been entertained."

In the Marks Case, *supra*, the motion for a new trial had been overruled before the application for certiorari was presented, and hence the ruling in that case, that the remedy of certiorari "may be used as a means of reviewing the judgment upon a motion for new trial," was in reply to the contention that no other course was open to Marks upon the overruling of his motion for a new trial except to sue out a writ of error to review the judgment of the judge of the city court refusing a new trial. But the real point upon which the right to review a judgment of an inferior judicatory depends is whether the judgment complained of is final. Review by certiorari is a constitutional right, which is available to any one seeking to review the judgment of an inferior judicatory, even though there may be other cumulative remedies which might be applied to the same end. The act creating the municipal court of Atlanta provides a specific means of reviewing the judgment of the particular judge who tries the case in the first instance, and is silent as to application for certiorari: but certainly it cannot be inferred from this silence that the Legislature intended to deprive litigants of an inherent right without even referring to it. See Hood v. State, *supra*; Dixon v. State, 121 Ga. 346, 49 S. E. 311. A judgment rendered by any judge of the

municipal court of Atlanta is final, unless excepted to, and the party who complains has the option of proceeding either by the route prescribed by the act or by certiorari.

There is no conflict between what is now ruled and the holding in Woodward v. Gresham, 16 Ga. App. —, 84 S. E. 981, though a casual reading of the decision might perhaps convey that impression. As expressly stated in the decision, the only point for adjudication in that case was whether the grant of a nonsuit in the municipal court of Atlanta could be reviewed by the appellate division of that court by a motion for a new trial. It was held in that case that, though "the act of 1913 (Acts 1913, p. 167), creating the municipal court of Atlanta, provides no other method of review *in that court* of a judgment therein in the first instance, by a single judge, than by a motion for a new trial," "the writ of certiorari * * * is always available to review any final judgment of an inferior judicatory." It is apparent from this that the court was speaking only of the fact that a motion for a new trial was the exclusive mode of review in the municipal court of Atlanta, without any intention, of course, of holding that any final judgment of that court might not be reviewed by the constitutional remedy of certiorari. In that case there was a motion for a new trial. In the case at bar, so far as appears from the record, no motion for a new trial was made. The plaintiff in error proceeded in the first instance to avail himself of the constitutional right of certiorari, which permits the superior court to review the judgments of all inferior judicatories.

The act creating the municipal court of Atlanta provides that any person dissatisfied with the judgment of the court in the first instance—that is to say, the judgment rendered by a particular judge who tried the case—*may* make an oral motion for a new trial; and the act proceeds to prescribe the method in which the motion shall be disposed of, and to provide for an appeal in case the motion is overruled, but there is nothing in the language used which indicates any intention on the part of the General Assembly to abridge or postpone the exercise of the litigant's right of certiorari, or to regulate the manner of its exercise. The use of the word "may," to our minds, clearly denotes nothing more than an intention to provide a cumulative remedy. Even if we concede that the General Assembly could have prescribed the manner in which the writ of certiorari should be exercised, by declaring that there should be no writ of certiorari until after the remedy of a motion for new trial and appeal had been exhausted, there is nothing in the act to indicate that such was the legislative intent. We are therefore clearly of the opinion that the remedy by motion for a new trial and appeal provided by the act of 1913 creating the municipal court of Atlanta is not

exclusive, but merely cumulative—a right which the complaining party may use at his option in case he does not prefer to proceed directly by certiorari.

This view is strengthened when we consider that in a case such as this—where the only question presented is one of law—a decision on certiorari in the first instance might speed the final determination of the case and shorten litigation, rather than prolong it. In the present case the petition of the plaintiff in the municipal court was dismissed on general demurrer; therefore the sole question presented was whether, as a matter of law, the plaintiff had a case. Without considering the apparently anomalous provision (by which a trial judge would have been required to determine on a motion for new trial the correctness of his ruling upon the demurrer), if a motion for new trial had been made, and the motion had been overruled, and the judgment of the municipal trial judge had been affirmed upon appeal to the appellate division of the municipal court, the case then could have proceeded by certiorari, or by a direct bill of exceptions to this court. If, upon the hearing in the appellate division, the judgment of the trial judge had been reversed, for the reason that he erred in sustaining the general demurrer, the case would then have to be tried, with the probability of again traveling over the same route, and also with the probability that the precise question raised by the demurrer would be raised by one or the other of the parties upon review.

There is no force in the argument that, since the act creating the municipal court of Atlanta was passed in pursuance to a constitutional amendment which authorized the General Assembly to confer on this court or other like courts a provision for the correction of errors in and by said courts, and that since, by the provisions of section 41 of the act creating the municipal court of Atlanta (Acts 1913, p. 167), provision is made for a rehearing in that court, the power to grant or refuse a new trial provides an adequate means of review, so as to exclude the exercise of the right of certiorari until the remedies provided in the municipal court have been exhausted. The right of certiorari is granted in article 6, section 4, paragraph 5, of the Constitution (Civil Code,

§ 6514); and section 5188 of the Civil Code declares:

"When either party, in any cause in a justice's court, corporation court, council, or any inferior judicatory, or before any person exercising judicial powers, shall be dissatisfied with the decision or judgment in such cause, such party may apply for and obtain a writ of certiorari by petition to the superior court."

One of the prime objects of the constitutional amendment of 1912, and the act creating the municipal court of Atlanta in pursuance thereof, was to supersede the justice's courts in certain cities by municipal courts authorized to exercise jurisdiction with which justice's courts were formerly clothed; and it cannot be said that "the municipal court of Atlanta, as such, has not spoken until the appellate division has spoken, unless the decision of a judge is acquiesced in by the parties," any more than it can be affirmed that a justice's court has not spoken upon a matter of law until there has been a verdict upon an appeal in the justice's court. The act creating the municipal court of Atlanta specifically designates the review by the appellate division of that court as an appeal, and while it is true that the act prescribes that upon appeal, as upon motion for a new trial, questions of law may be determined, there is nothing in the act which restricts one who complains of the judgment of the particular judge who tried the case to that method of review, for in all cases where only questions of law are to be determined by the superior court the remedy may be found by a writ of certiorari. *Greenwood v. Boyd & Baxter*, 86 Ga. 584, 13 S. E. 128. In *Fontano v. Mosely & Co.*, 121 Ga. 48, 48 S. E. 707, it is said:

"An appeal is allowed only by statute. At common law, as well as by the Civil Code, * * * a writ of certiorari lies to the judgment of any inferior judicatory. The losing party before any inferior judicatory has the right to review its judgment by certiorari, but he has not the privilege of a second trial unless it is expressly given him by statute. *Roser v. Marlow*, R. M. Charlt. 543."

It is plain from these rulings that the right of review provided for in the act creating the municipal court of Atlanta is merely cumulative to the right of certiorari, and is not exclusive.

Judgment reversed.

BROYLES, J., disqualified.

(101 S. C. 196)

LANE v. DILLON et al. (No. 9109.)
(Supreme Court of South Carolina. May 19,
1915.)

1. WILLS ¶608—CONSTRUCTION—"HEIRS OF HIS BODY"—RULE IN SHELLEY'S CASE.

Where testators, in separate paragraphs of their will, devised certain lands to each of their children by name and the "heirs of his body," the words quoted were used in their legal sense, not as words of purchase, though a separate paragraph following these paragraphs used the words "to have and to hold during the term of their natural lives, then to go to the heirs of their bodies," and a codicil gave the land bequeathed to one son and the heirs of his body, to him absolutely; and hence a conveyance by a son having children vested the grantee with a fee-simple title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. ¶608.]

For other definitions, see Words and Phrases, First and Second Series, Heirs of the Body.]

2. WILLS ¶457—CONSTRUCTION—TECHNICAL WORDS.

Where technical words are used in a will, they have their technical meaning, unless a contrary intention clearly appears from the whole instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. ¶457.]

Appeal from Common Pleas Circuit Court of Dillon County; John S. Wilson, Judge.

Action by R. L. Lane against T. A. Dillon and another. From judgment for defendants, plaintiff appeals. Reversed.

L. D. Lide, of Marion, and Jos. P. Lane, of Dillon, for appellant. J. W. Johnson, of Marion, and Gibson & Muller and N. B. Hargrove, all of Dillon, for appellees.

HYDRICK, J. In separate paragraphs or items of their will, testators devised certain lands to each of their children by name, "and the heirs of his body." The devise to plaintiff's grantor, omitting the description of the land, reads:

"Item. We give and devise to our beloved son, Benjamin F. McDaniel, and the heirs of his body, thirty acres," etc.

The others are in the same language, except the name of the devisee and description of the land devised.

Following these devises, but in a separate paragraph, are these words:

"To have and to hold during the term of their natural lives, then to go to the heirs of their bodies."

About a year after the execution of the will a codicil was added, the material part of which reads:

"Item. That the land given and bequeathed in our first will and testament to our son, James A. McDaniel, Jr., and the heirs of his body, we do hereby give and bequeath unto him with full power to himself to dispose of it, if he may so elect, and the better to enable him our said son, James A. McDaniel, Jr., to dispose of the same to his own benefit and advantage, we have this day given him a deed for the same."

Having children, B. F. McDaniel conveyed the land devised to him in fee simple to plaintiff. His children, being advised that

he had only a life estate, conveyed the remainder to J. W. Dillon & Son, under whom defendant T. A. Dillon claims it, after the death of B. F. McDaniel, who is still living.

The question is: What estate did B. F. McDaniel take under the will? The defendant Dillon relies upon the clause of the will above quoted, which, for brevity, is called the habendum, and the codicil, to show an intention that each devisee should take only a life estate with remainder to the heirs of his body as purchasers.

[1, 2] The habendum does show the intention that each devisee shall take only a life estate. It says so plainly. But, in equally plain terms, the remainder is limited to "the heirs of their bodies." The word "their," in this clause, evidently refers only to the immediate devisees—the sons and daughters—and does not include "the heirs of their bodies," so as to qualify those words, as used in the several devises, and make them words of purchase. The rule is well settled that, when technical words are used, they must have their technical meaning, unless a contrary intention clearly appears from the whole instrument. There is nothing in the habendum clause from which we could infer the intention that the words "heirs of their bodies" should not have their technical meaning. Nor can such an inference be drawn from the codicil. It does not appear whether the devisee therein named had issue. The codicil might, therefore, have been executed because he had no issue, or to enable him to dispose of his land before the death of testators, as it recites that a deed therefor was executed, or it might have been because testators were ignorant of the legal effect of their devises. In such matters we cannot speculate. Certain it is that neither the habendum clause, nor the codicil, nor both together, warrant a clear inference that the words "heirs of their bodies" were not used in their legal sense. This being so, they must have that meaning; and, giving them that meaning, the conclusion is inevitable that plaintiff's grantor took a fee conditional, and his conveyance to plaintiff vested in him a fee-simple title. The cases cited by appellant fully sustain this conclusion.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 193)

COX et al. v. NEWBY et al. (No. 9108.)
(Supreme Court of South Carolina. May 18,
1915.)

1. DEEDS ¶124—WORDS OF INHERITANCE—INTENT.

The habendum, in a deed in regular form was: "Unto the said E. and her heirs begotten by her present husband, G., forever." The covenant of warranty was: "Unto the said E. and her heirs by G." Held, that E. took a condi-

tional fee under the deed; since the word "heirs" must be given its technical meaning when a contrary intent does not appear.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. ¶124.]

2. DEEDS ¶123—GRANTEES—"BEGOTTEN."

The word "begotten," as used in conveying, means the same as "to be begotten," unless a contrary intent appears.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-374, 413-435; Dec. Dig. ¶123.]

For other definitions, see Words and Phrases, First and Second Series, Beget.]

Appeal from Common Pleas Circuit Court of Greenville County; H. F. Rice, Judge.

Action by Tench Cox and others against Mary C. Newby and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Ansel & Harris, of Greenville, for appellants. Haynsworth & Haynsworth, of Greenville, for respondents.

HYDRICK, J. The question here is the proper construction of a deed conveying real estate, which is regular and in the usual form. In the premises the grant is to Elizabeth J. Cox. The habendum is: "Unto the said Elizabeth J. Cox and her heirs begotten by her present husband, George Cox, forever." Then follows a full covenant of warranty: "Unto the said Elizabeth J. Cox and her heirs by George Cox."

At date of the deed Mrs. Cox had five children by George Cox. Two of them predeceased her. She died in 1912, after having conveyed the land in fee simple to Dill, under whom the defendants claim. Mrs. Cox left three children by George Cox surviving her. They are the plaintiffs.

[1] The question is: What estate did Mrs. Cox take under the deed? Plaintiffs contend that the word "heirs," in the habendum and warranty, was used in the sense of "children." If so, then Mrs. Cox and her children took only life estates, for there is no other word of inheritance in the deed. But the deed shows the intention of the grantor to part with the fee.

[2] It is contended that the word "begotten," being in the past tense, so qualified the word "heirs" as to show not only that it was used in the popular sense of that word, as meaning "children," but also as meaning children already born and in esse. Such construction is not warranted by reason or authority. "Begotten" is often used to refer to future as well as past issue. The words "begotten" and "to be begotten," "procreatis" and "procreandis," have always been construed to mean the same, unless a contrary intention clearly appears. Coke, Litt. 20b. The word "heirs" is a technical word, and the rule is well settled that, when technical words are used, they must have their technical meaning, unless a contrary intention

clearly appears from the context. There is nothing here to take this case out of the rule. *Church v. Moody*, 98 S. C. 234, 82 S. E. 428, is conclusive of the question. There the deed was to Margaret Scott "and the heirs of her body begotten," etc. At date of the deed she had one child, and another was afterwards born. Held, that both were entitled under the deed.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 181)

JONES et al. v. WESTERN UNION TELEGRAPH CO. (No. 9106.)

(Supreme Court of South Carolina. May 17, 1915.)

1. TELEGRAPHS AND TELEPHONES ¶38—RECEPTION OF MESSAGE FOR TRANSMISSION—OBLIGATION IMPOSED ON TELEGRAPH COMPANY.

A telegraph company receiving a message for transmission must deliver it within a reasonable time, and, where it fails through its wrongful act so to do, it is liable for the damages proximately resulting therefrom.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. ¶38.]

2. TELEGRAPHS AND TELEPHONES ¶37—RECEPTION OF MESSAGE FOR TRANSMISSION—OBLIGATION IMPOSED ON TELEGRAPH COMPANY.

A telegraph company, learning that, because of conditions brought about by no fault on its part, it is unable to deliver a message, must send a service message notifying the sender why delivery cannot be made.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. ¶37.]

3. PLEADING ¶21—RECEPTION OF MESSAGE FOR TRANSMISSION—OBLIGATION IMPOSED ON TELEGRAPH COMPANY.

A cause of action for a telegraph company's nondelivery of a message is inconsistent with a cause of action for its failure to send a service message on learning that, because of conditions brought about by no fault on its part, it is unable to make delivery of the message, and one cannot recover damages for a wrongful failure to deliver and for a wrongful failure to send a service message.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 44; Dec. Dig. ¶21.]

4. APPEAL AND ERROR ¶1064—TELEGRAPHS AND TELEPHONES ¶74—RECEPTION OF MESSAGE FOR TRANSMISSION—OBLIGATION IMPOSED ON TELEGRAPH COMPANY.

Where the complaint, in an action against a telegraph company, alleged damages for nondelivery of a message and for failure to send a service message, a charge authorizing a verdict for actual and punitive damages for nondelivery and a verdict for actual and punitive damages for failure to send a service message was erroneous and prejudicial to the company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ¶1064; Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. ¶74.]

Gage, J., dissenting.

Appeal from Common Pleas Circuit Court of Kershaw County; W. A. Holman, Special Judge.

Action by J. H. Jones and another against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Geo. H. Fearons, of New York City, and Nelson, Nelson & Gettys, of Columbia, for appellant. De Pass & De Pass and Alfred Wallace, Jr., all of Columbia, for respondents.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, in failing to deliver the following telegram:

"Killians, S. C., 10-23-1918.

"To Dr. Langford, Blythewood, S. C.: Please come to see my wife.
J. H. Jones."

The jury rendered a verdict in favor of the plaintiff for \$500 actual damages and \$1,000 punitive damages. The defendant made a motion for a new trial, which was granted, unless the plaintiff remitted \$500 of the verdict for punitive damages, which sum was remitted and judgment entered for \$1,000. The defendant appealed, and the sole question is whether his honor, the presiding judge, erred in charging the jury as follows:

"A telegraph company owes to the sender of a telegram the duty to inform her promptly of inability to deliver the message to the addressee, and, if it fails to do so, it is responsible in damages to the sender for any injury to him caused by such failure to notify the sender, the same as for failure to deliver promptly."

The complaint alleges:

"That the defendant, as plaintiffs are informed and believe, negligently, recklessly, willfully, and wantonly failed to deliver said message to Dr. Langford, although, as plaintiffs are informed and believe, the message could have reached Blythewood in a short time after being received at the office at Killians, and the defendant negligently, recklessly, willfully, and wantonly failed to notify the plaintiff Sallie Jones of the nondelivery of said message to Dr. Langford."

[1, 2] When a telegraph company receives a message for transmission, the law imposes upon it the duty of delivering the telegram within a reasonable time; and, if it fails through its wrongful acts in this respect, it becomes liable for all damages proximately resulting from such dereliction of duty. If, however, it finds out that conditions are such as to cause inability on its part to transmit the telegram, then the law requires that it should send a service message notifying the sender why delivery cannot be made.

The obligation to deliver is primary in its nature, while the duty to send a service message is secondary, and arises from a different state of facts, viz., inability of a telegraph company, without fault on its part, to discharge its primary duty. *Mackorell v. Telegraph Co.*, 90 S. C. 498, 73 S. E. 359, 875.

[3] A cause of action for nondelivery, based upon the wrongful acts of the telegraph company, is inconsistent with a cause of action for failure to send a service message, for the reason that a cause of action for failure to send a service message presupposes and is predicated upon the theory that conditions which were brought about by no fault on the part of the telegraph company, and for which it is not responsible, were the cause of its inability to make delivery.

A plaintiff cannot recover damages for failure to send a service message, unless there was negligence or willfulness, on the part of the telegraph company, not in failing to deliver, but in the failure to send a service message, after ascertaining that conditions had arisen which rendered it powerless to make delivery. Therefore a plaintiff cannot recover double damages—those caused by the wrongful failure to deliver, and those resulting from the wrongful failure to send a service message.

[4] It will be observed that the complaint alleges that the plaintiff suffered damages, not only on account of the nondelivery of the telegram, but also on account of the failure to send a service message; and that under the charge of his honor, the presiding judge, the jury could render a verdict for actual and punitive damages, for nondelivery, and also for actual and punitive damages for failure to send a service message. This was erroneous and prejudicial to the rights of the appellant, and may have been the cause of the amount of the verdict for punitive damages, which was reduced, because his honor, the presiding judge, regarded it as excessive.

Judgment reversed, and new trial granted.

WATTS and FRASER, JJ., concur.
GAGE, J., dissents.

HYDRICK, J. I concur in the result. There should be a new trial, because plaintiff's seventh request was inapplicable to the facts of the case and prejudicial to defendant. Dr. Langford was a member of the firm of Langford Bros., whose store was across the street from the telegraph office. The testimony is that, when he was not attending calls, he was usually about the store; and, when he was absent, telegrams for him were nearly always left at the store, though not by his instructions or request. The agent of defendant who received this message testified that he remembered receiving it, and thought that it was left at the store, where most of the telegrams for the doctor were delivered, or left for him, when he could not be found. He had no receipt for it or positive recollection of its having been left at the store, but felt sure it was delivered somewhere. Even if the company should, under some circumstances, inform

the sender of nondelivery and the reasons therefor, it was not required to do so under the facts of this case, because it was supposed that a proper delivery had been made. It is unnecessary, in this view, to decide whether the failure to send a service message, when the circumstances require the sending of one, would give rise to a separate and distinct cause of action, or is a mere incident to the cause of action arising from the failure to deliver the principal message.

(100 S. C. 375)

MIMS v. ATLANTIC COAST LINE R. CO.
et al. (No. 9042.)

(Supreme Court of South Carolina. April 3, 1915.)

1. MASTER AND SERVANT §250—INJURY TO SERVANT—PLEADINGS AND PROOF—INTERSTATE COMMERCE — FEDERAL EMPLOYERS' LIABILITY ACT.

When the pleadings show facts bringing an action for the death of an employé within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) it must be tried under that law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 805; Dec. Dig. §250.]

2. MASTER AND SERVANT §264—DEATH OF SERVANT—PLEADING—AMENDMENT.

Where the complaint, in an action for the death of a railroad employé, averred that he was engaged in intrastate commerce, and there was nothing to show the applicability of the federal Employers' Liability Act, defendant cannot, on a second trial, after the close of plaintiff's evidence, show, without amending its answer, that deceased was engaged in interstate commerce at the time of his death, for that fact should have been raised by the pleadings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. §264.]

3. TRIAL §55—RECEPTION OF EVIDENCE—RES GESTÆ.

The trial court has considerable discretion in determining what is res gestæ.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 130; Dec. Dig. §55.]

4. APPEAL AND ERROR §1097—DETERMINATION—LAW OF CASE.

A judgment on a prior appeal is the law of the case and, where the facts on the second trial are the same, is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. §1097.]

5. APPEAL AND ERROR §854—REVIEW—REASONS OF LOWER COURT.

Reasons assigned for the denial of a motion to dismiss form no part of the court's charge, and error cannot be predicated thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. §854.]

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Lizzie M. Mims, as administratrix of the estate of John J. Mims, deceased, against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

P. A. Wilcox, of Florence, L. W. McLe-more, of Sumter, and Barron, McKay, Frier-son & Moffatt, of Columbia, for appellants. Nelson, Nelson & Gettys, of Columbia, and J. H. Clifton, of Sumter, for respondent.

WATTS, J. This was an action by plain-tiff, as administratrix, for the benefit of her-self and her four minor children, to recover damages for the death of her husband on December 19, 1910, caused by the alleged joint and concurrent carelessness, negligence, recklessness, willfulness, and wantonness of the defendants. This is the second appeal in the case. In the first case, at the close of all the testimony, his honor, Judge Spain, granted a nonsuit, which upon appeal was reversed. The decision on the first appeal is reported in 95 S. C. 370, 78 S. E. 1031. The suit was brought under what is commonly known as the Lord Campbell's Act. The allegations of the complaint and answer do not show that plaintiff's intestate was en-gaged in interstate commerce at the time he was killed, and during the time of the first trial, and in the appeal therefrom, no men-tion is made by the defendants of the act of Congress known as the federal Employ-ers' Liability Act. Not only was no mention made of the federal act during the first trial and appeal, although it was as available to the defendants on the first trial as the sec-ond, but it appears at the second trial the defendants obtained leave over objection of the plaintiff and were permitted to amend their answer by setting up the defense of willful and gross contributory negligence on the part of the plaintiff's intestate under the South Carolina statute. The second trial was had before Judge Memminger and a jury, and resulted in a verdict in favor of plaintiff for \$16,000. As soon as plaintiff's case was closed, the counsel for defendants announced that train 46, which plaintiff's in-terstate was inspecting while killed, was en-gaged in interstate commerce, and that they would introduce testimony to show that, in the inspection of this train and otherwise, the plaintiff was engaged in commerce be-tween the states, and consequently the stat-ute under which plaintiff was bringing her case had been suspended by the act of Con-gress of the United States, known as the federal Employers' Liability Act April 22, 1908. The court refused to allow the defend-ants at that time, under the pleadings, to raise this issue, and refused to admit any testimony in regard thereto. The court also refused to direct a verdict in favor of defend-ants as asked for. After entry of judgment, defendants appeal.

Exceptions 1 and 2 allege error on the part of the presiding judge in refusing to allow certain testimony, which the appellants con-tend would show that, when plaintiff's in-terstate was killed, he was engaged in inter-

state commerce, and in refusing to allow testimony which defendants' counsel stated they would offer for the purpose of bringing the case under the Employers' Liability Act, and the remarks of the judge at that time. His honor took the position that the testimony was irrelevant and not responsive to the pleadings and not an issue in the case; that the case had been passed upon by the Supreme Court and an amendment over objection of plaintiff allowed just before proceeding with the second trial. After the plaintiff's testimony was all in, for the first time it seems to have occurred to the defendants that they wanted to avail themselves of the federal statute (Employers' Liability Act). The facts in every case should be pleaded.

[1] Whenever the pleadings show facts pleaded that the case is one that can be tried either under the federal or state law, then the court can try it under either law. When the pleadings show facts that bring it under the federal law, it must be tried under the federal law; and, when the pleadings show it is brought under the state law, it must be tried under that law.

[2] The complaint was filed April 5, 1911, and alleges deceased was killed December 19, 1910, and alleges defendants controlled and operated its railroad in the counties of Sumter and Richland and cities of Sumter and Columbia, S. C., and it nowhere alleges that the defendants operated its road in any other state than South Carolina, and there is no allegation in the complaint whereby it could be inferred that defendant railroad was engaged in interstate commerce, but the complaint clearly alleges that, at the time of the death of the deceased, it was engaged in intrastate business. The defendants answered without alleging that, at the time the deceased was killed while in their employment, he was engaged in the inspection of a car which was engaged in interstate commerce. These facts must have been known, or should have been known, to them, if they existed. They try the case in 1912 before Judge Spain. Defendants obtain a nonsuit, which upon appeal is reversed, and the case is ripe for a trial before Judge Memminger, and a motion to amend answer is made and allowed, and still no effort made to set up this defense and advertise the plaintiff of this defense. It does seem to us that justice and fair dealing under all of the circumstances of the case should have required the defendants if they intended to invoke the benefits which they thought would issue to them under the act of Congress to plead the facts applicable to bring it under the act. It would be an injustice at this stage of the case to allow this defense. The plaintiff alleged he was engaged in intrastate commerce when he was killed. The first trial showed that he was. When his honor, in the exercise of his discretion, allowed the defendants to amend their answer, permitting them all they asked

for, there was no hint or suggestion that he was engaged in interstate commerce. If he was, the information was or should have been known to them, and, if they desired to raise this issue, they should have set forth such allegations in their answer as to raise an issuable fact; but this they failed to do, but knowing that the plaintiff by her pleadings based her case on the state law, and after a trial under that law, and an appeal, without any reference, or suggestion even, or allegation, being made to the federal Employers' Liability Act, or that the deceased at the time of his injury was engaged in interstate commerce, defendants wait until the close of plaintiff's testimony in the second trial, and, without even seeking to amend their answer, attempt to bring into the case by introducing evidence, and seek a direction of a verdict upon a ground not pleaded. The plaintiff alleges that she has a cause of action against the defendants and is entitled to a trial either under the state or federal law, the pleadings made out a case to be tried under the state law, and under the pleadings his honor was correct in ruling as he did. It is not necessary to plead either a state or federal statute, but it is necessary to plead facts which bring it under one or the other; and, when the pleadings show that it was interstate commerce, the state or federal courts try it, and federal law governs; when the pleadings show it was intrastate commerce, the state law governs. The defendants should have pleaded the federal act, or at least such facts as would render the act applicable; and inasmuch as they did not do so, and the pleadings made out a case based on the state law, the exclusion of the evidence by his honor, complained of, was proper, as it was not responsive to any issue raised by the pleadings. If there had been an allegation in the answer that brought it within the federal Employers' Liability Act, it would have been controlled by the act, although the provisions may not have been referred to in express terms in the pleadings, and proof would be allowed in the case, but in this case there is no such allegation, and his honor committed no error, and these exceptions are overruled.

[3] Exception 3 is overruled. As we see no error on the part of his honor, it was not, in his honor's opinion, a part of *res gestæ*; and other witnesses practically testified to the same thing sought to be proved by Dr. China as to what part of the *res gestæ* must in a large measure be left to the sound judicial discretion of the trial judge.

[4] Exceptions 4 and 5 are overruled. The facts in this case were practically the same as in the former trial, and on former appeal it was held to be error to grant a nonsuit on case made out. This certainly became the law of this case, and *res adjudicata* as to the points and question presented in the appeal, and his honor was not in error in refusing

the same, and he had sound reason for refusing the same upon the law decided and the evidence developed.

[5] Exception 6 is overruled. His honor overruled the motion for direction of verdict and assigned his reason therefor. It was not a part of his charge, and could not be prejudicial to the defendants. It was not such a judicial indiscretion as was committed by the trial judge in *Latimer v. Electric Co.*, 81 S. C. 374-375, 62 S. E. 438, or in *Irby v. Express Co.*, 96 S. C. 354, 80 S. E. 613, or *Stokes v. Murray*, 99 S. C. 217, 83 S. E. 33, but is analogous to the case of *Rearden v. Insurance Co.*, 79 S. C. 526, 60 S. E. 1106. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., concurs in the result. HYDRICK, FRASER, and GAGE, JJ., concur in the opinion.

(101 S. C. 86)

KOENNECKE v. SEABOARD AIR LINE RY. (No. 9093.)

(Supreme Court of South Carolina. May 4, 1915. On Rehearing.)

1. MASTER AND SERVANT §264 — FEDERAL EMPLOYERS' LIABILITY ACT—PLEADING.

Where neither plaintiff nor defendant in a death action, claimed any right or immunity under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) evidence tending to bring the case under the statute should be excluded.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.]

2. COMMERCE §8 — FEDERAL EMPLOYERS' LIABILITY ACT—PLEADING.

Where, in an action for the death of a railroad employé, evidence that he was engaged in interstate commerce was elicited without objection on the cross-examination of one of plaintiff's witnesses, either party might, so long as the evidence remained in the record, claim the benefit of the federal statute, though the pleadings of neither asserted any right or immunity under it.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. § 8.]

3. PLEADING §248 — AMENDMENT — NEW CAUSE OF ACTION.

Where a complaint for the wrongful death of a railroad employé averred the existence of a dependent wife and children, the court might, in its discretion, allow an amendment which changed the action from one under the state laws to one under the federal Employers' Liability Act; such amendment not changing the cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.]

4. PLEADING §239 — AMENDMENT — TRIAL AMENDMENT.

Where the court grants a trial amendment which enables plaintiff to rely on a federal statute instead of the state law, it should impose such conditions as will prevent prejudice to defendant.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 626-635; Dec. Dig. § 239.]

5. CONTINUANCE §14 — AMENDMENT OF PLEADINGS—RIGHT TO.

In an action against a railroad company for the death of an employé, the court allowed a trial amendment to the complaint, which originally sought recovery under the state laws. After the amendment, which based recovery upon the federal Employers' Liability Act, defendant asserted that it was not prepared to meet the issue of the dependency of deceased's widow and children. Held that, where plaintiff's counsel consented to striking out the names of those children who were not concededly dependent, and, although the trial continued for three days, defendant offered no evidence on the issue of dependency, though the widow and children resided in the place where the trial was held, the action of the court in allowing the amendment and proceeding with the trial was not error.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 25, 99-112; Dec. Dig. § 14.]

6. MASTER AND SERVANT §284 — FEDERAL EMPLOYERS' LIABILITY ACT — WHAT LAW GOVERNS.

Where it is an issue of fact whether the state law is applicable or the federal Employers' Liability Act, that question should be submitted to the jury under proper instructions.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1000-1080, 1092-1132; Dec. Dig. § 284.]

7. NEGLIGENCE §136—DIRECTED VERDICT.

Where some of the specifications of negligence in a complaint were supported by evidence, defendant's motion to direct a verdict in its favor was properly denied.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.]

8. APPEAL AND ERROR §1067 — HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

In an action for a railroad employé's death, the refusal to charge that the fact that a large number of cars were being backed was no evidence of negligence is not prejudicial error, for the jurors must be presumed to have been reasonable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. § 1067.]

9. MASTER AND SERVANT §137 — INJURIES TO SERVANT—DUTY TO WARN.

It cannot be held that under no circumstances is the crew of a switch engine working in a switch yard bound to give signals.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.]

10. MASTER AND SERVANT §270—INJURIES TO SERVANT—EVIDENCE.

Where it was a question of fact whether a movement of cars was more than a switching operation, the admission of a rule governing the movement of cars, not applicable to mere yard service, was not error.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.]

Appeal from Common Pleas Circuit Court of Richland County; W. A. Holman, Special Judge.

Action by B. M. Koennecke against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Lyles & Lyles, of Columbia, for appellant. F. G. Tompkins, W. H. Cobb, and C. S. Monteith, all of Columbia, for respondent.

HYDRICK, J. [1] Plaintiff brought this action to recover damages for the alleged wrongful killing of her intestate by the defendant. The complaint states a cause of action under the state statute. There is no allegation that, at the time he was killed, deceased was employed in interstate commerce, or that defendant was engaged in such commerce. Nor are any facts alleged from which, by reasonable intendment, such employment or engagement can be inferred. Nor does defendant set up in its answer any facts which directly, or by reasonable intendment, bring the case under the federal statute. The allegation of the complaint that deceased left a widow and four children, who were dependent upon him, is appropriate to an action under the federal statute; and, while the allegation of dependency is not strictly necessary, it is not wholly inappropriate to an action under the state statute, because the damages recoverable under the state statute are such as the jury "may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." *Barksdale v. Railway*, 76 S. C. 183, 56 S. E. 906. Therefore, as neither plaintiff nor defendant set up or claimed any right or immunity under the federal statute, there would have been no error, if all evidence tending to prove facts sufficient to bring the case under that statute had been excluded. *Mims v. Railroad Co.*, 85 S. E. 372, filed April 3, 1915. That such right or immunity must be specially set up or claimed at the proper time and in the proper way cannot be controverted. *Oxley Stave Co. v. Butler Co.*, 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149.

[2, 3] But, on cross-examination of one of plaintiff's witnesses, defendant brought out testimony, without objection, which tended to prove facts sufficient to bring the case under the federal statute. So long as that testimony remained in the record, either side had the right to claim the benefit of the federal statute, even without amendment of the complaint or answer. *Toledo, etc., R. Co. v. Slavin*, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. Ed. —. But, when that testimony came out, plaintiff moved to amend her complaint by alleging facts to bring the case under the federal law, and her motion was granted. Defendant resisted the motion to amend on the ground that the amendment would substantially change the plaintiff's claim by substituting one cause of action for another, and denied the power of the court to grant such an amendment. Strictly and very technically speaking, it may be that the amendment substituted one cause of action for another, though it would, perhaps, be more nearly correct to say that the cause of action is the same, whether the action be brought and tried under the state or the federal law; and, since the principal differ-

ences between an action under the state and federal law lie in the authority by which the right of action is given and in some of the rules of law applicable in the determination of the rights of the parties, they relate to form and procedure rather than to substance. So that it could rarely happen that a shifting from one to the other would work prejudicial surprise. But if the parties have not been previously warned by the pleadings that such shifting might take place, and if it should be made to appear that it would be a surprise and operate to cut off a claim or defense which could otherwise have been made, the court would either not allow it or allow it upon such terms as would prevent prejudice.

In *Missouri, etc., R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, plaintiff brought action in her individual capacity under the state law for damages for the death of her son. Defendant alleged that, at the time of his injury and death, deceased was employed and defendant engaged in interstate commerce. Thereafter plaintiff was appointed administratrix of her son's estate, and was allowed to amend her petition by making herself a party plaintiff, as administratrix, and by alleging a cause of action both under the state and federal law. She recovered under the federal law. There, as here, the contention was made that, by the amendment, the plaintiff was allowed to substitute a new and entirely different cause of action. But the court overruled that contention, and held that the change was in form rather than in substance, and it was not equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by the federal act. The court said:

"It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit."

[4] The amendment allowed in the case at bar was clearly within the power and discretion of the court. Such an amendment may be allowed even during the trial, when it does not so materially change the claim or defense as to result in prejudice to the adverse party. *Shelton v. Railway*, 86 S. C. 98, 67 S. E. 899; *Birt v. Railway*, 87 S. C. 239, 69 S. E. 233; *Hewlett v. Railroad Co.*, 93 S. C. 76, 76 S. E. 32. Where such amendments are asked for during the trial, if the opposite party would be misled or surprised thereby to his prejudice, it is incumbent upon him to make the fact appear by affidavit or otherwise, to the satisfaction of the court; and, if that is done, the court would either refuse the amendment, or, granting it, would continue the hearing, or impose such other terms and conditions as it might deem necessary to prevent prejudice. *Shelton v. Railway*, *supra*.

[6] Defendant contends further that the court erred in ordering the trial to proceed after the amendment was allowed, notwithstanding the statement made by its attorney that he was not prepared to meet the issue of the alleged dependency of the widow and children upon deceased. The record shows that defendant resisted the motion to amend chiefly on the assertion of the want of power in the court to grant it, and that its main purpose was to obtain a nonsuit. Evidently the statement of counsel that his only objection to proceeding with the trial was that he was not prepared to meet the issue of dependency did not satisfy the court that he would suffer prejudice on that score, for the court stated, time and again, that if counsel was taken by surprise, and was not prepared to proceed with the trial, he would not force him to go on. When counsel first raised the objection that he was not prepared to meet the issue of dependency, plaintiff's attorneys consented to strike out the names of two of the children alleged to be dependent, and then claimed damages only for the widow, an unmarried adult daughter, and a minor son, who were all shown by clear and undisputed testimony to have been dependent on deceased. Under all the circumstances, as they appear in the record, appellant has failed to satisfy this court that the trial judge abused his discretion. Though the plaintiff and her children all resided in the city of Columbia, where the case was tried, and had resided here with deceased for more than ten years, and the trial lasted three days, no effort at all appears to have been made by the defendant to procure any testimony rebutting or questioning that of the plaintiff on the issue of dependency, not even by cross-examination of her witnesses. We are impressed that defendant's objection was interposed rather for the purpose of obtaining a technical advantage, and a ground for a new trial, in the event of an adverse verdict, than for the purpose of getting time and opportunity to prepare to meet the alleged new issue, and that, if he had made any showing that he was taken by surprise to his prejudice and had earnestly asked for time to meet the issue, his request would have been granted.

Certainly, in a case like this, where the defendant must be presumed to know the facts surrounding the employment of deceased better than the plaintiff did, it will not be allowed to withhold the facts, until the trial is in progress, and then spring them on the plaintiff, without having alleged them in its answer, to the discomfiture of the plaintiff. Such procedure is repugnant to any proper conception of a just administration of law.

[8] From what has already been said, there does not appear to be any sound reason why a plaintiff may not set up in his

complaint the same cause of action under the state law and also under the federal law, stating it separately, of course, and try it under the law which the proof shows to be applicable. Where the cause of action is so alleged, the parties would come to trial prepared to meet the issues which might arise under either aspect of the case. There is no inherent difficulty in this method of procedure, and it will greatly facilitate the trial of such cases and promote the ends of justice. Doubtless in most cases the evidence will clearly settle the question whether the state or federal law is applicable. But when, under proper allegations of the complaint or answer, and the evidence adduced, there is an issue of fact whether the state or federal law is applicable, the case should be submitted to the jury, under proper instructions as to both aspects of it, so that the jury may render their verdict under the one or the other, as they may find the facts. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Howell v. Railroad Co.*, 99 S. C. 404, 83 S. E. 639. Such is our procedure in actions having such a double aspect that they may be regarded either as actions at common law or under a statute. *Lee v. Railroad Co.*, 84 S. C. 125, 65 S. E. 1031. Nor is such procedure obnoxious to any provision of the federal statute. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226. In the case last cited, an action was brought under the federal act. But omitting the allegations which, if proved, would have made the federal statute applicable, a cause of action was stated under the state law. The proof failed to show that the injury occurred in interstate commerce, and, at defendant's request, the court instructed the jury that the federal statute was not applicable. The case was then submitted to the jury under the state law, and the plaintiff recovered. The federal Supreme Court sustained the judgment, holding that the state "court merely gave effect to a rule of local practice, the application of which was not in any wise in contravention of the federal act."

[7] As there was testimony tending to support some of the specifications of negligence in the complaint, the motion to direct a verdict for defendant was properly refused.

[8] It would be unprofitable to discuss the numerous exceptions in detail. Upon examination of the charge, we find no prejudicial or reversible error therein, or in the refusals to charge. The court might well have charged defendant's fourth and fifth requests that there was no evidence of negligence in that the train which killed deceased consisted of a great number of cars (more than 12), or in that the engine was backing and pulling the train. Still we are not satisfied that the refusal was prejudicial. The jury are as-

sumed to be men of common sense, and it is inconceivable that they would have found against defendant merely because the train consisted of any number of cars, or because the engine was backing, if the approach of the train had been signaled by headlight on the engine or in some proper way. There was testimony that the headlight of the engine was not lighted, and that a proper lookout was not kept.

[8] We cannot assent to the view that, under no circumstances, it is the duty of the crew of a switching engine, moving in a switching yard, to give signals of its approach for the benefit of other employes working in the yard, even though they may know that it is moving about the yard, and be under the duty of looking out for it. But, if the law were as so contended, the engine in question had not theretofore been moving about the yard. Its regular place of work was in another yard. It had just arrived in the yard where it ran over deceased, and its arrival may not have been expected.

[10] While the undisputed evidence shows that rule U, which forbids the moving of engines or cars backward without lookout, was not applicable to yard service, it was conceded that it was applicable on the main line. Therefore, under the rule, the engine should have had a lookout while on the main line from Columbia to Cayce. As it was a question of fact whether this more extended movement than yard service had been completed, there was no prejudicial error in admitting the rule, for it was for the jury to say whether, under the circumstances, the lookout should have been kept on the backing engine after it entered the yard and until its extended movement was completed.

The questions involved in the other exceptions have been so frequently considered by the court that they require no special consideration.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

On Rehearing.

PER CURIAM. The court regrets that counsel for appellant think that the language of the opinion is an implied criticism of their conduct of the defense. While we do not think it is susceptible of such an inference, lest any one may think so, it gives us pleasure to say that it was not so intended. Saying that counsel sought to obtain a technical advantage to the discomfiture of plaintiff by no means warrants the inference that it was unethical to do so, or even that it was improper. The petition for rehearing is therefore dismissed. But the remittitur will be stayed, until the further order of the court, to allow counsel to apply for a writ of error.

(100 S. C. 458)

WATKINS v. SOUTH CAROLINA W. RY. (No. 9065.)

(Supreme Court of South Carolina. April 12, 1915.)

1. CONTINUANCE ⇐33—ABSENCE OF WITNESS—DISCRETION OF COURT—ABUSE.

When an action against a railway company was called for trial, its counsel moved for a continuance until the next day for absence of a former conductor employed outside the state. No effort had been made to procure his deposition, and a subpoena issued for him was not served because he was not within the state. Plaintiff admitted the statement of the company's counsel as to what such witness if present would testify, and such statement was read to the jury. It being possible that the conductor was on a train arriving in about two hours, the trial was postponed until its arrival, and a further continuance was then refused. *Held*, that no abuse of discretion appeared.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 113; Dec. Dig. ⇐33.]

2. APPEAL AND ERROR ⇐1043—HARMLESS ERROR—DENIAL OF CONTINUANCE.

The witness not having appeared on the second day of the trial, the ruling was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. ⇐1043.]

3. APPEAL AND ERROR ⇐173—REVIEW—MATTERS NOT RAISED BELOW.

In a passenger's action for injuries, where the contention that he could not recover for an injury received in doing a thing which he had been forbidden to do by the conductor, was not raised in the circuit court, it could not be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1098, 1096-1098, 1101-1120; Dec. Dig. ⇐173.]

4. APPEAL AND ERROR ⇐215—RESERVATION OF GROUNDS OF REVIEW—ERRORS IN CHARGE.

Where the presiding judge misstates the issues, the error is waived, unless his attention is called thereto at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. ⇐215.]

5. TRIAL ⇐296—ERROR—CURE BY OTHER INSTRUCTIONS.

In a passenger's action for injuries, where the court charged that if plaintiff was injured as a result of defendant's negligence as alleged in the complaint, he was entitled to actual damages, the failure to qualify this by adding after "complaint," "to which plaintiff's negligence did not contribute as a proximate cause" or words to that effect, was not error, the court having charged the law as defendant claimed it should have been charged in another instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 737; Dec. Dig. ⇐296.]

6. CARRIERS ⇐348—ACTIONS FOR INJURIES—INSTRUCTIONS.

In a passenger's action for both actual and punitive damages for injuries claimed to have been due to the carrier's negligent, reckless, wanton, and willful conduct, defendant pleaded contributory negligence, and also pleaded plaintiff's gross negligence and reckless conduct as the sole cause of his injury. It requested an instruction that as to both causes of action plaintiff could not recover if his injury was due to his own fault, and not to the

fault of the railroad company.' The court limited this instruction to the cause of action for negligence. *Held* that this was erroneous, since it is as a complete defense to willfulness as to negligence that the injured person was the sole author of his own injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1408-1409; Dec. Dig. ¶348.]

7. TRIAL ¶296 — ERROR — CURE BY OTHER INSTRUCTIONS.

This error was not cured by a subsequent instruction charging the law correctly, since there was not merely an incomplete statement, and the jury might have understood that the modification applied to the subsequent instruction, as the court had already confined the defense to negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ¶296.]

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court, of Darlington County; Geo. W. Gage, Judge.

Action by George E. Watkins against the South Carolina Western Railway. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

George E. Dargan and B. Wofford Wait, both of Darlington, for appellant. Miller & Lawson, of Hartsville, for respondent.

FRASER, J. The following statement appears in the case:

"This action was commenced on June 1, 1912, by due service of a summons and complaint. The plaintiff seeks both actual and punitive damages for injuries alleged to have been sustained by him on the afternoon of May 4, 1912, by reason of the negligent, reckless, wanton, and willful conduct of the defendant, its agents and servants, then and there acting within the scope of their agency: (1) In failing and refusing to stop its passenger train, on which the plaintiff was a passenger, at a point called 'Segar's' or 'Segar's Siding,' his destination, long enough, to wit, a reasonable time, for plaintiff to alight therefrom; (2) in hindering and impeding plaintiff in his efforts to alight; (3) in starting the train while plaintiff was in the act of alighting; (4) in thereafter curtly and insultingly refusing to stop the train so that plaintiff might alight in entire safety; (5) in compelling plaintiff to alight from the then slowly moving train or be carried to another and distant station; and (6) in precipitating plaintiff so violently, roughly, and suddenly to the ground as to break his right arm. The defendant set up three defenses, to wit: First, a general denial; second, contributory negligence; and, third, plaintiff's gross negligence and reckless conduct as the sole cause of his injury. The defendant owns and operates a line of railway between Florence and McBee in this state, passing through Hartsville and Segar's, both in Darlington county, and, on the date of the alleged injury, plaintiff, his wife and two sons took passage on defendant's train from Hartsville to Segar's, reaching the latter point an hour or more before sundown.

"The case was tried before his honor, George W. Gage, and a jury. Upon the call of the case for trial, defendant's counsel moved for a continuance for one day on the ground of the absence of one Hawley, the conductor in charge of its train on the day of the alleged injury, stating that the witness was not then in the employ of the defendant, but was employed beyond the boundaries of this state; that defendant had exercised every effort to secure

his attendance, and that they were informed the witness was then on his way to attend the trial; that he would have been present in court had not his train missed a connection at Charlotte, N. C., and that he would be in court the next morning. His honor overruled defendant's motion, and ordered the case to trial. Defendant's counsel then stated that it was possible the witness might reach Darlington on a train arriving about two hours later, and his honor postponed the trial until after the arrival of said train, but refused any further continuance.

"No effort had been made to procure the deposition de bene esse of said witness. A subpoena writ was issued for him, as for other witnesses, but was not served because he could not be found within the state. Plaintiff admitted the statement of defendant's counsel as to what said witness, if present, would testify, which statement was read to the jury and hereinafter appears. The taking of testimony was concluded and argument commenced on the first day of the trial, which ended about noon of the second day, but said witness did not appear. The trial resulted in a verdict for the plaintiff in the following form, to wit: 'We find for the plaintiff, Watkins, (1) five hundred dollars as actual damages, and we find for him (2) five hundred dollars as punitive damages. W. A. Folsom, Foreman. April 5th, 1913.' On this verdict judgment was duly entered on the 14th day of April, 1913. From this judgment the defendant appeals on the ground stated in its exceptions, which hereinafter appear."

The question raised by the exceptions, as condensed by appellant, are as follows:

[1, 2] 1. Did his honor err in refusing defendant's motion for a continuance?

The appellant admits that a continuance was within his honor's discretion, but urges an abuse of discretion. It does not appear that there was an abuse of discretion. Besides this, the motion was for a continuance for one day to enable the appellant's witness to reach the place of trial. It appears that the witness did not appear on the second day. The ruling was not, therefore, prejudicial.

[3] 2. Did his honor err in refusing defendant's motions (a) for a nonsuit, (b) for direction of verdict, and (c) to set aside the verdict and for a new trial?

There was abundant evidence to carry the case to the jury unless it be the law of this state that a passenger can, under no circumstances, recover for an injury which he received in doing a thing which he has been forbidden to do by a conductor. A careful search of the record fails to show that this question was made in the circuit court, and it cannot be made here.

[4] 3. Did his honor commit error of law in his charge to the jury?

Exception IV complains of error in the statement of the judge as to certain propositions upon which "counsel on both sides have agreed." The rule is too well settled to need the citation of authority that, where the presiding judge misstates the issues, his attention must be called to his error at the trial, or the error is waived.

4. Exceptions V and VI: "That his honor

clearly intimated his opinion on the facts of the case." A careful consideration of the charge will show that the excerpts taken in their connection are a mere statement of the issues.

[5] 5. Exception VII is as follows:

"That his honor erred in charging plaintiff's sixth request, to wit: 'If you find that plaintiff was injured as the result of negligence of the defendant, as alleged in the complaint, then the plaintiff would be entitled to recover actual damages for the injury by him sustained;' the error being that his honor failed to qualify the same by adding after the word 'complaint,' 'to which plaintiff's negligence did not contribute as a proximate cause,' or words to that effect."

His honor charged the law as appellant claims it ought to have been charged in response to appellant's third request to charge, which was a fuller statement of the law.

Exception VIII is not argued, but submitted on exception VI.

[6, 7] 6. The ninth exception complains of error in a modification of defendant's fourth request to charge. The request was as follows:

"4. As to both causes of action I charge you that the plaintiff, Mr. Watkins, cannot recover if you find from the evidence that his injury, if he was injured, was due to his own fault, and not to the fault of the defendant railway company."

His honor modified as follows:

"4. As to the second cause of action I charge you that the plaintiff, Mr. Watkins, cannot recover if you find from the evidence that his injury, if he was injured, was due to his own fault, and not to the fault of the defendant railway company."

This was error. Doubtless his honor had in his mind the rule as to contributory negligence. The defendant pleaded contributory negligence, but it also pleaded that the plaintiff was the sole author of his own injury. The defense that the plaintiff is sole author of his own injury is as complete defense, if proven, to willfulness as it is to negligence, and when it is pleaded and a request to charge is made, the defendant is entitled to have the law in regard to it charged, and not to do so is error. *Moore v. Traction Co.*, 94 S. C. 249, 77 S. E. 928.

It is true his honor, under the defendant's eighth request, charged the law correctly, but this was not merely an incomplete statement, and the jury may have understood that the modification applied to the eighth request, inasmuch as he had already confined the defense to negligence.

Exceptions X and XI have already been considered.

The judgment appealed from is reversed, and a new trial is ordered.

HYDRICK and WATTS, JJ., concur. GAGE, J., disqualified.

GARY, C. J. I dissent. If the defendant had requested his honor, the presiding judge,

to charge that the plaintiff could not recover punitive damages, if his injury, was due *solely* to his own fault, quite a different proposition would have been submitted.

The defense of contributory negligence presupposes that the party injured was at fault, yet it cannot be interposed against a cause of action for punitive damages.

In any event, there should not be a new trial, as to both causes of action, for the reason that the request was charged, as to the cause of action for actual damages.

For these reasons, I dissent.

(100 N. C. 110)

MILLER v. SMITH et al. (No. 593.)
(Supreme Court of North Carolina. May 25 1915.)

1. JUDGMENT \S 101—DEFAULT JUDGMENT—PLEADINGS TO SUSTAIN.

A complaint alleging that the defendants were indebted to plaintiff in a certain sum, with interest thereon from a certain date, for goods sold and delivered, for board of employes, and for goods delivered to employes on order between certain dates, which sums the defendants agreed to pay at the prices charged, and stating the balance due after deducting the credits, entitled the plaintiff to a judgment by default final upon the failure to answer within the time required by law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 168-170; Dec. Dig. \S 101.]

2. JUDGMENT \S 145—DEFAULT JUDGMENT—MOTION TO VACATE — WANT OF MERITORIOUS DEFENSE.

In such case, where the court found defendants' inexcusable neglect in failing to file an answer, and that they had no meritorious defense to the cause of action set up in the complaint, it properly refused to vacate the judgment by default final.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 271, 292-295; Dec. Dig. \S 145.]

Appeal from Superior Court, Haywood County; Justice, Judge.

Action by C. E. Miller against S. M. Smith and others. Motion to vacate and set aside a judgment by default final denied, and defendant Smith appeals. Affirmed.

J. W. Ferguson, of Laurens, S. C., and M. Silver, of Waynesville, for appellant. Morgan & Ward and John M. Queen, all of Waynesville, for appellee.

BROWN, J. [1] The complaint alleges that the defendants are indebted to the plaintiff in the sum of \$1,387.39, with interest thereon from November 15, 1913, due for goods, wares, and merchandise sold and delivered, and for board of employes, and for goods, wares, and merchandise sold and delivered to employes on orders, from time to time from August 1, 1913, to March 1, 1914, which sums for board, merchandise, and orders the said defendants contracted and agreed to pay at the prices charged; that there is due on said account, after deducting all credits to which the defendants are entitled, the sum of \$1,387.39, with interest from

November 15, 1913. The language of this complaint is plain and unambiguous. It alleges a distinct promise to pay at the prices charged. Upon all the authorities the plaintiff was entitled to a judgment by default final upon the failure to answer within the time required by law. *Hartman v. Farrior*, 95 N. C. 177; *Witt v. Long*, 93 N. C. 388.

[2] In addition, his honor not only finds facts which fail to show excusable neglect for failure to file the answer, but he also finds that the defendants have no meritorious or valid defense to the cause of action set out in the complaint. *Jeffries v. Aaron*, 120 N. C. 169, 26 S. E. 696.

The judgment is affirmed.

(169 N. C. 379)

STATE v. WAINSCOTT. (No. 538.)

(Supreme Court of North Carolina. May 25, 1915.)

1. INTOXICATING LIQUORS — 201, 222 — OFFENSES—INDICTMENT—SUFFICIENCY.

An indictment, charging an illegal sale of intoxicants, need not allege that accused was other than a druggist or medical depository, duly licensed to sell liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 221, 240-248; Dec. Dig. — 201, 222.]

2. CRIMINAL LAW — 829—TRIAL—INSTRUCTIONS.

In a prosecution for the illegal sale of intoxicants, a charge that if the witness to the sale was impelled by any desire to catch accused in an unlawful act, his testimony might be weighed in view of that fact, sufficiently covered a requested charge that the testimony of a detective, who testified to the purchase, should be scrutinized with unusual caution.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. — 829.]

Appeal from Superior Court, Buncombe County; Cline, Judge.

O. K. Waincott was convicted of selling intoxicating liquor, and he appeals. Affirmed.

G. S. Reynolds, of Asheville, for appellant. Atty. Gen. Bickett and Asst. Atty. Gen. Calvert, for the State.

PER CURIAM. [1] The defendant moved to quash the warrant for the reason that it does not allege that the defendant is "other than druggist and medical depository, duly licensed thereto." The motion was properly overruled, as the identical question has been decided adversely to the defendant's contention in *State v. Moore*, 166 N. C. 284, 81 S. E. 294.

There are four exceptions relating to the admission and rejection of testimony, which we have examined, and find them to be without merit.

[2] The sixth and ninth exceptions relate to the charge. The defendant requested the court to instruct the jury that the testimony of the detective should be scrutinized with unusual caution. His honor did not give the prayer in the language requested. Instead his honor instructed the jury that

it was contended that the witness Graham was a special detective, and he charged the jury as follows:

"Now, if he made the sale—I will instruct you about that shortly again—but I am saying, if you find that the witness Graham was impelled by any desire to catch the defendant in an unlawful act, why, then, you have the right to scrutinize his testimony and consider that in determining what weight and effect you will give that; what is the value of his evidence here in this case, notwithstanding he may have borne that relation toward the defendant."

We think that is substantially an instruction to the jury that they should consider the witness Graham's relation to the case, what his purpose and object was, and that they should scrutinize and weigh his testimony according as his interest in the case may appear. We have examined the other instructions to the jury, and find them without merit.

No error.

(169 N. C. 228)

HAAR et al. v. SCHLOSS. (No. 273.)

(Supreme Court of North Carolina. May 25, 1915.)

WILLS — 601—CONSTRUCTION—ESTATES DEVISED—RULE IN SHELLEY'S CASE—APPLICABILITY—DEED.

A devise to testator's wife for life, and after her death to his and her heirs, to be equally divided between them, share and share alike, is not within the rule in Shelley's Case, and no estate of inheritance in the wife is created, so that, where the wife by her will authorized her executor to sell the land, and the only heir of testator joined in the deed of the executor, it conveyed only one-half of the land.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. — 601.]

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by John Haar, executor of Mary Christ, deceased, and another against Nathan Schloss. From a judgment for defendant, plaintiffs appeal. Affirmed.

See, also, 83 S. E. 306.

This is an action to recover the purchase price of a certain lot of land which formerly belonged to Philip Christ. The defendant refused to pay for the land upon the ground that the plaintiffs could not convey him a good title. The plaintiffs are John Haar, executor of Mary Christ, and Katherine Wegermann, the only heir at law of Philip Christ. Philip Christ died in 1895, leaving a will in which he devised the land in controversy to his wife, Mary Christ, for life, and then provided:

"After the expiration of the life estate just hereinbefore in item second of this my last will and testament, I give, devise and bequeath all of my estate, real and personal, to my heirs at law, and the heirs at law of the said Mary Christ, to be equally divided between them, share and share alike."

Mary Christ died in 1912, leaving a will in which she appointed the plaintiff, Haar, executor, and conferred upon him full pow-

er to sell said land and to execute a deed for the same. Thereafter the said Haar, executor, and the said Katherine Wegermann contracted to sell said land to the defendant, and they have tendered him a deed and have demanded payment of the purchase money, and the defendant has refused to accept the deed and to pay the purchase price upon the ground that the plaintiffs cannot convey him a good title. There was a judgment in favor of the defendant, and the plaintiffs excepted and appealed.

Bellamy & Bellamy, of Wilmington, for appellants. Herbert McClammy, of Wilmington, for appellee.

ALLEN, J. The will of Philip Christ passed only a life estate to the land in controversy to his wife, Mary Christ, unless the superadded words in the third item that, "after the expiration of the life estate I give, devise and bequeath, all my estate, real and personal, to my heirs at law and the heirs of the said Mary Christ," bring the devise within the operation of the rule in Shelley's Case. There might be some ground for this contention but for the additional words appearing in the item "to be equally divided between them, share and share alike." In *Mills v. Thorne*, 95 N. C. 364, which is affirmed in *Gilmore v. Sellars*, 145 N. C. 285, 59 S. E. 73, it was said that:

"In England, ever since the leading case of *Jepson v. Wright*, 2 Bligh, 1, it has been held that the words, 'equally to be divided,' or 'share and share alike,' superadded to limitations to the heirs of the body, etc., do not prevent the application of the rule. But in this state, it would seem that the superaddition of like words to the limitations to the heirs, or heirs of the body, or issue, do prevent the application of the rule"

—and this has been the consistent ruling of this court since the case of *Ward v. Jones*, 40 N. C. 400. We are therefore of opinion there was no estate of inheritance in Mary Christ, and that there is therefore a failure of title as to one-half of the land in controversy.

The other question discussed in the briefs as to whether the heirs at law of Mary Christ and of Philip Christ take per stirpes or per capita is not now before us, and it cannot hereafter arise, if, as stated in the record, Mary Christ left one heir, there being only one heir of Philip Christ.

Affirmed.

(100 N. C. 180)

BANK OF MURPHY v. MURPHY FURNITURE MFG. CO. et al. (No. 588.)

(Supreme Court of North Carolina. May 25, 1915.)

GUARANTY \S 36—**CONSTRUCTION—SCOPE.**

A guaranty, "in consideration of the credit extended to said company by the bank," and "to avoid the necessity and inconvenience of indorsing specifically every evidence of indebtedness which said bank may hold against said compa-

ny," of payment of all indebtedness, up to a certain limit, of a company to a bank, existing or thereafter created, "whether by note, acceptance, overdraft, indorsement, or any other form," executed to the bank by the stockholders of the company, which was from time to time borrowing from the bank, on notes executed by the company to the bank, and on paper executed by others to the company, and by it discounted with the bank, is limited to indebtedness arising out of direct transactions between the bank and company, and does not include notes of the company executed by it to others, and from them bought by the bank.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. \S 38-45; Dec. Dig. \S 36.]

Appeal from Superior Court, Cherokee County; Justice, Judge.

Action by the Bank of Murphy against the Murphy Furniture Manufacturing Company and others. From a judgment in favor of defendants, other than said company, plaintiff appeals. Affirmed.

Civil action to recover on certain notes, aggregating \$2,076.62, executed by the furniture company to one C. D. Mayfield, for lumber sold said company, and by him discounted for value to plaintiff bank. Judgment by default was entered against the company, and it was claimed by plaintiff that the individual defendants were liable for this indebtedness by reason of the following contract signed by them and existent at the time plaintiff bank acquired the notes:

"We, the undersigned stockholders (being also directors) of the Murphy Furniture Manufacturing Company, a corporation, hereinafter called the company, in the consideration of the sum of one dollar to each of us in hand paid, the receipt whereof we severally acknowledge, and in the consideration of the credit extended to said company by the Bank of Murphy, hereinafter called the bank, hereby bind ourselves, and agree to pay to said bank all indebtedness of said company to said bank, which now exists or may hereafter be created, whether by note, acceptance, overdraft, indorsement, or any other form, to the extent of twelve thousand (\$12,000) dollars. This agreement is made in order to avoid the necessity and inconvenience of indorsing specifically every evidence of indebtedness which said bank may hold against said company, and its true intent and purpose is to make the undersigned parties hereto liable for said indebtedness in such manner and to the same extent as if each of us had duly and regularly indorsed the paper of said company to said bank; and in the event of liability accruing under this agreement, each of us shall be jointly and severally liable to said bank for such indebtedness as indorsers are liable to the holder of the negotiable instrument under the law. Each of us hereby severally waive all rights to homestead or exemption under the laws of this or any other state, or the United States, and we severally waive demand, protest, and notice of demand, protest and nonpayment, of any and all papers of said company to said bank. No further credit is to be extended under this guaranty, after notice given in writing by any one of the undersigned parties not to do so."

It was contended for the individual defendants:

"That, at the time said agreement was executed and delivered, said Murphy Furniture Manufacturing Company was indebted to said bank for moneys heretofore borrowed from it, and

was from time to time borrowing money from said bank, and upon notes executed to it directly by said company, or upon paper of other persons due said manufacturing company, which was discounted by the latter to the plaintiff bank, and that said agreement was intended to cover such transactions had directly between the plaintiff bank and said Murphy Furniture Manufacturing Company, and was not intended to cover and include the purchase of notes given by said Murphy Furniture Company to other parties, and which may have been sold by such persons to said bank and indorsed by the holders thereof and discounted by said bank, the proceeds of which were not being credited to Murphy Furniture Manufacturing Company."

The notes sued on having been introduced and the agreement, it was admitted on the trial that said notes were executed by the company to one C. D. Mayfield, and thereafter sold and discounted by him to plaintiff bank, and that same were unpaid.

His honor charged the jury that, if they believed the evidence, they would answer the issue for defendants. Judgment, and plaintiff excepted and appealed.

M. W. Bell and Dillard & Hill, all of Murphy, for appellant.

HOKE, J. In *Railroad v. Railroad*, 147 N. C. 382, 61 S. E. 189, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, the court, in speaking of the interpretation of written contracts which are sufficiently ambiguous to permit of construction, said:

"It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties, as expressed in the contract, and * * * in written contracts, which permit of construction, this intent is to be gathered from * * * the entire instrument."

And after citing Page on Contracts, §§ 1105, 1106, 1112, and Merriam v. U. S., 107 U. S. 441, 2 Sup. Ct. 536, 27 L. Ed. 531, the opinion further quotes with approval from Beach on the Modern Law of Contracts, as follows:

"To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have."

Applying these principles, we concur in his honor's view that plaintiffs are not entitled to recover of the individual defendants. The evident purpose of these parties to strengthen the credit of their company, in its dealings with the bank, to the extent of the amount stipulated, and to save themselves the "necessity and inconvenience of indorsing specifically every indebtedness which said bank might hold against the company," and, from a consideration of this purpose and the language of the instrument and the facts in evidence, we think it clear that it was the intent of these parties, as expressed in the contract, to confine the obligation of the individual defendants to indebtedness arising out of transactions directly between the bank and

their company, and that it did not and was not intended to include any and every indebtedness which the bank might acquire from third parties.

While the position insisted on by plaintiff, that in contracts of guaranty words of ambiguous and doubtful import are construed most strongly against the guarantor, will be recognized, in proper instances, it may not be extended to enlarge the obligations of such parties beyond the scope and purpose of their agreement and of the terms in which the same has been expressed. *Shoe Co. v. Peacock and Fuller*, 150 N. C. 545, 64 S. E. 437. There is no error in the charge of the court, and the judgment for defendants is affirmed. No error.

(189 N. C. 254)

SOUTHERN SPRUCE CO. v. HAYES & ENLOE. (No. 591.)

(Supreme Court of North Carolina. May 25, 1915.)

1. COURTS ⇨104—OPINIONS—ADOPTION OF FINDINGS OF REFEREE.

A judge of the superior court is not obliged to write an opinion on adoption of findings of fact by a referee.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 353, 855-858; Dec. Dig. ⇨104.]

2. REFERENCE ⇨102—FINDINGS OF REFEREE—CONCLUSIVENESS.

Findings of fact by a referee, when approved by the judge upon review, are conclusive.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 181-187; Dec. Dig. ⇨102.]

Appeal from Superior Court, Swain County; Justice, Judge.

Action by the Southern Spruce Company against Hayes & Enloe. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action of trespass for damages for the wrongful cutting of timber upon certain lands, described in the pleadings. The defendants not only denied the plaintiff's title, but pleaded a counterclaim for damages sustained by them by reason of the wrongful issuing of an injunction. The cause was pending in the superior court of Swain county, and at March term, 1914, was referred to a referee by consent. The referee made his report, and the plaintiff filed exceptions. These exceptions were heard by Justice, Judge, at chambers December 30, 1914, who confirmed the report of the referee, and entered judgment in favor of the defendants against the plaintiff for the sum of \$500 damages and the costs of the action, including the fees of the stenographer. The plaintiff appeals.

Lucky & Andrews, of Knoxville, Tenn., and Frye, Gantt & Frye, of Bryson City, for appellant. Felix E. Alley, of Waynesville, Thurman Leatherwood, of Sylva, and Morgan & Ward, of Waynesville, for appellees.

PER CURIAM. [1] It was very earnestly contended upon the argument that the learn-

ed judge did not review the findings of fact made by the referee, but adopted them pro forma without examination. We find nothing in the record to justify such contention. The judge of the superior court is not obliged to write out his reasons for adopting the findings of fact made by a referee.

In this case the 14 findings of fact seem to have been considered by the judge and affirmed and adopted by him seriatim. The 10 conclusions of law reached by the referee are also specifically numbered and affirmed by the judge. This case involves purely questions of fact, and, the facts being found, the conclusions of law naturally follow.

[2] The main contention was as to the location of a maple corner, represented on the official map by the black figure "6" and the red figure "6"; the plaintiff contending that it was correctly located at the black figure "6," and the defendants contending that it was located at the red figure "6," which last place was designated on the map as the maple at the Broom place. The referee found the facts as contended for by the defendants, and there is abundant evidence to sustain such findings.

As said in another case (*McCullers v. Chambers*, 163 N. C. 63, 79 S. E. 306):

"The misfortune of the defendants [the plaintiff in the case at bar] in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and the exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect, but must decide the case upon the findings of fact as made by the referee and approved by the court. * * * We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them."

Affirmed.

(169 N. C. 373)

STATE v. TATE et al. (No. 578.)

(Supreme Court of North Carolina. May 25, 1915.)

1. CRIMINAL LAW §1158—REVIEW—COMPETENCY—DISCRETION ON TRIAL COURT.

The court's finding on objection and after questioning the witness, who was also questioned by counsel for defendants and by the solicitor, that she was mentally competent to testify, was conclusive.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. §1158.]

2. CRIMINAL LAW §1180—APPEAL—BRIEFS—OBJECTION TO JURISDICTION.

While court rule 27 (164 N. C. 548, 81 S. E. xi) permits an objection to the jurisdiction to be taken for the first time on appeal, it is just to the other side that the matter at least be presented in appellants' brief, instead of being submitted orally in the appellate court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. §1130.]

3. JURY §35—RIGHT TO JURY TRIAL.

Where there was a trial for a misdemeanor in a police court, where there could be no sen-

tence imposed of imprisonment in a state's prison or death, and the defendants on appeal to the superior court had a trial de novo before a jury, there was no deprivation of their constitutional right to a jury trial.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 236-241; Dec. Dig. §35.]

Appeal from Superior Court, Haywood County; Cline, Judge.

W. M. Tate and May Cope were convicted of fornication and adultery, and they appeal. No error.

M. Silver, of Waynesville, for appellants. The Attorney General, for the State.

CLARK, C. J. The defendants were indicted for fornication and adultery, under Revisal, 3350, in the police court of Waynesville, and adjudged guilty. On appeal to the superior court they were tried before a jury, who found them guilty.

[1] The first exception is because, the defendants having objected to permitting one Flora Franklin to testify because of mental incapacity, the court, after questioning the witness, who was also questioned by the counsel for the defendants and by the solicitor, found, as a fact, that she was competent to testify. In *State v. Perry*, 44 N. C. 330, where the same objection was made, the court held that the trial judge was the exclusive judge as to the competency of a witness in such case to testify; the weight of the testimony being for the jury. The finding by a trial judge that an infant is competent to testify was held conclusive. *State v. Stewart*, 156 N. C. 636, 72 S. E. 193; *State v. Edwards*, 79 N. C. 648; *State v. Manuel*, 64 N. C. 601; 40 Cyc. 2240.

Exception 2 was for the refusal of a non-suit. We need not recite the evidence, but it was amply sufficient to be submitted to a jury. *State v. Poteet*, 30 N. C. 23; *State v. Eliason*, 91 N. C. 564. It is rarely that in cases of this kind there can be direct evidence, but the attendant circumstances were sufficient to justify a jury in finding a verdict of guilty existed in this case, and were properly submitted to a jury.

[2] The exception was submitted orally in this court, not having been taken below, nor set out in the record, nor in brief of counsel, that the police court did not have jurisdiction. It is true that such objection can be taken for the first time in this court (rule 27, 164 N. C. 548, 81 S. E. xi), but it would be just to the other side to at least present the matter in the appellants' brief.

[3] The defendants have had a trial before a jury in the county of Haywood, and have thus preserved their constitutional rights. They were in no wise prejudiced by the fact that prior thereto they had been tried in the police court, for the trial in the superior court was entirely de novo. The constitutionality of police courts for the trial of mis-

demeanors, where there can be no sentence imposed of imprisonment in the state's prison or of death, and the defendant on appeal has had a jury trial in the superior court, has been too often sustained to require discussion. Walker, J., in *State v. Collins*, 151 N. C. 648, 65 S. E. 617, citing *State v. Lytle*, 138 N. C. 738, 51 S. E. 66; *State v. Baskerville* (Hoke, J.) 141 N. C. 811, 53 S. E. 742; per curiam opinion in *State v. Jones*, 145 N. C. 460, 59 S. E. 117; *State v. Shine*, 149 N. C. 480, 62 S. E. 1080. A later case is *State v. Hyman*, 104 N. C. 411, 79 S. E. 284.

No error.

(169 N. C. 229)

MASON v. WESTERN UNION TELEGRAPH CO. (No. 589.)

(Supreme Court of North Carolina. May 25, 1915.)

TELEGRAPHS AND TELEPHONES §54—NON-DELIVERY—CLAIM OF DAMAGES—COMMENCING ACTION.

The stipulation of a telegraph blank requiring notice in writing within 60 days, of claim for damages, was satisfied by commencing an action, by service of summons, within 60 days after sending two messages, for failure to deliver the first and delay in delivering the second, though at the same time notice of claim on account of the second message only was given, the company not having thereby been misled to its damage, and though the complaint was not filed till after the 60 days.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. §54.]

Brown, J., dissenting.

Appeal from Superior Court, Cherokee County; Justice, Judge.

Action by J. B. Mason against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action to recover damages for negligence on part of the defendant. There was evidence on part of plaintiff tending to show that, on October 30, 1910, plaintiff, whose son was very ill at his home, in said county, sent a telegraphic message from Nantahala, N. C., to Dr. Morrow, at Andrews, importing urgency, and same was not delivered, and, by reason of such failure, the doctor did not attend in response to said message. Later, on November 4th, plaintiff sent another message to the doctor, still more urgent, and it was claimed there was negligence in delivering this message, by reason of which the doctor's arrival was delayed from about 8 a. m. to 2 p. m. of same day, November 4th; that this boy was in a dying condition when the doctor arrived, and died the second day after the last message was sent. There was verdict for plaintiff as to negligent failure to deliver the first message, October 30, and for defendant as to second message, November 4th, and damages assessed at \$300.

Plaintiff introduced a written notice, of date December 16, 1910, containing claim for damages in \$2,000, for negligent failure to

deliver the message of November 4th, and further, the summons in the present action, issued December 16, 1910, and complaint, regularly filed therein, at the next term of superior court, April 4, 1911, claiming damages for negligence in case of both messages.

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Alf. S. Barnard, of Asheville, and Geo. H. Fearns, of New York City, for appellant. Dillard & Hill, of Murphy, for appellee.

HOKE, J. (after stating the facts as above). Our cases on this subject are to the effect that the ordinary and usual stipulation, requiring that claims for damages, arising from the company's negligence in the transmission or delivery of a telegraphic message, shall be made in writing and within 60 days from the sending, is a reasonable one except, perhaps, in certain instances, where there is an entire failure to deliver, and they also hold that when an action for such negligence is instituted within the 60 days, the giving of such notice is dispensed with and a failure in this respect is not then available as a defense. This was fully recognized in *Sherrill v. Telegraph Co.*, 109 N. C. 527, 14 S. E. 94, and expressly decided in the subsequent case of *Bryan v. Telegraph Co.*, 133 N. C. 604, 45 S. E. 938.

In the present instance, the message on which recovery has been had, was received for transmission on October 30, 1910. The action was instituted on December 16th following, and the case, therefore, comes directly within the principle of the decisions referred to, and we see no reason why the judgment should not be affirmed.

It is earnestly urged for defendant that, not only was no written notice filed within the 60 days, but the claim that was filed made demand on an entirely different message, to wit, that of November 4th, and, to apply the principle of *Bryan's Case*, would operate with great harshness on the company as it has been positively misled, but, on the facts in evidence, we are not impressed with this view. Even if it was sufficiently presented, the position would not, in our opinion, justify a departure from a principle established and acted on as the law of the state for the past 15 years and more, but, on the record, we think that no such claim can be sustained. These stipulations have been upheld because it is deemed fair and right that the company shall be notified before the witnesses may disappear, and, while the facts may be made available, by proper inquiry. We know that Nantahala and Andrews, villages on the railroad, have no such great amount of business that the facts relevant to a message of this character are likely to escape observation, and a perusal of the testimony will show that the action was instituted six weeks after the message was

sent; that a complaint, giving specific notice of the demand, was regularly filed at the first term of the superior court thereafter and five months from such date, and not only was the defendant not deprived of opportunity to inquire, in this instance, by lapse of time, but there is uncontradicted evidence of the doctor, the addressee of the message, to the effect that, soon after the action was instituted, the agent of defendant company presented a number of back receipts to witness, claiming that, in the pressure of business, he had failed to have them signed, and induced the doctor, by inadvertence, to sign for the message sued on, although the doctor told the witness that he would not sign a receipt for that date, as no such message had been received.

We find no reason for disturbing the results of the trial, and the judgment in plaintiff's favor must be affirmed.

No error.

WALKER, J. (concurring). The defense set up is that "no written claim for damages was presented to the company within 60 days after filing the message for transmission, as required by the contract." We have held this stipulation to be a reasonable one, but it should be enforced reasonably, and not harshly to defeat a just claim. It does not apply if the suit for damages is commenced within the 60 days. *Sherrill v. Telegraph Company*, 109 N. C. 527, 14 S. E. 94; *Bryan v. Telegraph Co.*, 133 N. C. 604, 45 S. E. 938. Whether those cases were properly decided is a question we need not discuss, as the contention now is that this case should be exempted from the operation of the rule established by those cases, by reason of its special facts. The object of this provision in the contract is to inform the company of its default, to the end that it may make seasonable investigation of the matter, before the proof is lost by lapse of time. The ground alleged for exempting this case from the operation of the rule, as to the suit being itself equivalent to presenting a claim, is that there were two telegrams, and there was no written claim presented for failure to deliver the one filed with the company October 30, 1910, while there was such a claim made as to the one filed November 4, 1910. According to the above-cited cases, the suit would be notice as to both, unless, as defendant now contends, the filing of a claim as to one should prevent it from being so. It is urged that this should be so, because the conduct of plaintiff was apt to mislead the defendant. If the fact that plaintiff was in fact misled, and not merely apt to be misled, should take the case out of the rule, it was incumbent upon the defendant to plead and prove the fact. This must be so, as if a suit is a notice of the claim, it must continue to be so, unless some valid reason is shown in the regular course of procedure why it should not be.

The burden was not on the plaintiff to show why that, which this court has said is a sufficient compliance with this stipulation, is not so, but this burden rested on the defendant. And I take it that this burden would not be adequately discharged by simple proof that two telegrams were involved, instead of one, unless it was alleged and shown that the defendant was actually misled to its prejudice, and not merely that there was a chance of its being misled. There was no allegation in the answer as to this material matter, which it is contended avoided the effect of the suit as notice, the averment being that no written notice of claim was given, as required by the contract; nor was there any issue tendered or submitted that fairly embraced it, unless it was the fourth issue, and there was no request for instructions as to this issue, but only as to the issue concerning damages, which is the fifth, and the question of notice was not germane to that issue. But apart from all this, the proof tends to show, not that the defendant was misled by the claim as to one of the messages, but on the contrary, that it well knew of the default as to the telegram of October 30th, as its agent at Andrews asked Dr. Morrow to "sign for the message" on the delivery sheets, "so that his books would show up and make it all right for him," which the doctor agreed to do, upon the express promise of the agent that his acknowledgment of its receipt should not be dated as of October 30, 1910, but should bear the true date, the doctor testifying that the message of October 30th was not delivered until some time after that date. Besides, the delivery sheet was still in the company's possession after the suit was brought, and itself showed the default, until the doctor "signed for the message." This proved full knowledge of the facts, on the part of the company, through the agent who handled the messages, and the possession of its own record of the facts, viz.: the "delivery sheet," on which the default clearly appeared. If the *Sherrill* and *Bryan* decisions are not to be overruled, and I do not think it necessary that they should be, in order to sustain the judgment, there is no reason for excepting this case from the operation of the rule they established. I may add, that in *Sherrill's Case*, 109 N. C. at page 533, 14 S. E. at page 95, it was held that when the message is not delivered, the claim for damages may be filed, or the suit brought, within 60 days after knowledge of that fact, and "if defendant wishes to insist that plaintiff did not give notice of his claim within 60 days after knowledge of the nondelivery, he must set this up by answer." This is a case of nondelivery, and it is not alleged or found as a fact when plaintiff had notice of nondelivery.

BROWN, J. (dissenting). The issues and findings of the jury are as follows:

(1) Was the defendant, Western Union Telegraph Company, negligent in the transmission and delivery of the telegram dated October 30, 1910, as alleged in the complaint? Answer: Yes.

(2) If so, was the plaintiff injured thereby? Answer: Yes.

(3) Was the defendant, Western Union Telegraph Company, negligent in the transmission and delivery of the telegram dated November 4, 1910, as alleged in the complaint? Answer: No.

(4) If so, was the plaintiff injured thereby? Answer: No.

(5) What damage, if any, is the plaintiff entitled to recover? Answer: \$300.

It is thus seen that the jury passed on two causes of action, one based on the failure to deliver the telegram on November 4, 1910, and the other on the failure to deliver the telegram of October 13, 1910. It is admitted that the plaintiff filed with the defendant within the 60 days a notice in writing that he claimed damages for failure to deliver the telegram of November 4th. It is admitted that the plaintiff did not file any written claim for damages based on the telegram of October 30, 1910. I am of opinion that this omission is fatal to a recovery on that cause of action.

It is well settled in this state that the stipulation that the company will not be liable unless the claim is presented in writing and within 60 days is not a stipulation restricting the liability of the Telegraph Company for negligence, but is a stipulation rather against the neglect of the plaintiff in not making known his cause of complaint within a reasonable time. This is held to be a most reasonable requirement, and unless it is complied with, bars a recovery. *Sherrill v. Telegraph Co.*, 109 N. C. 527, 14 S. E. 94; *Lytle v. Telegraph Co.*, 165 N. C. 505, 81 S. E. 759; *Jones on Telegraph and Telephone Companies*, § 393.

It is clear from these authorities that this court recognized the justness of this stipulation in order that the company may have notice while the transaction is fresh that there has been a default, and that such default has resulted in damages, so that it can make an intelligent investigation to ascertain if the claim is just, and if not just, prepare its defense. It is contended that the fact that this action was commenced within the 60 days is a full compliance with the stipulation.

It is held in *Bryan v. Telegraph Co.*, 133 N. C. 604, 45 S. E. 938, that a summons served on a Telegraph Company within the time stipulated in the telegraph blanks for making claim for damages is equivalent to the presentation of the claim within that time. It is not necessary that I should controvert what is there held, for in my opinion there is quite a distinction between that case and this. If the plaintiff had only one cause of action, based on a failure to send one telegram, or for negligence in delivering that telegram, the principle laid down in *Bryan's Case*

might apply. In this case the plaintiff presented to the defendant company a claim for damages in writing, based upon a failure to transmit and deliver the telegram of November 4th. That notice is dated December 16, 1910, and specifically confines the plaintiff's demand for damages to the negligent failure to promptly deliver the telegram dated November 4, 1910. That notice was delivered to the defendant's agent on December 16, 1910. The summons in this action is dated December 16, 1910, and was served the same day. The complaint was not filed until April 4, 1911. The defendant had a right to suppose that the action was brought to recover damages, the claim for which, based on the telegram of November 4th, had that day been delivered to its agent. The defendant had no notice whatever, and no right to suppose that the plaintiff was suing upon a cause of action relating to the telegram of October 30th. The fact that the claim in writing for damages had been presented to the defendant's agent on the very day that the summons was issued and served was well calculated to mislead the defendant's agent and to cause him to suppose that the cause of action sued upon was the failure to deliver the telegram of November 4th.

It is plain to me that where several messages, handled perhaps by different agents, are involved, the company acquires no information from the mere service of a summons such as is issued out of our courts from which it can determine on which message the suit is based, or make any intelligent investigation which will enable it to decide whether the claim is just, or prepare a defense to the action.

It is admitted that where a summons has been issued and no complaint filed, it is not a *lis pendens*, and that evidence is incompetent to show what the cause of action was. This is expressly held by Mr. Justice Walker in *Person v. Roberts*, 159 N. C. 168, 74 S. E. 322, in which he cites many supporting authorities.

Instead of the summons being any assistance to the defendant, it was positively misleading. When the plaintiff presented his claim for damages in writing, based on the telegram of November 4th exclusively, the defendant had a right to suppose that if the plaintiff had any other cause of action against him, or any other claim for damages, he would have embraced that in his written demand, also.

The fact that he made claim for only one cause of action would lead the defendant to believe that the plaintiff had no other. Consequently, when the summons was served on the same day, immediately after filing the written claim, any reasonable person would have supposed that the action was brought solely for the purpose of enforcing the written demand which had been made on the same day.

(159 N. C. 371)

STATE v. BERRY. (No. 577.)

(Supreme Court of North Carolina. May 25, 1915.)

1. SHERIFFS AND CONSTABLES \S 153—FAILURE TO SERVE PROCESS—CRIMINAL LIABILITY—STATUTE.

Under Revisal, \S 3604, providing that if any sheriff refuse or neglect to return any process which it is his duty to execute, he is guilty of a misdemeanor, a sheriff may be indicted for a failure to return the process issued to him in a civil action; and the same indictment might also be sustained under section 3576, providing that if any county officer fails to discharge any duty devolving on him, he shall be guilty of a misdemeanor, or section 3592, providing that any sheriff, willfully neglecting to discharge any official duty, for default whereof it is not elsewhere provided that he shall be indicted, shall be guilty of a misdemeanor.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. $\S\S$ 343, 344; Dec. Dig. \S 153.]

2. OFFICERS \S 121 — OFFENSES — CRIMINAL PROSECUTION—INDICTMENT.

To convict an officer of willful omission, neglect, or refusal to discharge his duty, it is not necessary that the indictment should allege, or that the state should prove, a corrupt intent.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. $\S\S$ 207, 208; Dec. Dig. \S 121.]

Appeal from Superior Court, Haywood County; Cline, Judge.

Forest C. Berry, sheriff of Burke county, was indicted for failure to return certain executions. Bill quashed, and the State appeals. Reversed.

Atty. Gen. Bickett and Asst. Atty. Gen. Calvert, for the State. Avery & Ervin, of Morganton, for appellee.

BROWN, J. [1] The defendant, as sheriff, was prosecuted on an indictment alleging that he—

"willfully and unlawfully did fail to return a certain process to him directed from the superior court of Haywood county, to wit, one execution issued on a judgment in favor of American Lumber Company as plaintiff and Aberdethy and Lyerly as defendants," etc.

A motion by defendant was made to quash the indictment on the ground that it is not an indictable offense under the statutes of North Carolina for a sheriff to fail to return the process issued to him in a civil action. From a judgment sustaining the motion to quash, the state appealed.

No point is made as to any technical defect in the indictment. The only ground of the motion to quash was that it was not an indictable offense for a sheriff to fail to return a process issued to him in a civil action. It is said that the indictment is founded on section 3604 of the Revisal, which reads as follows:

"If any sheriff, constable, or other officer," etc., "refuse or neglect to return any precept, notice, or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to any one who will sue for the same \$100, and shall moreover be guilty of a misdemeanor."

An analysis of this section fails to disclose any reason why it does not cover the offense charged in the indictment in this case. It is said that this statute, which is identical with section 1112 of the Code, has been held to be confined to criminal processes only. It is claimed that this was decided by this court in *Harrell v. Warren*, 100 N. C. 264, 6 S. E. 777. It is not plain by any means that the court so held. It is said in that case:

"The present action is not brought under that section [1112 of the Code] which belongs to the chapter entitled 'Crimes and Punishments.'"

The only language in the opinion which we can find from which it can be inferred that this statute is applicable only to criminal process is that which we have quoted from the opinion. The fact that the statute is embraced in the chapter on Crimes and Punishments is no warrant whatever for the position that its language applies only to a failure to return criminal process. As the statute is a criminal statute and creates an offense, it is very properly placed in the chapter on "Crimes and Punishments," and the fact that it is there does not alter its character or limit or qualify the plain meaning of its language. This seems to have been a mere obiter, and not at all necessary to a decision of that case. This inadvertence is referred to in *Manufacturing Company v. Buxton*, 105 N. C. 75, 11 S. E. 264, in these words:

"Section 1112 is found in the chapter on Crimes and Punishments, and it is held in *Harrell v. Warren*, 100 N. C. 259 [6 S. E. 777], to apply only when criminal process is delivered to an officer."

No reason is given in either case for a construction so at variance with the plain language of the statute itself. Therefore we are unwilling to perpetuate the error any longer. We conclude that this section of Revisal, 3604, is amply sufficient to support the indictment. If this were not true, then there are two other sections of the Revisal which are amply sufficient to uphold the bill. Section 3576 provides that:

"If any state or county officer shall fail, neglect or refuse to make, file or publish, any report, statement or other paper, * * * or to discharge any duty devolving upon him by virtue of his office as he is by law required to do, he shall be guilty of a misdemeanor."

Section 3592 in part declares:

"If any * * * sheriff, * * * shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor."

[2] It is not necessary that the bill should allege or that the state should prove a corrupt intent in order to convict an officer of willful omission, neglect, or refusal to discharge his duty. *State v. Hatch*, 116 N. C. 1003, 21 S. E. 430.

The principle laid down in *State v. Snuggs*, 85 N. C. 542, and in *State v. Railroad*, 145 N. C. 498, 59 S. E. 570, 13 L. R. A. (N. S.) 968, has no application here. In those cases

it is held that, when an offense is created by statute and did not exist at common law, and the penalty for its violation is prescribed by the same statute, the particular remedy thus prescribed must alone be pursued, for the mention of the particular remedy makes the latter exclusive. The difference between the statutes under consideration in those cases and section 3604 of the Revisal is that the last-named statute prescribed, not only a penalty, but likewise makes the violation of it a misdemeanor. In the two cases cited, the statutes under consideration prescribed only a penalty, and did not make the violation of them a misdemeanor.

Reversed.

(169 N. C. 255)

BRADLEY v. CAROLINA COAL & ICE CO.
(No. 550.)

(Supreme Court of North Carolina. May 25, 1915.)

1. MASTER AND SERVANT ⇨107 — INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

For a servant to recover because of defects in instrumentalities furnished by the master, he must show, first, a defective condition; second, that it was the proximate cause of the injury; and, third, that the master knew of the condition or was guilty of negligence in not discovering it; hence a teamster injured when a piece of wire used for holding the sideboards of a wagon together gave way and the sideboards separated, throwing him off a piece of timber which, without the knowledge of the master, he was using for a seat, cannot recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. ⇨107.]

2. MASTER AND SERVANT ⇨97—INJURIES TO SERVANT—NEGLIGENCE.

For a servant to recover, he must show some breach of duty culpable in itself which the master as a reasonable man could have foreseen would have produced the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 163; Dec. Dig. ⇨97.]

3. MASTER AND SERVANT ⇨107 — INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

A master is not liable for defects in simple appliances such as farm tools, and hence is not liable for the breaking of a wire used to hold the sideboards of a wagon together.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. ⇨107.]

Appeal from Superior Court, Buncombe County; Webb, Judge.

Action by L. W. Bradley against the Carolina Coal & Ice Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Zeb F. Curtis, of Asheville, for appellant. Alfred S. Barnard, of Asheville, for appellee.

PER CURIAM. The evidence is to the effect that the plaintiff, at the time of his injuries, was a driver on one of the coal wagons of the defendant, and was engaged in delivering coal about four miles from the plant of defendant. Defendant furnished plaintiff with a two-horse wagon and team of mules, but failed to provide him with a

seat upon which to sit while in the discharge of his duties. Plaintiff selected a piece of timber from the yard of defendant with which to make a seat for the wagon furnished by defendant, and while driving along a rough street in the city of Asheville, with a load of coal to be delivered at Grove Park Inn, a small piece of wire, which was used for holding the "sideboards" of said wagon together, and upon which "sideboards" plaintiff had placed the piece of timber for a seat, suddenly broke, allowing his seat to fall by the spreading of "sideboards," and thereby throwing plaintiff against the ground, whereby he sustained injuries.

[1, 2] It is well settled by numerous decisions of this court that where a servant seeks to recover damages because of defects in the instrumentalities furnished him by the master, he must allege and prove, first, that there was a defective condition; second, that the defective condition was the proximate cause of his injury; and, third, that the defendant knew of the defective condition or was guilty of negligence in not discovering and repairing the same. *Hudson v. Railroad*, 104 N. C. 491, 10 S. E. 669; *Shaw v. Manufacturing Co.*, 143 N. C. 131, 55 S. E. 433.

The evidence fails to prove these necessary facts. There was no evidence that the defendant knew or should have anticipated this accident, or could have foreseen that the accident might occur, and before there would be a recovery on the part of the plaintiff, it was necessary for him to show a breach of duty on the part of the defendant, some act or omission producing the breach culpable in itself, and such as a reasonably careful man would foresee might be productive of injury, for one is not liable for an injury which he could not foresee. *Carter v. Lumber Co.*, 129 N. C. 203, 39 S. E. 828; *Raiford v. Railroad*, 130 N. C. 599, 41 S. E. 806.

[3] As was said by this court in *House v. Railroad Co.*, 152 N. C. 397, 67 S. E. 981:

"The rule requiring the employer of labor to provide for his employes a reasonably safe place to work and appliances reasonably safe and suitable for the work in which they are engaged, obtains in case of machinery more or less complicated, and more especially driven by mechanical power, and does not apply to ordinary conditions requiring no special care, preparation or provision; * * * where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result."

We think the words of Mr. Justice Cook in *Martin v. Manufacturing Co.*, 128 N. C. 264, 38 S. E. 876, 83, Am. St. Rep. 671, are peculiarly applicable to the facts in this case:

"Surely, it cannot be seriously contended that every employer is responsible for injuries occurring from improperly tempered axes, hoes, scythes, trace chains, lap links, bridle bits, etc., the imperfections of which could not be known till used; or for defective whiffle trees, axe helves, hoe helves, hand spikes, plow lines, and

such like (the defects of which would be first discovered by the party using them), unless the employer is shown to have had knowledge of such defects.

If such be the rules of law, then the contentment of the farmer must give place to anxiety and dread lest injury, resulting to a servant from a splintered hoe helve or hand spike, defective bridle bit, whiffle tree or plow line, et id simile, may at any time occur, and sweep from him his farm and belongings in compensation of the damage done. To the same experience would the contractor expect to be subjected, should a defective nail, while being driven by one of his carpenters, break and do injury. To which doctrine we cannot subscribe."

Affirmed.

(169 N. C. 173)

HYATT & CO. v. CLARK et al. (No. 592.)

(Supreme Court of North Carolina. May 25, 1915.)

1. JUDGMENT \Leftrightarrow 101—DEFAULT JUDGMENT—PLEADING TO SUPPORT.

A complaint alleging that plaintiff sold certain amounts of feed and furnished feed for defendants for their stock, and conveyances at their request at the times and for the prices set forth in an attached itemized statement, made a part of the complaint, and that defendants failed to pay for such feed, etc., might be construed as alleging that the feed, etc., were sold and delivered at the prices set forth, known to defendants at the time of purchase, and that there was an implied promise to pay same, and supported a judgment for plaintiff by default final.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 168-170; Dec. Dig. \Leftrightarrow 101.]

2. JUDGMENT \Leftrightarrow 145—DEFAULT JUDGMENT—VACATION—MERITORIOUS DEFENSE.

Where a judgment by a default final was irregular, the court properly refused to set it aside, where it found that the defendant had no meritorious or valid defense or any excusable neglect; such findings being conclusive.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295; Dec. Dig. \Leftrightarrow 145.]

Appeal from Superior Court, Haywood County; Justice, Judge.

Action by Hyatt & Co. against George W. Clark and others. Judgment for plaintiff by default, motion to set aside judgment denied, and defendants appeal. Affirmed.

J. W. Ferguson, of Laurens, S. C., and M. Silver, of Waynesville, for appellants. Morgan & Ward and John M. Queen, all of Waynesville, for appellee.

BROWN, J. [1] The complaint alleges that the plaintiffs were doing business as Hyatt & Co., a copartnership, and engaged in the livery business and the sale of feed stuff for animals; that the defendants were partners doing a general logging business; that the plaintiff sold and delivered to the above-named defendants, and at their request, certain amounts of feed and feed stuff, and furnished feed for the said defendants herein named for their stock, and furnished the said defendants certain conveyances at the request of the said defendants, at the times and for the prices set

forth, as is set out in the itemized statement hereto attached, and marked Exhibit A, which itemized statement and amounts are made a part of this complaint; that the defendants have failed to pay the plaintiffs for the said feed, feed stuff, and livery so furnished them by the plaintiff.

The defendants failing to answer the said complaint at July term, 1914, the court rendered judgment final by default for the sum of \$350.53, according to the itemized statement attached to the complaint. It is contended by the defendant appellant S. M. Smith that the said judgment is irregular and only a judgment by default, and inquiry could have been rendered.

While the language of the complaint is somewhat doubtful as to its meaning, we are of opinion that it is fairly susceptible of the construction that the feed stuff and merchandise were sold and delivered at the prices set forth, and that these prices were known to the defendant at the time of the purchase, and that there was an implied promise to pay the same. Upon the same principle where a customer goes into a merchant's store, ascertains the price of certain goods, and takes them, there is an implied promise upon the part of the customer to pay that price. *Hartman v. Farrior*, 95 N. C. 177.

This case is easily distinguished from *Witt v. Long*, 93 N. C. 391. In that case there was no allegation in the complaint that the goods were sold at certain prices, and there was no schedule of the prices attached to the complaint at which the goods were sold. In that case the sum to be paid was not fixed by the terms of the contract, and it could not be implied from it, nor could the same be ascertained from the complaint by computation, because there was no allegation of a fixed price at which the goods had been sold. *Currie v. Mining Co.*, 157 N. C. 220, 72 S. E. 980.

[2] But even if the allegations of the complaint had not been sufficient for judgment by default final, and the judgment by default final was irregular, his honor was correct in not setting aside the judgment, because the defendant has no meritorious or valid defense and did not show any excusable neglect, as was found by his honor, in the judgment and findings of fact, and these findings of fact are conclusive. *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696; *Mauney v. Gidney*, 88 N. C. 200; *Osborn v. Leach*, 133 N. C. 427, 45 S. E. 783; *Pierce v. Eller*, 167 N. C. 672, 83 S. E. 758; *Marsh v. Griffin*, 123 N. C. 669, 31 S. E. 840; *Dell School v. Peirce*, 163 N. C. 424, 79 S. E. 687; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269.

In the case of *Jeffries v. Aaron*, 120 N. C. 169, 26 S. E. 696, the court held that:

"Although there was irregularity in entering the judgment, yet unless the court can now see

reasonably that the defendants had a good defense, or that they could now make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside now, and then be called upon soon thereafter to render just such another between the same parties?"

The judgment is affirmed.

(169 N. C. 156)

RALEIGH, C. & S. RY. v. MECKLENBURG MFG. CO. (No. 434.)

(Supreme Court of North Carolina. May 25, 1915.)

1. EMINENT DOMAIN §205—COMPENSATION—EVIDENCE.

In a condemnation proceeding, mere conjecture, speculation, or surmise is not allowed as a basis of proof as to damages or compensation, but the testimony offered must tend to prove the facts in question with reasonable certainty.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 544; Dec. Dig. §205.]

2. EMINENT DOMAIN §69—NECESSITY OF COMPENSATION.

Where the property of an individual is taken or condemned for public use, the positive law, as well as justice and equity, requires fair and reasonable compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. §69.]

3. EMINENT DOMAIN §111—COMPENSATION—RIGHT OF WAY—DANGER FROM FIRE—"PROPERTY."

Upon condemnation of a right of way through a mill property and village, the risk of danger of fire set by passing trains was to be taken into account in showing how the property had been lessened in value by the location of the right of way; the word "property" including the entire land, or the land enhanced in value by the mill, other structures, and other improvements placed upon it, and the difference in value being the measure of compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 294, 298; Dec. Dig. §111.]

For other definitions, see Words and Phrases, First and Second Series, Property.]

4. EMINENT DOMAIN §138—COMPENSATION—TAKING OF PART.

On condemnation of a railroad right of way through a mill property and village, the jury must consider the land with its improvements as a whole, and the effect of the appropriation for a right of way with reference to any loss in value by reason of such taking and the uses to which the land so taken is to be applied.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 370; Dec. Dig. §138.]

5. EMINENT DOMAIN §141—COMPENSATION—DEPRECIATION—FUTURE USE.

On condemnation of a railroad right of way through a mill property, the jury, in fixing the value and estimating the loss, were not confined solely to a consideration of the property in its present condition, but might consider the uses to which it might be adapted in the future.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372-376; Dec. Dig. §141.]

6. EVIDENCE §474—OPINION EVIDENCE—EXPERTS.

In a proceeding to condemn a railroad right of way through defendant's cotton mill property and village, witnesses with actual knowledge of the land and its improvements, uses,

etc., and whose opinions were based on such knowledge, aided by their long experience in cotton manufacture, were competent to give their opinion as to the value of the land or plant, and its depreciation by the right of way and the uses to which it was afterwards put by the road.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. §474.]

7. EMINENT DOMAIN §91—COMPENSATION—DANGERS AND INCONVENIENCES.

Upon condemnation of a railroad right of way through a cotton mill property and village, the dangers to person and property, inconvenience, annoyance, etc., incident to the remaining property were not so common to other land owners as to prevent the mill company from recovering for the direct and peculiar damages therefrom.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 234, 235; Dec. Dig. §91.]

8. EMINENT DOMAIN §203—COMPENSATION—EVIDENCE—VALUE.

On condemnation of a railroad right of way through a cotton mill property and village, it was competent to prove the value of the land, with its improvements, or the entire plant, before and after taking, as tending to show the depreciation and the amount of compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. §203.]

9. EMINENT DOMAIN §104—COMPENSATION—RAILROAD RIGHT OF WAY—SMOKE—NOISE.

On condemnation of a railroad right of way through a cotton mill property and village, the mill company was entitled to prove that the value of its plant had been appreciably affected to its detriment by the noise, smoke, cinders, inconveniences, etc., incident to the running of the trains on the right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 278-281; Dec. Dig. §104.]

10. EMINENT DOMAIN §203—COMPENSATION—INTERFERENCE WITH POSSESSION.

In such proceeding, the mill company was entitled to show the risks and dangers of injury to employes and their children, and that the use of the right of way would disorganize its help and tend to drive its operators away by rendering their condition uncomfortable, if not intolerable, and to require it to substitute a cheaper and inferior quality of labor, and thereby reduce its output and lower the standard quality of its goods, but confining such proof to the general facts, and not descending to particulars as to how many hands would leave, nor extending it to an estimate of a depreciation in value based on a capitalization of pay rolls, resulting from the effects of the right of way on employes and their families, since that would be mere conjecture and speculation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. §203.]

11. WITNESSES §268—CROSS-EXAMINATION—SCOPE.

Questions may be asked on cross-examination to test the value of a witness' testimony, which are not permissible on examination in chief by the party calling him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. §268.]

12. EVIDENCE §501—OPINION EVIDENCE—IMPROPER REASON.

An improper reason does not necessarily render the opinion of a witness incompetent, as the opinion may be valid and valuable without it, and rest upon other sufficient and admissible grounds, although the party objecting to any of a witness' reasons deemed to be incompetent

may ask that they be stricken out and the jury instructed not to consider them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. ¶501.]

13. EVIDENCE ¶474—EXPERT TESTIMONY—QUALIFICATIONS.

In a proceeding to condemn a railroad right of way through a cotton mill property and village, the jury should have the means of knowing the qualifications of expert witnesses to give an opinion worthy of their consideration and the extent of their knowledge and experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. ¶474.]

14. APPEAL AND ERROR ¶231—OBJECTIONS—EVIDENCE ADMISSIBLE IN PART.

The incompetent parts of evidence, some of which is competent, must be clearly specified in the objection thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. ¶231.]

Appeal from Superior Court, Mecklenburg County; Harding, Judge.

On petition for rehearing. Dismissed.

For former opinion, see 166 N. C. 168, 82 S. E. 5.

This is a petition to rehear the former decision in the above-entitled case, which is reported in 166 N. C. 168, 82 S. E. 5. The petition was filed by the defendant, and relates only to the plaintiff's appeal, in which a new trial was given for reasons stated in the opinion of the court. The proceedings were brought for the condemnation of a right of way over the defendant's lands, upon which it had erected a mill for the manufacture of cotton goods, with its buildings for employes and other appurtenances. The contentions of the parties upon the issue as to damages are thus stated in the opinion of this court:

"The plaintiff's exceptions are numerous, but all refer to the evidence and the charge on the measure of damages. The plaintiff contends that the defendant was entitled as compensation to the value of the land embraced in the right of way, plus any direct actual damages to any part of the remaining land.

"The defendant contends that the compensation to which it is entitled is the difference in the value of its entire manufacturing plant and premises, embracing 20 acres, before the right of way was condemned and afterwards, and that this difference in value is to be estimated by taking into consideration that the operation of a steam railroad would inconvenience and annoy the operatives by the noise, smoke, and inconvenience produced by the trains operating in proximity to their houses; that the dangers and perils to the operatives in going to and from their work would be increased by having to cross said railroad track; that the lives and limbs of the children of the mill operatives will be imperiled by their crossing said track in going to school and while playing near by; that their parents would be in constant fear while at work in the mill lest the children should be run over by the passing trains; and that on account of these conditions the better class of operatives will be driven away, and the defendant will be able to secure in their places only inferior help at increased wages, with result of a decrease in the quantity and quality of the mill output and an increase in the cost of production, thereby materially depreciating the

market value of the property as a cotton-manufacturing plant."

This court held that:

"The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. The owner is entitled as compensation to the actual and direct damages which he may sustain by being deprived of his property. These damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property."

Referring to the contentions of the defendant as to the considerations and the facts which should enter into the assessment of damages, as above set forth; the court said:

"The jury were allowed to consider these as grounds of damages, and also to introduce as experts cotton manufacturers to give their opinion as to the effect upon the value of this mill property by the laying out of the plaintiff's right of way. These experts estimated that the difference on the pay roll from the above causes would be \$4,000 to \$5,000 per year, which they capitalized at \$60,000 to \$80,000, and expressed their 'expert opinion' that the plaintiff should pay the defendant this sum of money as damages for the right of way 100 feet wide, of which only some 20 feet probably is actually occupied by the railroad and a little over 300 yards long."

The court rejected this evidence, which the lower court allowed to be heard, upon the ground that it was conjectural and speculative, and did not fall within the rule laid down that the defendant was entitled to recover, as compensation, the actual and direct damages, which it may sustain by being deprived of its property, which are limited to those that embrace the actual value of the property taken and the direct physical injury to the remaining property. The defendant asks that we rehear and reverse that decision, upon the following grounds, and because of the errors therein, which are assigned in the certificate of counsel, by which we are restricted, as follows:

"(1) The court erred in holding that only evidence of actual physical injury to the land not taken could be considered.

"(2) The court erred in holding that, in ascertaining the depreciation in the market value of the land, the defendant was not entitled to have the whole plant considered and valued.

"(3) The court erred in holding that the defendant was not entitled to show depreciation in the market value of the land on account of dangers, inconveniences, and annoyances to its mill operatives and their children as the result of the running of trains at grade through the mill village over the plaintiff's right of way.

"(4) The court erred in holding that it was not competent for the defendant to show that the operating of trains over the right of way through the mill village would disorganize help, increase wages, and decrease production of the defendant's manufacturing plant.

"(5) The court erred in holding that the dangers, inconveniences, and annoyances suffered by the defendant as the result of the operation of trains over the right of way in question were common to all property owners alike.

"(6) The court erred in holding that the opinions of experienced cotton manufacturers were incompetent to show the depreciation in the

market value of the defendant's plant on account of the dangers, annoyances and inconveniences resulting from the operation of trains through its mill village.

"(7) The court erred in declaring that the jury were allowed to consider as grounds of damages the estimates of mill 'experts' as to the increased pay roll of the defendant, capitalized at from \$60,000 to \$80,000.

"(8) The court erred in stating that there was no evidence tending to show that the defendant had lost even one of its operatives by reason of the location of the plaintiff's tracks, or had been forced to pay higher prices to its operatives, or hire inferior help for that cause."

Under each assignment of error, and as a part thereof, the particular part of the opinion of this court to which it is addressed is set out, for the purpose of showing the ruling of this court alleged to be erroneous. It is not necessary to repeat them here, as they can readily be found in the opinion. The foregoing statement will be sufficient for a clear understanding of the questions raised on this rehearing.

Tillett & Guthrie, of Charlotte, for plaintiff. Cansler & Cansler and J. W. Keerans, all of Charlotte, for defendant.

WALKER, J. (after stating the facts as above). In this case both parties appealed to this court from the judgment below; the defendant upon the ground that the land was not subject to condemnation under our statute which exempts certain property from the operation of the law. This view was rejected by the court; the writer of this opinion dissenting. The plaintiff's contention that there were errors in the rulings and charge of the court below was sustained, and a new trial ordered.

The first five errors in our former decision, now assigned, may naturally be considered together, as, if we were wrong in holding that only the value of the land actually taken and the direct physical injury to that which was left can be considered, there was error, and the other assignments relate only to the extent of the error. We are satisfied, upon reconsideration of the case, that the rule thus stated by the court was entirely too narrow and restricted, and, if applied without modification, or at least full explanation, will not afford just compensation to those whose lands may be appropriated for a public use; but we do not think this requires that the former conclusion or judgment of this court should be reversed, for reasons to be hereinafter stated. It may be said, generally, that there are some, if not many, indirect injuries to land, not necessarily of a physical kind, which will diminish its value, and which are susceptible of the kind of proof which the law requires in cases generally.

[1] It may in the beginning be readily and fully conceded that mere conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation. The testimony offered should tend to prove the fact in question with rea-

sonable certainty. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851; *Machine Co. v. Tobacco Co.*, 141 N. C. 284, 53 S. E. 885. There are expressions in the case of *Railroad v. Wicker*, 74 N. C. 220, which give some support to the ruling in this case, but the principles stated in that case have been greatly modified by subsequent decisions of this court, and we have been brought more in line and into more perfect agreement with the prevailing thought upon this subject, as exhibited in the many decisions of other courts. We are not permitted to apply the same rule in a case of this sort as obtains with reference to one where there has been no condemnation or taking of land for a public use, and where the injury complained of may be no more than a mere inconvenience or annoyance to an adjacent proprietor, which is common to all others similarly situated.

[2] We hold our property subject to all necessary or reasonable police regulations, and private inconvenience must give way to the public good; but it is quite a different thing when the property of the individual is taken or condemned for public use, for in such a case the positive law requires, as well as justice and equity, that we should make fair and reasonable compensation. The case of *Austin v. Railroad Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, was relied on in the former opinion to sustain the doctrine that the injury to the part of the land not taken must be direct and physical, but that was not a case of condemnation, where land was taken for a public use, nor was there any invasion of property or physical interference therewith. The court held that the right to recover damages or compensation for injury or inconvenience resulting from noise of the passing trains, smoke, jarring, or vibration, or any other annoyance, was incident to the taking of the property or some invasion of it or obstruction of some right or easement connected with or appurtenant to it, and that the inconvenience or annoyance alone will not furnish an independent ground for the assessment of damages, and this was so, said the court, because the right to "compensation" is given only where there has been a "taking" of private property. When such is the case, not only the direct, but the incidental, injury, resulting in a diminution of its value, may be considered in making compensation. This court more recently has considered the *Austin Case*, in *Railroad Co. v. Armfield*, 167 N. C. 464, 83 S. E. 809, where it was said:

"The rule for awarding damages in condemnation proceedings was not involved in the decision, and on this question *Simmons, C. J.*, delivering the opinion, said: 'In such a proceeding the effect of smoke and noise in the operation of trains are properly to be considered in so far as they tend to impair the value of the property.' And referring to and distinguishing a former decision of the Georgia Court, he further said: 'In our own case of *Railroad v. Steiner*, 44 Ga. 546, the tracks were in the street immediately in front of plaintiff's residence, physically invading his right of way, and

thereby giving him a cause of action. When there has been this physical interference, there is a "damage" in connection with the taking of private property, consisting of an easement or right of way, and the plaintiff, being thus damaged, is allowed to show all the elements of damages. The effect of smoke and noise are considered, not as an independent element of damage, but as tending to prove the value after the railroad has taken or damaged property or some right appurtenant."

The case, therefore, instead of being an authority for excluding annoyance from noise, smoke, vibration, etc., as matters affecting the value of the property, and therefore as proper to be considered in estimating the damage, is strongly the other way, so far as a case where the very point was not involved can be an authority. This court, on the authority of the Georgia case and many others, deliberately concluded in the Armfield Case that such proof as was offered by the appellee in regard to noises, smoke, etc., was admissible to show diminution in the value of the land as a basis for the award of compensation. It is there said:

"In these and all other cases where this question of condemning a right of way is substantially presented the principle, as stated, is only intended to exclude considerations of sentiment or personal annoyance detached from any effect on the pecuniary value of the property or the allowance of damages purely of a speculative character, and accordingly it is held here and in well-considered cases elsewhere that in awarding damages for a railroad right of way plaintiff shall be allowed to recover the market value of the property actually included and for the impairment of value done to the remainder, and that in ascertaining the amount it is proper, among other things, to consider the inconvenience and annoyances likely to arise in the orderly exercise of the easement which interfere with the use and proper enjoyment of the property by the owner, and which sensibly impair its value, and in this may be included the injury and annoyance from the jarring, noise, smoke, cinders, etc., from the operating of trains, and also damage from fires to the extent that it exists from close proximity of the property, and not attributable to defendant's negligence"—citing *Railroad Co. v. McLean*, 158 N. C. 498, 74 S. E. 461; *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912; *Chicago v. Taylor*, 125 U. S. 181, 8 Sup. Ct. 820, 31 L. Ed. 638; *Railroad Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42; *Telegraph Co. v. Darst*, 192 Ill. 47, 61 N. E. 398, 85 Am. Rep. 288; *Lewis on Em. Dom.* (3d Ed.) § 706 (478); 2 *Elliott on Railroads*, § 978; 15 *Cyc.* p. 724.

We may pause here to state that we need not decide whether risk from fires likely to be caused by negligence may be considered in the general estimate; for there is no such question presented by the exceptions, as there was no special instruction given in regard thereto. We do not perceive why the case of *Railroad v. Church*, 104 N. C. 529, 10 S. E. 761, is not an authority for the position that the proof is not confined to direct physical damage to the property, but may include annoyance or inconvenience to those occupying the premises or the buildings thereon, provided the jury find that the value of the property is diminished thereby. There is no substantial difference between the two cases.

We will refer to that case a little more fully, as it seems to be a direct and valuable authority as to several of the questions presented in this record. It points out the marked difference between showing a diminution in value of the property on account of the several annoyances from passing trains and proving them for the purpose of recovering special damages for the annoyance itself as a distinct element of damage. The one is proper, and the other is not. The interruption or disturbance of religious services held in the church by reason of the noise and other causes incident to the running of trains, and the frightening of horses of the worshippers from the same causes, was held to be proper for the consideration of the jury in determining how, if at all, the value of the property as a site for the church had been thereby affected, and not as, in themselves, separate items of damage. We do not see why the case is not parallel with this one. If it is competent to prove those things, as tending to show a diminution in value of the particular land for church purposes, why not apply the same rule to similar annoyances as tending to show a decrease in the value of land for mill purposes? The result is apt to be the same in the one case as in the other, though not, perhaps, of the same degree. The two cases are at least sufficiently analogous to make *Railroad Co. v. Church* an authority for the position we have taken.

[3] The risk or danger of the property being damaged or destroyed by fire set out by passing trains is another matter which is proper to be taken into account for the purpose of showing how the property has been lessened in value by the location of the right of way on the land, and the word "property" must be taken as including the entire plant, or the land enhanced in value by the mill, other structures and other improvements placed upon it, and the difference in value is the measure of compensation. These views are strongly supported by many authorities in other jurisdictions. *Pierce on Railroads*, pp. 210, 211; *Baker v. Railroad Co.*, 236 Pa. 483, 84 Atl. 959; *Railroad Co. v. Williams*, 133 Ga. 679, 66 S. E. 942; *Railroad Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Kayser v. Railroad Co.*, 88 Neb. 343, 129 N. W. 554; *Moore v. Railroad Co.*, 130 N. Y. 523, 29 N. E. 997, 14 L. R. A. 731; *Railway Co. v. Kirkover*, 68 N. E. (N. Y.) 366; *Doughty v. Sommerville & E. R. Co.*, 22 N. J. Law, 495; *Railroad Co. v. Board of Education*, 32 Utah, 305, 90 Pac. 565, 11 L. R. A. (N. S.) 945; *Duke of Buccleuch v. Board of Works*, L. R. 5 H. L. 418; *Comstock v. Railroad Co.*, 169 Pa. 582, 32 Atl. 431; *Sommerville v. Doughty*, 22 N. J. Law, 495; *Railway Co. v. Coey*, 78 Wash. 291, 131 Pac. 810; *Gas Transp. Co. v. Cartee*, 149 Ky. 90, 147 S. W. 925; *Railroad Co. v. Blechle*, 234 Mo. 471, 137 S. W. 974, Ann. Cas. 1912D, 246; *Power Co. v. Bruneau*, 41 Utah, 4, 125 Pac. 399, Ann. Cas. 1915A, 1251; *Railroad Co. v. White*

Villa Club, 155 Ky. 453, 159 S. W. 983; Railroad Co. v. Munsell, 38 Okl. 253, 132 Pac. 906. The above cases fairly and fully illustrate the prevailing doctrine of the courts and the utmost extreme, in some instances, far beyond those here proposed, to which it has been carried. Instructive cases as to special features of the subject will be found in *Railway v. Mendosa*, 193 Mo. 518, 91 S. W. 65, as to risk from fires affecting the value without regard to probability of fire even by negligence; *Kayser v. Railroad Co.*, supra, as to noise, smoke, and other annoyances; *Railroad Co. v. Board of Education*, supra, as to danger of railroad tracks and other hazards and inconveniences as affecting public school grounds; *Railway Co. v. Bass*, 9 Ga. App. 83, 70 S. E. 683, as to inability to hear over a telephone, prevalence of smoke, dust, and other like facts. The court said, in *Snyder v. Railroad Co.*, 25 Wis. 60:

"There is a very wide distinction between giving damages for such remote and possible injuries, and compensating the owner for the actual depreciation of his property because of its exposure to such hazards and dangers. Whatever may cause the depreciation, the loss to the owner is the same. If, in consequence of its exposure to these remote injuries, the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner."

And in *Railway Co. v. Hill*, 56 Pa. 460:

"I see not much difference in the nature and certainty of the exclusion of the customers of this mill between an absolute physical obstruction, directly in their way, and others which continually threaten their lives and limbs in the use of the ordinary means of getting there."

This question was carefully discussed in *Railroad Co. v. Cont. Brick Co.*, 198 Mo. 698, 96 S. W. 1011, with special reference to the exposure of property to fire by the location of the right of way and its proximity to buildings and other inflammable material. The court said:

"A prudent business man would generally prefer to purchase property in which to conduct his business which is not peculiarly liable to destruction by fire, even though the menacing party may be solvent and liable to responsibility in damages." 10 Am. & Eng. Enc. (2d. Ed.) pp. 1117, 1118, and notes 1 and 2, and cases cited.

It all comes to this at last, that the landowner is entitled "to full and complete compensation, and it must include everything which affects the value of that which is taken in its relation to the entire property," as said in *Abernethy v. Railroad Co.*, 150 N. C. 97, 63 S. E. 180. The court also said in *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912:

"Certainly, where by compulsory process and for the public good the state invades and takes the property of its citizens, in the exercise of its highest prerogative in respect to property, it should pay to him full compensation. The highest authorities are to that effect. * * * The state has conferred upon the company, to enable it to accomplish these beneficent results, one of the highest and most dangerous of its sovereign powers—that of eminent domain. An essential and elementary condition precedent annexed to the exercise of this power is that the

owner of property who is compelled to surrender it shall have full compensation."

It was stated in *U. S. v. Grizzard*, 219 U. S. 180, 31 Sup. Ct. 162, 55 L. Ed. 166, 167, 31 L. R. A. (N. S.) 1135, that the rule of compensation requires that the landowner should be paid for the part actually taken for the right of way, and, in addition thereto, justice demands that he also be remunerated for the further loss incurred in the depreciation of what remains of the land, which results from such taking, and also in its future use and value, and this loss is not confined to direct physical injury, but the inquiry should extend to all incidental injuries to the part not taken which are caused by the location of the right of way, and which tend to reduce its value. The court then says:

"To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty on justice."

[4] In order to arrive at this full compensation, the jury must consider the land, with its improvements, as a whole, and the effect thereon of the appropriation of a part for a right of way, with reference, of course, to any loss in value by reason of such taking and the uses to which the land so taken is to be applied. We so held in *Railroad v. Armfield*, supra, *Brown v. Power Co.*, supra, and *Railroad v. Church*, supra, and the principle is sustained by numerous decisions in other courts. *Railroad Co. v. Hill*, 56 Pa. 460; *Railroad Co. v. Cont. Brick Co.*, 198 Mo. 698, 96 S. W. 1011; *Foust v. Railroad Co.*, 212 Pa. 215, 61 Atl. 829; *Ranck v. Cedar Falls*, 134 Iowa, 563, 111 N. W. 1027; *Railroad Co. v. Roeder*, 30 Wash. 247, 70 Pac. 498, 94 Am. St. Rep. 864; *Railway Co. v. L. A. Synod*, 20 Idaho, 573, 119 Pac. 60; *Brainerd v. State*, 74 Misc. Rep. 100, 131 N. Y. Supp. 221; *Railroad Co. v. Chamblin*, 100 Va. 402, 41 S. E. 750; *Pause v. City of Atlanta*, 98 Ga. 95, 26 S. E. 489, 58 Am. St. Rep. 290; *Jeffery v. Osborne*, 145 Wis. 351, 129 N. W. 831; *Railway Co. v. Memphis*, 126 Tenn. 275, 143 S. W. 662, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913E, 153; *Railroad Co. v. White Villa Club*, 155 Ky. 453, 159 S. W. 983; *Nelson v. City of Atlanta*, 138 Ga. 252, 75 S. E. 245; *Railroad Co. v. Gordon*, 184 Ill. 456, 56 N. E. 810. As we have shown, we held in *Abernethy v. Railroad Co.*, supra, that the compensation must be full and complete, and include everything which affects the value of the property taken and its relation to the entire property affected. Speaking of the method of ascertaining the value and the depreciation, the court said, in *Brainerd v. State*, supra:

"It is a matter that must be left to the judgment of the court, but it may be safely asserted that no element should be excluded in arriving at the market value of premises, which it is customary for the business world to consider in de-

termining such market value or which an ordinarily prudent man would take into account before forming a judgment as to the market value of the property which he is about to purchase."

And in *Railroad v. Hill*, 56 Pa. 460, the court thus referred to the same subject:

"I regard the testimony as but a mode of ascertaining a measure of damage sanctioned by the court. * * * the difference between the value of the property after the construction of the railroad and before; the amount of deterioration, when ascertained by proper tests, being the amount the owner should be entitled to."

[5] But the jury, in fixing the value and estimating the loss, are not confined solely to a consideration of the property in its present state and condition, but may go further, and take into consideration the uses to which it may be adapted in the future, and, predicated the value upon this also, they will determine what depreciation has resulted by the taking and use of a part of the property. *Mills on Em. Domain*, § 173. We said in *Railroad v. Armfield*, supra, quoting in part from *Pierce on Railroads*, p. 217:

"In estimating the value, all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. Speaking to this same question, *Pierce on Railroads*, p. 217, states that the author [Lewis on Eminent Domain] says: 'The particular use to which the land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial uses to which it would be likely be put by men of ordinary prudence should be taken into account. It has been well said that the compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may reasonably be expected in the immediate future. But merely possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded.'"

In this connection we may well refer to what is said in the following cases:

"A citizen must surrender his private property in obedience to the necessities of a growing and progressive state, but in doing so he is entitled to be paid full, fair, and ample compensation, to be reduced only by such benefits as are special and peculiar to his land." *Railroad Co. v. Platt Land*, 133 N. C. 266, 45 S. E. 589.

"It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good condition as he would have been if the injury had not occurred. Nothing short of this is adequate compensation." *Railroad Co. v. Heisel*, 47 Mich. 393, 11 N. W. 215.

Where, in the nature of things, there can be no market value of a piece of land, as separated from an extensive business enterprise in connection with which it is used, its value cannot justly be determined without considering the use to which it has been applied.

"The value of the land consists in its fitness for use, present or future, and before it can be taken for public use the owner must have just compensation. If he has adopted a peculiar mode of using that land by which he derives profit, and he is to be deprived of that use, justice requires he should be compensated for the loss. That loss is the loss to himself. It is the value which he has, and of which he is deprived,

which must be made good by compensation." *Railway Co. v. Memphis*, supra.

[6] We are of the opinion that those called "experts" in this case were competent to give their opinion as to the value of the land or plant and its depreciation by the location of the right of way, and the uses to which it was afterwards put by the plaintiff. They were not testifying, it appears, strictly as experts, but with actual knowledge of the land and its improvements, its situation, uses, and surroundings, and their several opinions were based upon such knowledge, aided by their long observation and experience in the same kind of business which is carried on by defendant on the premises in question. It would seem that the competency of such evidence was expressly decided in *Railroad v. Church*, supra, by this court. But there are other cases equally as strong in support of its competency. *Davenport v. Railroad Co.*, 148 N. C. 287, 62 S. E. 431, 128 Am. St. Rep. 599; *Sikes v. Paine*, 32 N. C. 280, 51 Am. Dec. 389; *Wade v. Telephone Co.*, 147 N. C. 222, 60 S. E. 987; *Cotton Mills v. Assurance Corporation*, 161 N. C. 562, 77 S. E. 682, where the court said at page 564 of 161 N. C., at page 682 of 77 S. E.:

"The court erred in refusing to permit the witness Taylor, who had 20 years' experience in the cotton mill business, to state whether work of this character was the repair of, or an addition to, the mill plant. The evidence offered was not a mere matter of opinion, but the result of knowledge and observation by the witness. *Davenport v. Railroad*, 148 N. C. 287 [62 S. E. 431, 128 Am. St. Rep. 599]; *Ives v. Lumber Co.*, 147 N. C. 306 [61 S. E. 70]; *Morrisett v. Cotton Mills*, 151 N. C. 33 [65 S. E. 514]. It is true the jury, upon all the evidence, could have drawn their own conclusion on this point. But the evidence of Taylor, if it had been admitted, would have been only a matter for consideration by them, and not conclusive."

As held in *Railroad Co. v. Cont. Brick Co.*, supra, the knowledge and experience of such witnesses, acquired while engaged in the same kind of business, adds weight and trustworthiness to their opinions, and theirs is exactly the kind of knowledge that is needed in order to obtain an intelligent estimate of that "just compensation" called for in a case of this kind. See, also, *Jeffery v. Osborne*, 145 Wis. 351, 129 N. W. 931; *Railway Co. v. Columbia*, etc., *Synod*, 20 Idaho, 573; *Railroad Co. v. Hill*, supra.

[7] But it is suggested that these supposed elements of damage are common to all persons along the line of railway whose property is similarly circumstanced; that is, there is the same exposure to fire, smoke, noise, dangers, and hazards to person, as well as property. In the first place, there is no evidence that there is any plant the same as this one or bearing any resemblance to it on the line of this railway, or, if there is, that it is affected in the same way, but, apart from this consideration, the dangers, hazards, inconveniences, and annoyances, etc., are not, in such a case as this, to be regarded

as, in any just or legal sense, common to other landowners, and that doctrine should not apply when land is taken and appropriated to a use, as here, which directly injures or damages the property, because of its peculiar nature, though not necessarily in a physical way. As we have already shown, this question is virtually settled by the decision in *Railroad v. Arnfield*, at last term, 167 N. C. 464, 83 S. E. 809, where it was said that those uses of the easement acquired by the railroad company, which are likely to interfere with the proper enjoyment of the land by its owner, and which sensibly impair its value, should be considered by the jury, and these include jarring, noise, smoke, cinders, and other annoyances of a similar kind arising from the operation of trains and risks from fires caused by close proximity to the track. The physical injury or damage to the land not taken would, in a certain sense, be common to all land through which the road would pass; but, being a special and distinct injury to this land, it does not, for that reason, destroy or even affect the right to compensation, which is inseparably incident to the right of appropriation to the particular public use. *Railroad v. Blechle*, 234 Mo. 471, 137 S. W. 974, Ann. Cas. 1912D, 246, and cases supra. The law says:

"You may have the land or any easement therein which is reasonably necessary for your purpose, but you must compensate the owner justly and fully for it, and for any damage accruing to the remainder of his property by reason of the use to which you may put it, and because of its injurious effects upon the property."

The damage to the property remaining is considered as much a taking as is the actual appropriation of the part condemned for the right of way, and the cases above cited sustain this view.

[8] It was competent to prove the value of the land, with its improvements, or the entire plant, before and after the taking, as tending to show the depreciation and the amount of compensation. *Railroad v. Church*, supra; *Brown v. Power Co.*, supra, and *Jeffery v. Osborne*, 145 Wis. 351, 129 N. W. 931. In the *Church Case*, 104 N. C. at page 529, 10 S. E. 761, this court said:

"Unquestionably, it was competent to show what the land was reasonably worth before the location of the railroad on it, preparatory to showing what it was worth after the road was constructed and used. This is a common, reasonable, and necessary way of proving the quantum of damages, when it appears that the construction and use of the road produces the difference in value"—citing *Wood on Railroads*, p. 899; 3 *Sutherland on Damages*, 441.

[9, 10] We therefore conclude that defendant was entitled to prove: (1) That the value of its plant had been appreciably affected to its detriment by the noise, smoke, cinders, jarring, discomfort, inconveniences, and other like causes incident to the running of the trains on the right of way, and by the risks and dangers of fire and of injury to employes and their children, and to show further that

the use of the right of way, because of such things, would disorganize its help and tend to drive its operators away, by rendering their condition uncomfortable, if not intolerable, and require the defendant to substitute a cheaper and inferior quality of labor, and thereby reduce its output and lower the standard quality of its goods, but proof of the latter should be confined to the general facts, and not descend into particulars, as to how many hands would leave, nor should it extend to an estimate of depreciation in value, based upon a capitalization of pay rolls, which will, as alleged, be incurred by the evil effects of the right of way and the trains upon the employes and their families. This would enter too much into the forbidden domain of conjecture and speculation, even if considered only as bearing upon the question of depreciation alone, or as being an independent element for the assessment of damages. It would be impossible to do more than guess as to how many hands would quit the service, or to what extent the latter would be disorganized, and a definite opinion upon such matters, dealing with the actual figures in the final estimate, would be unsatisfactory, misleading and dangerous, as the basis for fixing the total amount of damage to the plant.

[11] Questions may be asked on cross-examination for the purpose of testing the value of a witness' testimony, which are not permissible on examination in chief by the party calling him. To be sure, even on direct examination he may give the reasons for his opinion, provided those reasons are kept within proper and competent limits, as fixed by the established rules of evidence.

[12] An improper reason does not necessarily render the opinion of the witness incompetent, as the opinion may be valid and valuable without it, resting, as it may, upon other sufficient and admissible grounds. The party objecting to any of a witness' reasons, which are deemed to be incompetent, may ask that they be stricken out, and that the jury be instructed not to consider them.

[13] The jury, in finding the amount of depreciation in value of the plant by the location of the right of way and the operation of trains thereon, would naturally adopt neither the opinions of men who are sanguine in their estimate of value, nor of those who are overcautious, but of prudent, conservative, and practical men, who have knowledge, and also have had experience and an opportunity of forming correct opinions, and are influenced in their judgment only by careful thought and deliberation. *Railroad Co. v. Doughty*, 22 N. J. Law, 503. It is proper, therefore, that they should have the means of knowing the qualification of the witness to give an opinion worthy of their consideration, his intelligence, of course, and the extent of his knowledge and experience. The opinion of an ignorant man would be of no value whatever. We need not say whether an "expert,"

or one having no knowledge of the facts, that is, the situation of the property, its surroundings, and other pertinent matters, but merely having had experience in the management or operation of cotton mills, should be allowed to express an opinion upon the question of value or depreciation, as the point is not presented; the witnesses who testified in this case appearing to have had knowledge of those facts.

We are inclined to the opinion that some of those who testified as "experts," and perhaps some of the other witnesses, were allowed to go too much into details, and their testimony permitted to take too wide a range, by which the minds of the jurors may have been led astray by collateral and irrelevant matters; but the objections interposed to this class of testimony may be too general for notice.

[14] The incompetent parts of a mass of testimony, some of which is competent, should be clearly specified. *State v. Ledford*, 133 N. C. 714, 45 S. E. 944; *Bank v. Chase*, 151 N. C. 108, 65 S. E. 745; *State v. Stewart*, 156 N. C. 639, 72 S. E. 193; *Ricks v. Woodard*, 159 N. C. 647, 75 S. E. 735.

Our final conclusion is that, while the petition is disallowed, because there was error, the case will hereafter be tried in accordance with the principles stated in this opinion. The writer thought, when the case was here before, that the land was not the subject of condemnation at all, under our statute, and therefore his attention was not specially directed to the other questions we have discussed, and, while he concurred in the result, he can well see now, after receiving more light upon the subject, that, because of the importance and intricacy of the questions, the reasons leading up to that result should be stated more fully and with closer reference to the facts as they appear in the record for future guidance in the case.

Petition dismissed.

(169 N. C. 253)

SHEPHERD v. TAYLOR et al. (No. 595.)

(Supreme Court of North Carolina. May 25, 1915.)

ACKNOWLEDGMENT \Leftrightarrow **DOCUMENTARY EVIDENCE—DEEDS—ABSENCE OF SEAL.**

In a suit to recover commission for services in procuring contracts under which defendants could obtain title to a mine, a deed to the mine tendered defendants was properly received in evidence, though the notary before whom proof of execution was made failed to affix his seal, where defendants refused to accept it, not because of the absence of the seal, but on the ground that they had not entered into the contract.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 46-54, 56; Dec. Dig. \Leftrightarrow 6.]

Appeal from Superior Court, Macon County; Webb, Judge.

Action by T. B. Shepherd against R. L. Taylor and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action to recover the sum of \$2,500, alleged to be due for services in procuring options or other contracts under which the defendants would be able to obtain the title to the Angel Copper Mine. The defendants denied the contract as alleged by the plaintiff. There was a verdict and judgment for the plaintiff, and the defendants appealed.

G. L. Jones, of Franklin, and J. Scroop Styles, of Asheville, for appellants. T. J. Johnston, H. G. Robertson, and J. Frank Ray, all of Franklin, and M. Silver, of Waynesville, for appellee.

PER CURIAM. The controversy between the plaintiff and the defendants is one of fact as to the terms of the contract, which has been settled by the jury in favor of the plaintiff, and we find no error committed upon the trial.

Three exceptions taken by the defendants, one being raised by an objection to evidence and two by prayers for instructions, are to the validity of the deed which was tendered to the defendants for the Copper Mine, on account of the fact that the notary public, before whom the proof as to the execution of the deed was made, failed to affix his notarial seal. The deed was not offered as a link in a chain of title, but as evidence that the plaintiff had performed his contract, nor did the defendants refuse to accept it because of the absence of the seal, but upon the ground that they had not entered into a contract which compelled them to pay the plaintiff for his services. The execution of the deed was not denied, and, as the action was not one to recover land, the seal could have been affixed at any time, if the defendants had agreed to accept it.

The plaintiff offered evidence fully sustaining the allegations in his complaint, and the motion for judgment of nonsuit could not therefore have been allowed. The questions asked the witness Taylor upon his examination were competent as impeaching, and his honor only admitted the evidence for that purpose.

No error.

(169 N. C. 105)

WORLEY v. SOUTHERN RY. CO.

(No. 549.)

(Supreme Court of North Carolina. May 25, 1915.)

RAILROADS \Leftrightarrow **229—SAFETY APPLIANCE ACT—POWER BRAKES—SWITCHING OPERATIONS.**

The federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1913, §§ 8605-8612]), making it unlawful for an interstate carrier to use any locomotive not equipped with power brake on its driving wheels, or to run any train that has not a sufficient number of cars in it equipped with a power or train brake, so that the engineer can control its speed without requiring the use of

hand brakes, does not apply to switching operations in the switching yards and terminals.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 743; Dec. Dig. ¶ 229.]

Appeal from Superior Court, Buncombe County; Cline, Judge.

Action by J. H. Worley, by his next friend, G. W. Worley, against the Southern Railway Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

This is a civil action, tried upon the ordinary issues of negligence, contributory negligence, assumption of risk, and damage. His honor directed the jury, upon all the evidence, to answer the first issue as to negligence, "No," and rendered judgment dismissing the action. The plaintiff excepted and appealed.

Zeb. F. Curtis, A. H. Johnston, and V. S. Lusk, all of Asheville, for appellant. Martin, Rollins & Wright, of Asheville, for appellee.

BROWN, J. This action is brought by the plaintiff to recover damages for personal injury received in operating a hand brake upon a car of the defendant while engaged in switching operations in the defendant's switching yards at Asheville.

The evidence tends to prove that it was the plaintiff's duty to get on top of the cars and apply the hand brakes as the cars descended from an elevated point in the railroad switching yards called the "Big Hump"; that plaintiff got aboard the third car from the rear for the purpose of applying the hand brakes, and while using the usual brake stick for that purpose, and applying the brakes in the usual way, the brake stick slipped out of the brake wheel, causing the plaintiff to fall to the ground, in consequence of which he was injured. The only ground of negligence alleged is the failure of the defendant to have coupled up and in use on these cars, while engaged in switching movements on the switching yards in Asheville, power brakes, or brakes under the control of the engineer, on 85 per cent. of the cars in use.

It is admitted that the defendant is engaged in interstate commerce, and that at the time of the injury the plaintiff was employed in interstate commerce, and that this action is brought under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]). The only question presented is whether or not the federal statute known as the Safety Appliance Act applies to switching operations upon the switching yards of a railroad corporation. The act provides:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its

speed without requiring brakemen to use the common hand brake for that purpose." Thornton (2d Ed.) p. 452.

We agree with the judge below that the provisions of this act do not extend to switching operations in the switching yards and terminals of railroad companies. This is the view taken by the federal courts, and it seems to have been regarded by the government that to extend the use of automatic brakes for switching operations is impracticable.

In the case of the Erie Railroad Co. v. United States, 197 Fed. 287, 116 C. C. A. 649, this question was considered by the Circuit Court of Appeals, Third Circuit. In the opinion it is said:

"It is conceded by the government that this act does not apply to, or at least has never been enforced as to, switching operations. Manifestly, such is the reasonable construction of the act."

Again:

"That it was meant to apply to train transit as contrasted with switching operations is clear, not only from the essentially different character of the operation, but from the wording of the act itself."

In the opinion is quoted cases from the other federal courts.

It seems that this particular question has not yet come before the Supreme Court of the United States. This construction of the statute has been adopted by the Supreme Court of New Jersey in the case of *Farrell v. Penna. Ry.* (N. J. Sup.) 93 Atl. 682. In the opinion the case of the *Erie Railroad Co. v. United States* is cited and approved, the court saying:

"It must suffice to say that the construction given by the federal courts to the act in question must, upon familiar principles applicable to federal legislation, be controlling upon this court in its construction and application of the act."

There is only one case in the federal courts that has been cited as contrary to this view, and that is the case of *Atchison Ry. Co. v. United States*, 198 Fed. 637, 117 C. C. A. 341. Upon an examination it will be found that the case is easily distinguished from the Erie Case, and is not an authority adverse to that decision. In the *Atchison Case* it appeared that the trains on that system engaged in interstate traffic were stopped before reaching Chicago at Corwith, an outer Chicago yard. The train in question was destined to the Atchison inner yard at Eighteenth Street, about eight miles distant. At Corwith the regular train crew was relieved by the switching crew, who ran the train on to its destination. In that case it was held that the section of the act was not limited to road trains, but applied to interstate trains destined to a particular railroad yard, although before terminating the trip and reaching the destination they were operated a part of the way by a switching crew. An examination of that case discloses that it does not at all conflict with the other cases

decided by the federal courts construing the Safety Appliance Act.

Since the above was written we have received copies of the opinions of the Supreme Court of the United States (just handed down) in the cases of *United States v. Erie R. R. Co.*, 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. —, and *U. S. v. C., B. & Q. Ry. Co.*, 237 U. S. 410, 35 Sup. Ct. 634, 59 L. Ed. —, dealing with the very question at issue in this case.

In the former case the decision of the Circuit Court of Appeals of the Third Circuit is reviewed and reversed upon the ground that upon the undisputed facts the operations were not switching operations but those of trains in transit from Jersey City to Weehawken, Bergen, and other points around New York Harbor. Nevertheless, in construing the statute the court says:

"It will be perceived that the air brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit, and in the other a car. As the context shows, a train, in the sense intended, consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up, and is proceeding on its journey, it is within the operation of the air brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and are not within the air brake provision. The other provisions calling for automatic couplers and grabirons are of broader application, and embrace switching operations as well as train movements, for both involve a hauling or using of cars."

In the case at bar there is no question as to the character of the operations. The plaintiff was not injured while assisting in conducting a train from one place to another on the line, but he was injured in switching operations pure and simple upon the local Asheville switching yards.

No error.

(169 N. C. 207)

CITY OF KINSTON v. SECURITY TRUST CO. (No. 223.)

(Supreme Court of North Carolina. May 25, 1915.)

1. MUNICIPAL CORPORATIONS — 935—MUNICIPAL BONDS — IRREGULARITY IN PROCEEDINGS—CURATIVE STATUTE.

Acts of General Assembly of 1915, purporting to legalize and ratify all proceedings of the city of Kinston, relating to the issue of certain public improvement bonds, cured any defect under the charter in such proceedings, though it inadvertently referred to the bonds as having been already delivered; and hence a purchaser of such bonds could not, by reason of such defect, refuse to accept and pay for them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1951; Dec. Dig. § 935.]

2. MUNICIPAL CORPORATIONS — 911—INDEBTEDNESS — CONSTITUTIONAL LIMITATION — BONDS FOR PUBLIC IMPROVEMENTS.

Bonds issued by a municipal corporation to provide funds for paving and improving streets, enlarging the waterworks system, equipping an electric light plant, installing an electric fire system, and erecting municipal buildings, being for necessary expenses, were not subject to Const. art. 7, § 7, limiting the right of municipalities to incur indebtedness, except for necessary expenses.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1899, 1901; Dec. Dig. § 911.]

3. MUNICIPAL CORPORATIONS — 935 — ISSUANCE OF BONDS—IRREGULARITIES—CURATIVE STATUTE.

Though the statutory requirements must be observed in proceedings to authorize the issuance of municipal bonds, irregularities in such proceedings may be cured by statute, unless vested rights have intervened.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1951; Dec. Dig. § 935.]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by the City of Kinston against the Security Trust Company. From judgment for plaintiff, defendant appeals. Affirmed.

Civil action heard on case agreed and by consent before his honor, R. B. Peebles, judge, presiding in the courts of the Sixth judicial district, on April 17, 1915. The action was to recover the purchase price of a bond issue of the city of Kinston, contracted to be sold to defendant, and said defendant declined to take the bonds or pay the stipulated price, alleging that the same were invalid. There was judgment for plaintiff, and defendant excepted and appealed.

G. G. Moore, of Kinston, for appellant. Loftin & Dawson, of Kinston, for appellee.

HOKE, J. [1] On the hearing it was properly made to appear that, pursuant to an act of the General Assembly, regularly passed, an election was held in the city of Kinston on the 23d of June, 1914, on the proposition to issue bonds to the amount of \$100,000, "in order to provide funds with which to pave and generally improve the streets of the city, to enlarge and extend the waterworks system, to enlarge and better equip the electric light plant, to install an electric fire alarm system, and to erect municipal buildings," and the measure was approved by a majority of the qualified voters of the city; that the results of the election having been duly certified, on resolution of the board of aldermen, the bonds were prepared and contracted to defendants at a stipulated and lawful price, and defendants have declined to accept and pay for same, alleging that they are being issued in violation of a provision of the city charter, to the effect:

"That no ordinance or resolution shall be finally passed upon the date of its introduction, except in case of public emergencies, and then only when requested by the mayor in writing: Provided that no ordinance or resolution making a grant of any franchise or special privilege shall ever be passed as an emergency measure."

And it was admitted that the resolution of the board of aldermen, under which these bonds were prepared and bargained and one or two other resolutions of the board, bearing on the subject, all of them, had been passed the day of their introduction. It was further made to appear that, this alleged defect having been suggested, the General Assembly of the state, at the regular session of 1915, passed an act to legalize and ratify "all proceedings of the city of Kinston relating to the issue of these bonds," referring in express and definite terms to the former statute, the election and the purposes of the bond issue, and the resolutions, etc., and providing, among other things, in section 1:

"All proceedings of the city of Kinston for the issuance of said one hundred thousand dollars public improvement bonds for the purposes aforesaid, including said election held June twenty-third, nineteen hundred and fourteen, are hereby ratified and legalized, and said bonds are valid and binding obligations of said city of Kinston."

The defendants object further to the validity of the proposed bond issue because the ratifying act, in its preamble, refers to them as bonds already delivered. Upon these, the facts chiefly relevant, we concur in the view of the judge below that the proposed bond issue will constitute a valid indebtedness of the city, and that these defendants must be held liable for the stipulated price.

[2] Under our decisions applicable and on the facts in evidence, the bonds are for necessary expenses, and are not therefore subject to the constitutional restrictions on municipalities as to incurring indebtedness contained in article 7, § 7, of the Constitution. *Murphy v. Webb*, 156 N. C. 402, 72 S. E. 460; *Commissioners v. Webb*, 148 N. C. 120, 61 S. E. 670; *Fawcett v. Town of Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825; *Black v. Commissioners*, 129 N. C. 121, 39 S. E. 818; *Vaughn v. Commissioners*, 117 N. C. 434, 23 S. E. 354.

[3] The municipalities, however, in matters of this character, are very largely subject to legislative control, and as to incurring indebtedness and other questions, gov-

ernmental in character, they must observe the statutory requirements under which they act. *Ellison v. Williams*, 152 N. C. 147, 67 S. E. 255; *Town of Hendersonville v. Jordan*, 150 N. C. 35, 63 S. E. 167; *Robinson v. Goldsboro*, 135 N. C. 382, 47 S. E. 462; *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948.

This last position, however, is subject to the principle very generally recognized that, when defects and irregularities are by reason of the violation or nonobservance of statutory provisions, and unless vested rights have supervened, the objections may be removed and the measure validated by proper legislative action. *Reid v. Railroad*, 162 N. C. 355-358, 78 S. E. 306; *Grenada County Supervisors v. Brogden*, 112 U. S. 261-271, 5 Sup. Ct. 125, 28 L. Ed. 704; *Ill. v. Ill. Cen. R. R. (C. C.)* 33 Fed. 721-771; *Schneck v. Jeffersonville*, 152 Ind. 204-217, 52 N. E. 212. In *Reid's Case* the court said:

"It is a well-recognized principle that in so far as the public is concerned, and when not interfering with vested rights, a Legislature may ratify and make valid measures which it might have originally authorized."

In *Board of Supervisors, etc., v. Brogden*, supra, it was held:

That "a municipal subscription to the stock of a railroad company, or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given."

And in *Schneck's Case*, supra:

"In the absence of constitutional restrictions, the Legislature has the right to legalize the bonds of a city, so long as vested rights have not intervened."

The objection that the ratifying act refers to the bonds as already delivered is without merit. The evident purpose of the act is to cure all of the defects suggested. The language is broad enough to do it, and the reference to the bonds as having been delivered is so clearly an inadvertence that it is deserving of no consideration. *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950. There is no error in the proceedings below, and the judgment of his honor is in all respects confirmed.

Affirmed.

(117 Va. 351)

PERKINS v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. March 11, 1915. Rehearing Denied June 10, 1915.)

1. RAILROADS \S 350—ACCIDENT AT CROSSING—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for injury at a crossing, where defendant's negligence in failing to give the statutory signals was conceded, *held*, on conflicting evidence involving the intelligence and veracity of witnesses, that plaintiff's contributory negligence was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1152-1192; Dec. Dig. \S 350.]

2. RAILROADS \S 346—ACCIDENT AT CROSSING—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

In an action for injuries at a crossing, the burden of establishing plaintiff's contributory negligence was on the defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1117-1123; Dec. Dig. \S 346.]

Error to Circuit Court, Pittsylvania County.

Action by one Perkins against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed, and judgment entered for plaintiff for the amount provisionally awarded by the verdict.

Volney E. Howard and Wm. M. Murrell, both of Lynchburg, for plaintiff in error. William Leigh, of Danville, for defendant in error.

WHITTLE, J. This is a crossing case in which the negligence of the defendant in failing to give the statutory signals is conceded. The circuit court sustained the defendant's demurrer to the plaintiff's evidence; and the narrow question for our consideration is whether or not the alleged contributory negligence of the plaintiff in error was so clearly proved as to have justified the court in withdrawing the question from the jury.

The material facts from the standpoint of a demurrer to the evidence may be thus summarized: On Sunday afternoon, June 15, 1913, D. G. Hagood, who was the owner of a wagon and pair of mules, invited the plaintiff, a girl 17 years old, and four other persons, to drive with him and his wife to a religious meeting near Stokeland. Stokeland is a station on defendant's railroad five miles south of Danville and close to Cook's crossing, where the Greensboro road passes over the railroad. The railroad is double-tracked, and at the place of the accident is practically straight and runs north and south. The highway along which Hagood and his party were traveling diverges from the railroad at Dick Williams' crossing (half a mile north of Cook's crossing), and follows a ridge in the form of a bow, which at the farthest point is about 120 yards from the railroad. The road then curves in the direction of

Cook's crossing down a gradual incline until within a short distance of the tracks, when it ascends to the higher level of the roadbed. There was a dense growth of trees and bushes along the highway which shut out the view of the railroad, except at a point 120 feet from the crossing, where a narrow road leads into the main road. This cross-road forms an opening through which a passing train momentarily could be seen from the main road. After leaving that road, the view is again obstructed by woods and an embankment to within 22 feet of the first track. On entering that space, the view of the track in the direction of Danville is clear for 2,000 feet. North-bound trains pass over the eastern track and south-bound trains over the western track. The wagon was crossing from east to west, and the collision was with a south-bound train. As the wagon passed the rift in the woods, Hagood, the driver, and others, looked through the opening, but no train was visible. Thereupon he remarked to his companions that they would have to listen for trains as they could not be seen, and they did listen as they approached the track, but heard none. The mules were in a walk, and their speed was still further slackened, though they were not brought to a stop, before going on the track. Hagood was sitting in the fore part of the wagon bed and first reached the point from which approaching trains could be seen. He looked both ways, and, seeing that the tracks were clear, drove on. When the wagon had passed the embankment far enough to bring the tracks within the line of vision of the plaintiff, who was sitting toward the rear end of the wagon, the mules had reached the east track. She immediately looked in both directions, and no train was in sight. She then looked again in the direction of Danville, and was the first one to discover the south-bound train, which had then come in sight, and instantly gave the alarm. Hagood testified that it was then impossible to back the team, and he drove forward as fast as he could, but the train, which was behind time and running at the rate of 40 or 45 miles an hour, struck the rear end of the wagon, breaking it up, and all the occupants were more or less injured.

[1, 2] Upon the issue of the plaintiff's contributory negligence there was an irreconcilable conflict of evidence, involving the intelligence, integrity, and veracity of opposing witnesses, and the burden rested upon the defendant to establish the plaintiff's negligence to the satisfaction of the jury. To say the least, we are unable to affirm that the evidence makes out a case of contributory negligence so plain as to have warranted the court in taking it away from the jury. *Southern Ry. Co. v. Aldridge*, 101 Va. 142, 43 S. E. 333.

In *Bass v. Norfolk Ry. & Light Co.*, 100 Va. 1, 8, 40 S. E. 100, 102, it was said:

"Whether or not the plaintiff's intestate, under all the facts and circumstances of this case, was guilty of contributory negligence, is a question about which reasonably fair-minded men might differ. The inferences to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided by the court. It was therefore a question for the jury. * * * And since the jury might have found for the plaintiff on the question of contributory negligence of the plaintiff's intestate, on the defendant's demurrer to the evidence the court must so find."

That is the settled rule in this court. *Carlington v. Ficklin*, 32 Grat. (73 Va.) 670; *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *Marshall v. Valley Ry. Co.*, 99 Va. 798, 34 S. E. 455; *Fisher v. C. & O. Ry. Co.*, 104 Va. 643, 52 S. E. 373, 2 L. R. A. (N. S.) 954; *C. & O. Ry. Co. v. Williams*, 108 Va. 689, 62 S. E. 796; *A. C. L. Ry. Co. v. Grubbs*, 113 Va. 214, 74 S. E. 144; *Higgins v. Southern Ry. Co.*, 116 Va. 890, 83 S. E. 380; *Saunders v. Southern Ry. Co.*, 84 S. E. 650, decided at the present term.

The case of *C. & O. Ry. Co. v. Chapman*, 115 Va. 32, 78 S. E. 631, involved, as this case involves, the question of the comparative weight to be given to the positive and negative testimony of witnesses. The court there, speaking through Cardwell, J., held:

"The positive testimony of a single credible witness that he saw or heard a particular thing at a particular time ought ordinarily to outweigh that of a number of witnesses, equally credible, who, with the same opportunities, testify that they did not see or hear it; but where a witness, who denies a fact in question, has as good opportunity to see and hear it as he who affirms it, and his attention, because of special circumstances, was equally drawn to the matter controverted, the general rule that the witness who affirms a fact is to be believed rather than he who denies it does not hold good. The denial of the one in such case constitutes positive evidence as well as the affirmation of the other, and produces a conflict of testimony to be decided by the jury."

The case of *Higgins v. Southern Ry. Co.*, supra, is quite similar in its facts to the case at bar. There, as here, the train, without ringing the bell or sounding the whistle, as the statute prescribes, ran into a wagon at a public crossing, destroying the wagon, and killing the horses and driver, a woman, and her child. The defendant demurred to the evidence, and relied on the defense of contributory negligence. The trial court sustained the demurrer to the evidence and entered judgment for the defendant; but this court, reiterating the oft-repeated rule that negligence cannot, as matter of law, be predicated on a state of facts upon which fair-minded men might differ, reversed the judgment and overruled the demurrer to the evidence.

For these reasons, we are of opinion that the judgment of the circuit court must be reversed, the demurrer of the defendant to the plaintiff's evidence overruled, and judgment entered in favor of the plaintiff for the amount of damages provisionally awarded by

the verdict of the jury, with interest from the date of the verdict, and costs.

Reversed.

(101 S. C. 213)

WHITWORTH v. COLUMBIA, N. & L. R. CO. (No. 9115.)

(Supreme Court of South Carolina. May 27, 1915.)

1. CARRIERS — 320 — CARRIAGE OF PASSENGERS — ACTIONS — INJURIES.

Whether a train stopped sufficiently long to allow passengers to alight in safety held, in a passenger's action, for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. — 320.]

2. CARRIERS — 347 — CARRIAGE OF PASSENGERS — ACTIONS — INJURIES.

Where a railroad company, knowing of the custom of passengers to alight from both sides of the train, although the platform was on only one, did not object thereto, plaintiff, who alighted from the off side of the train, cannot be held guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. — 347.]

3. CARRIERS — 303 — CARRIAGE OF PASSENGERS — DUTY TO STOP.

Regardless of statute, it is the duty of a railroad company to stop its train at a flag station for a sufficient length of time to allow passengers to alight.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. — 303.]

4. CARRIERS — 340 — CARRIAGE OF PASSENGERS — DUTY TO STOP.

Where the conductor in charge of a train knew that passengers were alighting on the side opposite the platform, it was negligence for him to start the train before they had a sufficient length of time to alight in safety.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1354; Dec. Dig. — 340.]

5. CARRIERS — 339 — CARRIAGE OF PASSENGERS — ACTIONS — DEFENSES.

Where plaintiff negligently alighted from the side opposite the platform, and was thrown by the sudden starting of the train, her negligence was not the proximate cause of the injury, if it would have occurred had she attempted to alight in the regular manner.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1353; Dec. Dig. — 339.]

6. APPEAL AND ERROR — 1033 — REVIEW — HARMLESS ERROR.

In an action by a passenger injured when the train suddenly started as she was alighting, an instruction that recovery could not be based on the great distance from the step to the ground, unless it caused her to fall, or affected the result of the fall, is not prejudicial to the railroad company, even if erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. — 1033.]

7. TRIAL — 243 — CONFLICTING INSTRUCTIONS — INJURIES TO PASSENGER.

In an action by a passenger, injured in alighting at a flag station, the complaint alleged that the train was stopped before it reached the regular stopping place, and that she was thereby invited to get off at a place where there was no suitable landing. The train was com-

posed of several coaches. *Held*, that charges that it was for the jury to say whether the train was stopped at the platform, and that there was no evidence that the train was stopped before reaching the station, were not conflicting; it being obvious that all the cars could not be stopped opposite the platform, though the train was not stopped at a point away from the station.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Action by Sallie Whitworth against the Columbia, Newberry & Laurens Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lyles & Lyles, of Columbia, for appellant. A. F. Spigner, W. H. Cobb, and J. S. Verner, all of Columbia, for respondent.

HYDRICK, J. This appeal is from a judgment for \$5,000 damages for injuries sustained by plaintiff while alighting from one of defendant's trains, on which she was a passenger from Columbia to Ballentine, a flag station on defendant's road.

The specifications of negligence are: (1) In stopping the train before it reached the regular stopping place, and in inviting plaintiff to alight where the train was stopped, which was not a safe place, because the ground was rough and the distance from the step to the ground was too great for plaintiff to alight in safety, without the aid of a stool, which was not furnished, and without light to enable her to see how to get off, which was not provided; (2) in causing the train to be moved forward with a sudden jerk, while plaintiff was in the act of getting off, and before sufficient time had been allowed for her to get off. Defendant denied the allegation of negligence, and charged plaintiff with contributory negligence in getting off on the wrong side of the train, where no landing had been provided, when she knew there was a suitable landing on the other side, where the conductor and porter attended with their lanterns to assist passengers in getting off.

[1] The proof showed that defendant had provided a suitable landing for the distance required by statute on each side of the umbrella shed, which was on the right going from Columbia to Ballentine, and it tended to show that it extended as far as the end of the car where plaintiff got off. But she got off on the opposite side, though she got on the train that morning going to Columbia from the landing on the side next to the shed. There were 20 or more passengers on the train that night for Ballentine. The station blow and stop signals were given, and the porter called the station. When the train stopped, Mr. Shealy, who was in the car with plaintiff, suggested that, as there was a large crowd to get off, they go to the rear end of the car and get off, and thereby avoid the rush. Accordingly he and his wife, son, and

daughter, plaintiff's sister and her husband, and plaintiff went to the rear of the coach, plaintiff being next to the last, her sister being last. The testimony tends to show that they went out promptly; that those in front got out safely, but, just as plaintiff was on the bottom step, in the act of stepping off, the car was moved forward with a sudden jerk, and she had to jump to keep from being thrown down; that Mr. Shealy, who was assisting her off, caught her in time to keep her from falling, and she landed on her feet, but the sudden jar caused the injuries of which she complained. Her sister testified that she was standing in the door of the car, and that the jerk was so sudden and violent that it nearly threw her out of the car. She failed to get off, and was carried on to the next station, and returned to Ballentine on the next train. The conductor and porter were on the opposite side. The conductor said that he saw passengers get off all along on that side, and that, as sufficient time had been allowed for all to get off, and none were getting off on his side, he signaled the train forward. There was evidence that at Ballentine it was customary for passengers to get on and off the train on either side, and that this was done with the knowledge and acquiescence of the company. Some of the witnesses said they had seen as many get on and off on one side as on the other, and one or two testified that they had seen the conductors help ladies off on the side on which plaintiff got off. It is clear from the foregoing statement of the tendencies of the evidence that defendant's motion for a directed verdict was properly refused. The court could not have held, as matter of law, that the train stopped a sufficient length of time for all the passengers, exercising due diligence, to get off safely. Nor could the court have held that there was no evidence of negligence on the part of the conductor in signaling the train forward, under the circumstances, or on the part of the engineer in moving it with a sudden jerk. Considering all the circumstances—the unusual number to get off, of which the conductor had notice, for he had taken up their tickets, the custom of passengers getting on and off on both sides at that station, which the engineer said he had observed daily, and of which the conductor did not deny knowledge, but, on the contrary, admitted that, on that occasion, he thought they were getting off on both sides, and he did not observe closely, and could not give even an approximate estimate of the number that got off on his side, the fact that it was in the night and at a flag station, where there was little or no light, except that afforded by the lanterns of the trainmen and the lights in the cars, and the evidence that the six persons with plaintiff, moving with reasonable promptness and celerity, were not all able to get off, before the train was started, and the evidence that it was started with

a violent jerk—the issue of evidence was properly submitted to the jury.

[2] Nor could the court have held, as matter of law, that plaintiff was guilty of contributory negligence in getting off on the wrong side. What has been said with reference to the custom of passengers getting on and off on both sides, with the knowledge and acquiescence of the company, applies to this contention. While there was no evidence of a direct or special invitation to get off on that side, the court properly left it to the jury to say whether an implied invitation to do so should be inferred from the circumstances, just as the constant and long-continued use of the track as a walkway, with the knowledge and acquiescence of the company, may warrant the inference of an invitation to so use it. *Du Bose v. R. Co.*, 81 S. C. 271, 62 S. E. 255.

[3, 4] The remaining exceptions complain of alleged errors in the charge, which is too long to report in full. But when it is considered as a whole, it was not erroneous or misleading. The jury were instructed that it is the duty of a railroad to stop its train at stations where passengers are to be let off for such reasonable length of time as may be necessary for those who move with reasonable promptness, diligence, and care to get off in safety; that when such time has been allowed, the conductor may order the train forward, and if a passenger is in a position of danger at that time, the railroad is not responsible for resulting injury, unless the conductor knows, or ought to know, of his danger; that the length of the stop should vary according to circumstances; that, if defendant did not stop a reasonably adequate time to allow the passengers to alight in safety, it was guilty of negligence, and that would be true, even if the passengers were getting off on the wrong side, if they were exercising due diligence in getting off; that the company was required by statute to prepare a suitable landing on one side only—that next the station—and every passenger is presumed to know that, and has no right to alight on the other side of the train, without assuming the risks incident thereto, unless he has been notified by the company to do so; that the fact that a few persons may get on and off trains on the wrong side with the knowledge of the company does not amount to an invitation to do so; that it would require such constant practice as would satisfy the jury of an implied invitation to do so; that where the company actually or impliedly invites passengers to alight, it is under the duty of providing a reasonably safe place; that if plaintiff was negligent in attempting to alight on the wrong side, and she was thrown by an act of negligence on the part of the company, whether her negligence would defeat her recovery would depend upon whether she would have met the same fate if she had gotten off on the other side; in other words, if the train was moved before the pas-

sengers had a reasonable time to get off, and if the moving of the train was the proximate cause of plaintiff's injury, then it would make no difference on which side she was getting off; that the fact of the step being some distance from the ground could have no effect, unless they found that the distance from the ground was the cause of the fall, or that the distance affected the result of the fall; that a passenger train must stop at the station; that does not mean that every coach must be opposite the station, a physical impossibility; that it was for them to say whether the train stopped at the station, and, if it did, the defendant did all the law required of it in that respect. Later the court charged defendant's request that there was no evidence that the train was stopped before it reached its usual stopping place at Ballentine.

The first assignment of error in the charge is that it was charging on the facts to tell the jury that the failure to stop a reasonably adequate length of time for passengers, moving promptly and with due diligence, to get off, even if they were attempting to do so on the wrong side, would be negligence. The precise objection seems to be that this was a flag station, at which the statute, which prescribes the length of time for trains to stop at regular stations, does not apply. But the instruction was in accord with the common law. The failure to observe so plain a duty wherever passengers are to be let off is negligence. It is further objected that this part of the charge was erroneous in that it made the principle applicable even if the passenger was getting off on the wrong side. But it was not so made applicable, unless the conductor knew, or in the exercise of proper care and diligence should have known, that passengers were getting off on the wrong side. If he did so know, there is no reason why it should not apply.

[5] The next assignment of error is in charging that plaintiff's negligence, if any, in getting off on the wrong side would not defeat her recovery, if she would have met the same fate on the other side. The objection is that it left it to the jury to surmise whether she would have met the same fate on the other side. Not so. It meant no more than to say that, if the sole proximate cause of the injury was the sudden movement of the car, the alleged contributory negligence of attempting to get off on the wrong side would not defeat recovery, for, in that contingency, it was not a proximate contributory cause.

[6] The same may be said of the next assignment of error that the distance from the step to the ground could have no effect, unless the jury found it was the cause of the fall, or that the distance affected the result of the fall. This instruction was favorable rather than prejudicial to defendant. Responding to plaintiff's charge of negligence in that the distance was too great for a safe

landing without the aid of a stool, the jury were told, in substance, that the distance could make no difference, unless it caused the fall or increased the injurious effects of it. In other words, if it had nothing to do with the injury, either in causing it or in enhancing it, defendant should not be prejudiced by the alleged negligent failure to provide a stool.

[7] It is next contended that the charge was conflicting and confusing, in that the court first charged that it was for the jury to say whether the train stopped at the station, and subsequently charged defendant's request that there was no evidence that it was stopped before it reached the station. A moment's reflection will show that there was nothing conflicting or confusing in these instructions. Plaintiff had charged as an act of negligence that the train was stopped before it reached the station; and she was thereby invited to get off at the place where it was stopped, at which there was no suitable landing. The train was composed of six coaches. As the judge said, it was a manifest impossibility for each of them to be immediately opposite to the station, shed at the same time, and clearly it was properly left to the jury to say whether it stopped at the usual and prepared stopping place. There is nothing in that inconsistent with the view that there was no evidence that the train was stopped before any part of it reached the station grounds, which was the real meaning of the plaintiff's allegation, which defendant's request was intended to meet.

Judgment affirmed.

GARY, C. J., and FRASER, WATTS, and GAGE, JJ., concur.

(101 S. C. 210)

GRUBBS v. ATLANTIC COAST LINE R. CO. (No. 9114.)

(Supreme Court of South Carolina. May 27, 1915.)

CARRIERS \Leftrightarrow 158—CARRIAGE OF GOODS—STIPULATION AS TO LIABILITY—VALIDITY.

An agreement that the loss, for which the carrier was liable, should be computed on the basis of the value of the property at the place and time of shipment is valid, the provision merely being intended to establish a rule for determining the value of the property in case of loss, and not to limit or diminish the carrier's liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. \Leftrightarrow 158.]

Appeal from Common Pleas Circuit Court of Barnwell County; W. B. Gruber, Special Judge.

"To be officially reported."

Action by J. B. Grubbs against the Atlantic Coast Line Railroad Company, begun in justice court and appealed by defendant to the circuit court. From a judgment there for

plaintiff, defendant appeals. Affirmed, on condition that plaintiff enter remittitur; otherwise, reversed and remanded.

Harley & Best, of Barnwell, for appellant. Thos. M. Boulware, of Barnwell, for respondent.

GARY, C. J. This action, which was commenced in a magistrate's court, is to recover the value of certain goods lost in transit, and for the statutory penalty.

Two sacks of rice were shipped from Charleston, S. C., to Hilda, S. C. Before the sacks arrived at Hilda, 27 pounds of rice were lost from one of them. The plaintiff filed a statement with the defendant, claiming that the value of the lost rice was \$1.45. The defendant refused payment. The value of the lost goods, when the shipment arrived at Hilda, was \$1.45, but this was greater than the value thereof, at Charleston, when they were shipped, even including the freight charges. The bill of lading, under which the goods were shipped, contained the following stipulation:

"The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid), at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon, or is determined by the classification of traffics upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The magistrate rendered judgment in favor of the plaintiff for \$1.45, the amount claimed, and for \$50 penalty, whereupon the defendant appealed to the circuit court, which affirmed the magistrate's judgment, for the following reasons:

"Under the authorities in this state, the amount of loss is ascertained by showing the value of the goods at the point of destination. This may be varied by special contract, where the contract is based upon a valuable consideration. In the case at bar, there is no evidence that the provision in the bill of lading, limiting the amount of loss to the invoice price, was based upon any consideration whatsoever, hence under the authority in the case of *Johnstone v. Railroad Co.*, 39 S. C. 55, 17 S. E. 512, and the other decisions by our Supreme Court, the provision in the bill of lading, limiting the liability in this case, must be disregarded, and the judgment of the magistrate's court affirmed."

The practical question raised by the exceptions is, whether the circuit court erred in ruling that the amount of loss was to be determined at the point of destination, or the place of shipment, as stipulated in the bill of lading.

The bill of lading does not show that there was an agreement that, in consideration of a reduced rate of shipment, the amount of recovery in case of loss would be limited to a specified amount. On the contrary, the lan-

guage of the bill of lading negatives any such agreement. The provision in the bill of lading was merely intended to establish a rule for determining the value of the property in case of loss, irrespective of the fact whether it was greater at the point of shipment or destination, which could not be foreseen, on account of the fluctuation in prices. It was for this reason that such a rule was upheld in *Matheson v. Railway*, 79 S. C. 155, 60 S. E. 437, which is conclusive of this case. It will thus be seen that the principle announced in the case of *Johnstone v. Railroad Co.*, 39 S. C. 55, 17 S. E. 512, is not applicable.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial, unless the plaintiff shall remit upon the record the amount of the penalty, and all above the value of the lost goods at Charleston when shipped (being the bona fide price including the freight if paid), within 10 days after receiving notice that the remittitur has been filed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 207)

IOWA CITY STATE BANK v. HOEFER.
(No. 9112.)

(Supreme Court of South Carolina. May 27, 1915.)

1. BILLS AND NOTES ¶502—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where the answer admitted plaintiff gave the note in question but set up failure of consideration, the instrument is admissible in evidence without proof of execution.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1708-1716; Dec. Dig. ¶502.]

2. BILLS AND NOTES ¶370—ACTIONS—DEFENSES.

Failure of consideration is not available against a holder who acquired the note in due course without knowledge of the defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. ¶370.]

3. BILLS AND NOTES ¶530—PLEADING—NECESSITY FOR.

In a suit on notes, interest cannot be recovered where not demanded in the complaint.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1941-1944; Dec. Dig. ¶530.]

Appeal from Common Pleas Circuit Court of Richland County; W. A. Holman, Special Judge.

Action by the Iowa City State Bank against C. F. Hoefer. From a judgment for plaintiff, defendant appeals. Reversed unless plaintiff shall remit interest.

C. S. Monteith, of Columbia, for appellant.
Hunter A. Gibbes, of Columbia, for respondent.

HYDRICK, J. This was an action on four negotiable promissory notes, aggregating \$199.70, given by defendant to the Royal Company of Iowa City, Iowa, and indorsed by the payee to the plaintiff for value before maturity, and without notice of any infirmity in the notes. These facts being shown, the court directed a verdict for plaintiff for the full amount of the notes with interest.

[1, 2] Error is assigned in admitting two of the notes in evidence without proof of the execution thereof by defendant. There is no merit in this contention, because the defendant admits in his answer that he gave the notes to the Royal Company, and alleges, as a defense, that they were given in payment of the purchase price of goods bought of that company, under warranty and an agreement that if the goods were not as warranted or were not satisfactory they should be returned; that they were not satisfactory or as warranted, and the seller was immediately notified of that fact and that defendant would not pay for them, but would return them; that thereafter an agent of the plaintiff called upon defendant, and, after examining the goods, told him to return them to the Royal Company and there would be no further liability; that the goods were accordingly returned. There was testimony tending to prove the defense alleged, except there was no proof that plaintiff had any notice of it before it bought the notes, and there was no proof that the person who is alleged to have been the agent of plaintiff and alleged to have told defendant to return the goods to the Royal Company and there would be no further liability (though this was denied by the alleged agent) had any authority from the plaintiff to do so. The court therefore correctly held that the defense was not available against the plaintiff.

[3] The plaintiff, in the complaint, demanded judgment for \$199.70. No claim was made for interest. Therefore, without amending the complaint, interest was not recoverable, as it was not consistent with the case made by the complaint and embraced within the issue. *Straub v. Screven*, 19 S. C. 445.

The judgment is reversed, unless plaintiff shall remit the interest.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 249)

CLARK et al. v. SOUTHEASTERN LIFE INS. CO. (No. 9094.)

(Supreme Court of South Carolina. May 5, 1915.)

1. INSURANCE — 668—ACTIONS ON POLICY—QUESTION FOR JURY—FORFEITURE.

In an action on a life insurance policy, where the defense was forfeiture for nonpayment of premiums, and it appeared that the insured had given his notes for the premium, and received a receipt stating that the premium had been paid and the policy continued in force, subject to the condition of any notes given therefor as shown in the margin, but no notes were mentioned in the margin, and both parties introduced evidence as to the intent of the parties, it was a question for the jury whether it was intended that the failure to pay the notes would result in a forfeiture of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. — 668.]

2. TRIAL — 142—TAKING CASE FROM JURY—CONFLICTING INFERENCES.

Where the facts are undisputed, but conflicting inferences may be drawn therefrom, the court cannot direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. — 142.]

3. INSURANCE — 668—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE — WAIVER OF FORFEITURE.

In an action on a life insurance policy, evidence held sufficient to take to the jury the question whether the insurer had waived its right to declare a forfeiture for failure to pay premium notes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. — 668.]

4. INSURANCE — 668—ACTIONS ON POLICIES—QUESTION FOR JURY—WAIVER OF FORFEITURE.

Where a number of facts in evidence, taken together, were sufficient to support an inference of waiver of forfeiture of a life insurance policy for nonpayment of premium notes, though no one of them would support such inference, the question of waiver is one for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. — 668.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Thos. S. Sease, Judge.

"To be officially reported."

Action by Alice Clark and others against the Southeastern Life Insurance Company. Judgment for the plaintiffs, and defendant appeals. Affirmed.

Haynsworth & Haynsworth, of Greenville, and Bomar & Osborne, of Spartanburg, for appellant. Sanders & De Pass, of Spartanburg, for respondents.

GARY, C. J. This is an action on a policy of life insurance. On the 23d of December, 1905, the defendant issued to Joseph M. Blair a policy of insurance on his life in the sum of \$2,000, in favor of his children, the plaintiffs herein. Joseph M. Blair died on the 2d of September, 1911.

The defendant, after denying certain allegations of the complaint, set up the following as a defense:

(1) "It alleges that the policy referred to in the complaint was issued, and was to be of force in consideration of \$121.68, to be paid, in advance, and of the payment of a like sum on December 5th at noon, in every year thereafter during the continuance of the said policy, and the policy provided that a failure to pay any renewal premium or installment thereof, or any note or other obligation given therefor, would render the policy null and void."

(2) "That the insured failed to pay the premium which fell due on December 15, 1908, but executed for said premium four notes of the amounts and the dates hereinafter indicated, to wit: \$30 due March 15, 1909; \$30 due June 15, 1909; \$30 due September 15, 1909; \$31.68 due December 15, 1909. That all of said notes contain the following clause, to wit: 'Said policy, including all conditions therein for surrender or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity.'"

(3) "That when the note which fell due on March 15, 1909, became payable, the insured was unable to pay the same, and thereupon it was extended by mutual agreement to May 15, 1909, when the insured was still unable to pay it. Thereupon the insured made therefor his two notes to this defendant, each in the sum of \$15, due, respectively, June 15, 1909, and July 15, 1909."

(4) "That all of the said notes and renewals contained the clause hereinbefore set forth, and were conditioned that the policy set forth in the complaint would become void on the failure to pay any of the said notes."

(5) "That none of the said notes, or any part thereof, were paid, nor were the premiums which matured, respectively, on December 15, 1909, and December 15, 1910, ever paid by the insured or by any other person, and that by the terms of the said policy and the terms of the said notes the said policy, with all rights thereunder, became void on the failure to pay the said notes and the said premiums, or any of them, as they respectively matured."

(6) "That under the terms of the policy, however, the insured, by reason of the payment of the premiums falling due prior to December 15, 1908, was entitled to have the said policy extended from December 15, 1908 to April 2, 1910, but that said policy expired on said date."

The following statement appears in the record:

"The entire policy was in evidence, but it is agreed for the purpose of this appeal that the following statement of its contents includes all the matters essential to the determination of this case: It was issued by the Southeastern Life Insurance Company to Joseph Mayo Blair on December 23, 1905, and 'in consideration of the application for this insurance, which application is copied hereon, and made a part of this contract, and in further consideration of the sum of \$121.68, to be paid in advance, and of the payment of a like sum, on the 15th day of December at noon, in every year thereafter during the continuance of this policy,' insured the life of the said Joseph Mayo Blair in the sum of \$2,000, payable at his death to Alice Elizabeth M. and Joseph M. Blair, Jr., share and share alike, or to the survivors of them, subject, however, to the conditions stated in the policy:

"Premium Payments.—Failure to pay, when due, any renewal premium or installment, or any note or other obligation given as a lien against this policy, will render the contract null and void, except as is herein below provided.

Any indebtedness to the company on account of this contract will first be deducted in any settlement of this policy or any benefit hereunder.

"Surrender Values.— * * * (3) Only the president, vice president, secretary, or treasurer has power on behalf of the company to make or modify this or any contract of insurance, or to extend the time for paying the premium. (4) Premiums must be paid at the home office, unless otherwise provided, and in any case, in exchange for an official receipt, signed by one of the above-named officials, and countersigned by the person to whom payment is made. Upon failure to pay any annual premium after the third the company will extend automatically, as term insurance, the net amount insured by this policy, for the number of years and days named in table C. below. The extension, as stated in table C, is as follows: "After 3 years, 1 year and 108 days; after 4 years, 1 year and 269 days."

"Assignments.—Any assignment of this policy must be made in duplicate and sent to the home office, one to be retained by the company, and the other to be returned. The company has no responsibility for the validity of any assignment."

"Reinstatement.—Should this policy lapse by reason of the nonpayment of any premium, it may be reinstated at any time within 12 months after lapse, provided the insured shall furnish evidence of good health satisfactory to the company, and pay all overdue premiums, and any indebtedness to the company, under this contract to date of reinstatement, with interest thereon."

"Pasted in the policy is the receipt of the secretary of the company, dated December 16, 1906, for \$121.66, 'being the first premium upon policy No. 67, issued upon the life of Jos. M. Blair, containing said policy in force to the 15th day of December, 1906, at noon. This receipt is subject to the condition of any and all notes which have been given, or may be given, for the amount of said premium, or any part thereof.'"

At the close of the testimony the defendant's attorneys requested his honor, the presiding judge, to direct a verdict for the defendant, on the following grounds:

"There is only one inference to be drawn from the testimony concerning the following matters, and that the following propositions are consequently made out, to wit: That there was a failure to pay the notes made for the premium due December 15, 1908, and that under the contract, the policy became forfeited, except for the period of extended insurance, and this period expired prior to the death of Mr. Blair. (2) There was no waiver of forfeiture of the policy operating to extend the life of the policy to the time of the death of Mr. Blair. (3) Under the testimony there was no estoppel on the part of the defendant preventing it from setting up forfeiture of insurance."

The jury rendered a verdict in favor of the plaintiffs for the full amount, less the unpaid notes, and the defendant appealed.

[1] The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing to direct a verdict on the ground that the failure to pay the notes given for the premium due on the 15th of December, 1908, caused a forfeiture of the policy, except for the period of extended insurance, which, it is contended, expired prior to the death of the insured.

The defendant introduced testimony, both

oral and written, tending to sustain the allegations of its defense.

The plaintiffs offered in evidence the following receipts:

Settlement.	Premium, \$121.66.	Number 67.
	Southeastern Life Insurance Company.	
Cash.....	Received one hundred twenty-one & ⁶⁶ / ₁₀₀ , being the annual premium on the above-numbered policy, issued upon the life of Joseph M. Blair, continuing said policy in force to the 15th day of December 1909, at noon. This receipt is subject to the conditions of any and all notes which have been given as shown on margin hereof, for amount of said premium, or any part thereof. This receipt is not valid unless countersigned and dated the day of payment by treasurer.	
Note...mos		
Note...mos		
Note...mos		
Note...mos		
Total paid		

Paid at Southeastern Life Ins. Co. this Nov. 17 day of 191-.

Wm. H. Valentine
Treas.

W. H. Valentine,
Secretary.

The words, "Received one hundred twenty-one & ⁶⁶/₁₀₀ dollars, being the annual premium on the above-numbered policy, * * * continuing said policy in force to the 15th day of December, 1909," are in themselves a plain and unequivocal acknowledgment on the part of the defendant that the premium in question had been paid, and that the policy was continued in force until the 15th of December, 1909. It is true the receipt contains the provision that "this receipt is subject to the conditions of any and all notes which have been given, as shown on margin hereof, for amount of said premium, or any part thereof," and that there are blank spaces on the margin of the receipt for the description of any notes so given, but it does not appear upon the margin of said receipt that notes were given for the amount of said premium or any part thereof. Therefore, unless there was a resort to other testimony explanatory of the receipt, the proper construction would be that it appeared upon the face thereof that the premium had been paid and the policy continued in force. The defendant introduced both oral and written testimony to explain and contradict the receipt; and the plaintiffs relied upon certain facts and circumstances to show that the receipt, upon its face, represented the intention of the parties.

[2] The inferences to be drawn from the testimony introduced by the respective parties were conflicting; and, if his honor had undertaken to direct a verdict, he would have invaded the province of the jury.

In 16 A. & E. Enc. of Law (1st Ed.) 465 et seq., the rule when the facts should be submitted to the jury is thus clearly stated:

"The general rule is well known that questions of fact are to be submitted to the jury, and this includes, not only cases when the facts

are in dispute, but also when the question is as to inferences to be drawn from such facts after they have been determined. * * *

"The following rules may be stated as applicable to every case: 1. When the facts which, if true, would constitute evidence of negligence, are controverted. 2. When such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn. 3. When the facts are in dispute, and the inferences to be drawn therefrom are doubtful." (Italics added.)

This language is quoted with approval in the cases of *Rinake v. Mfg. Co.*, 55 S. C. 179, 32 S. E. 983; *Wood v. Mfg. Co.*, 66 S. C. 482, 45 S. E. 81; *Teague v. Tel. Co.*, 91 S. C. 443, 74 S. E. 980. See, also, *Holliday v. Pegram*, 89 S. C. 73, 71 S. E. 367, Ann. Cas. 1913A, 33, and *Watson v. Paschall*, 93 S. C. 537, 77 S. E. 291.

[3] The next question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing to grant the motion for the direction of a verdict, on the ground that there was no testimony tending to show waiver of defendant's right to claim a forfeiture by reason of failure of the insured to pay the notes when due.

The policy was issued in December, 1905, and it is admitted that all premiums due, prior to the 15th of December, 1907, were paid. On the 15th of December, 1907, in order to continue the policy of force until the 15th of December, 1908, the insured gave three notes, in the respective sums of \$40, \$40, and \$41.66, aggregating \$121.66, the amount of the premium; but none of these notes were paid until the 17th of November, 1908, when a check was given for \$124.15, which included the principal and interest then due. Although the notes were not paid until a year after the dates thereof had expired, nevertheless the defendant did not declare a forfeiture of the policy when there was a failure to pay any of said notes, but, on the contrary, it accepted at that time the four notes in question. (These notes, however, do not bear date the 17th of November, 1908, but the 15th of December, 1908.) When the notes which became payable on the 15th of March, 1909, were not paid, the defendant did not then assert its right to claim a forfeiture of the policy, but extended the time of payment until the 15th of May, 1909; and, when it was not paid at maturity, the defendant again failed to exercise its right to declare a forfeiture, but accepted two notes of the insured, each in the sum of \$15, due, respectively, the 15th of June, 1909, and the 15th of July, 1909. If there was a forfeiture of the policy, then the insured was not thereafter liable for the full amount of the premium. The defendant, however, did not return any of said notes, but retained them until the trial of the case, and upon its request his honor, the presiding judge, charged the jury, that if they found a verdict in favor of the plaintiffs to deduct the amount of the

notes (which, of course, included the unearned premium).

[4] Even though no one of said facts may be sufficient in itself to warrant an inference of waiver, yet, if taken together, they tend to produce that result, then there was no error in submitting that question to the jury. *Dantzler v. Cox*, 75 S. C. 334, 55 S. E. 774.

The question whether the indulgences granted the insured by the defendant constituted waiver could not have been determined by his honor, the presiding judge, without violating section 26, art. 5, of the Constitution, which provides that judges shall not charge juries in respect to matters of fact. *Sparkman v. Supreme Council*, 57 S. C. 16, 35 S. E. 391.

The appellant's attorneys rely upon the case of *Parry v. Insurance Co.*, 95 S. C. 1, 78 S. E. 441. The facts in that case, however, were quite different from those now under consideration. In *Parry v. Insurance Co.*, supra, there was no testimony tending to show waiver, while there are a number of facts and circumstances in the present case tending to establish such fact.

The other assignments of error relate to the charge of the presiding judge, and must be overruled, for the reason that, when the charge is considered in its entirety, even if there was error, it was not prejudicial to the rights of the appellant.

Judgment affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 154)

SUTTON v. CATAWBA POWER CO.

(No. 9069.)

(Supreme Court of South Carolina. April 17, 1915.)

EMINENT DOMAIN ~~§~~ 308—RECOVERY OF DAMAGES—CONCLUSIVENESS OF JUDGMENT.

Act March 2, 1899 (23 St. at Large p. 207), authorizes a power company therein named to construct a dam across the Catawba river, and provides that it shall be liable for all damages caused by building such dam. While the dam was in process of construction and protected by a temporary cofferdam, plaintiff sued for damages therefrom to his property, and during the trial withdrew any claim for prospective damages. Thereafter he brought a new action for damages subsequently suffered. Held that, while as a general rule all the damages from such a structure must be recovered in one action, the judgment in the first action did not bar the second action.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 825; Dec. Dig. ~~§~~ 308.]

Appeal from Common Pleas Circuit Court of York County; J. W. De Vore, Judge.

Action by A. E. Sutton against the Catawba Power Company. From a judgment for defendant, plaintiff appeals. Reversed.

Hart & Hart and J. S. Brice, all of Yorkville, for appellant. Osborne, Cocke & Robinson, of Charlotte, N. C., and McDonald & McDonald, of Winnsboro, for respondent.

FRASER, J. This is an action for damages caused by the building of a dam in Catawba river. The plaintiff's land lies below the dam. While the dam was in process of construction and protected by a cofferdam, the plaintiff brought an action for the damages already suffered and for prospective damages. During the progress of the trial, the plaintiff withdrew any claim for prospective damages and recovered a judgment for \$1,500 for injuries already suffered. This action is for subsequent damages. When the plaintiff brought this action, the defendant, by its answer, claimed that the plaintiff was estopped by her former action, and also that the plaintiff was barred by the statute, in that the dam had been erected more than six years before the commencement of the action. The question on circuit was heard on the question of estoppel alone, and on that ground the defense was sustained and judgment entered for the defendant. From this judgment, the plaintiff appealed.

1. The defendant relied upon two general propositions: (a) A judgment is conclusive between the parties, not only as to matters included in the action, but is conclusive also as to matters that might have been included and were not. That the plaintiff had then a right to recover for prospective damages, and the judgment is conclusive as to all subsequent damages, whether demanded or not. (b) The second proposition is that there is only one settlement for property taken by the right of eminent domain whether the amount is fixed by deed, condemnation proceedings, or by judgment for damages.

As general propositions, both are unquestionably sound. Both suits demand damages for injuries to the same tract of land. In the case of *Nunnamaker v. Water Power Co.*, 47 S. C. 486, 25 S. E. 751, 34 L. R. A. 222, 58 Am. St. Rep. 905, it appears that there was a conveyance of a right to overflow 14½ acres of land, and subsequently the plaintiff brought action for 60 acres more of the same tract of land, subsequently overflowed. In that case it was held that there could be only one assessment of damages and that assessment included all future damages, whether the damages were then in the minds of the parties or not. Many cases were cited by respondent to show that the great weight of authority sustains the *Nunnamaker* Case. Until the rule laid down in the *Nunnamaker* Case is changed, in some lawful way, we are bound by it.

It was deemed desirable to apply to the Legislature for an act to supplement a charter from the Secretary of State, and an act was passed (Statutes of South Carolina, vol. 23, p. 207) which contained the following proviso: "Provided that said corporation shall be liable for all damages caused by building said dam." We must presume that the Legislature knew the law, and that they did not incorporate a meaningless provision. The Legislature knew that the corporation would

be liable for damage to land, as "land taken," and it knew further the landowners along the line of the river would be entitled to a just compensation for "land taken," as soon as any land was taken, and the estimate must be made at a time when it would be impossible to estimate how much land would be taken, and the estimate as to future damages would be a guess. With the law clearly before it, the Legislature stipulated that the respondent shall be liable for all damages, and the courts must hold it liable for all damages caused by the building of the dam. If therefore the plaintiff has suffered damages for which she has not received compensation, then by the express terms of the statute the defendant is liable.

The general rule of public policy as to the multiplicity of suits must give way to express legislative enactment; indeed, the Legislature has the right to fix public policy.

The complaint alleges that the plaintiff has suffered damage caused by the building of the dam. If she has and has not been compensated for it, then the defendant is liable under the express terms of the statute, if she has brought her action within the time allowed by law. That is a matter of proof.

The judgment appealed from is reversed.

HYDRICK, J. Under the peculiar circumstances of this case—especially the fact that the plaintiff's first action was predicated in part upon damages caused by the cofferdam, which was a temporary structure—I concur in the conclusion that this action is not barred by the first. I do not think, however, that the proviso in the statute, "that said corporation shall be liable for all damages caused by building said dam," should be construed to allow all other riparian owners, who have been or may be damaged by the dam, to bring more than one action to recover all damages, past, present, and future. I do not think the Legislature intended, by adding that proviso, to change the general rule of law, which had been well settled, that where a permanent structure is erected by lawful authority, and cannot therefore be abated or removed, all damages caused by it, past, present, and prospective, must be recovered in one action. The rule is a wise and wholesome one. It was intended to prevent multiplicity of actions, and it is supported by the great weight of reason and authority. See *Nunnamaker v. Water Power Co.*, 47 S. C. 485, 25 S. E. 751, 34 L. R. A. 222, 58 Am. St. Rep. 905, and cases cited, and the authorities cited by respondent. The intention of the Legislature to depart from such a wise and wholesome rule of law would have been clearly expressed and not left to a doubtful inference—especially when the language used is susceptible of another meaning and purpose, which fully accounts for its use. The preamble to the statute shows that it was applied for and enacted because there was some doubt of the power of the

company, under a charter granted by the Secretary of State, to obstruct a navigable stream by a dam. The proviso was added, I think, out of abundance of caution, to anticipate and meet the contention, which might possibly be made, that, because the state gave authority to build the dam, the company building it would not be liable for any damages caused by it. It was probably intended also to anticipate and obviate the contention that the company would be liable only for damages caused by negligence in the construction of the dam—as that construction had been placed upon statutes authorizing the building of railroads on lands acquired by grant or condemnation (*Lampley v. Railroad Co.*, 71 S. C. 156, 50 S. E. 773), which was changed by statute. Civil Code, § 3115. The construction anticipated by the Legislature was, in fact, contended for by the company; but, under the terms of the proviso, was denied by the court. 76 S. C. 320, 56 S. E. 966. It seems to me to be a strained construction of the language of the proviso to hold that, because it provides that the company shall be liable for all damages caused by the dam, there may be as many actions as a landowner damaged may see fit to bring. There is no more difficulty in recovering all damages, past, present, and prospective, in one action, than in doing so in one proceeding under the condemnation statute; and this construction of the proviso harmonizes it with the general rule of law and proceedings under the condemnation acts.

GARY, C. J., and WATTS, J., concur in the result.

GAGE, J. I concur in the view expressed by HYDRICK, J.

(169 N. C. 199)

BOYDEN et al. v. HAGAMAN. (No. 482.)

(Supreme Court of North Carolina. May 19, 1915.)

1. BOUNDARIES — CONSTRUCTION OF DEED.

Where a deed called for a line to J. H.'s line, thence with his line to where it meets T. H.'s line, then "with his line around to the mouth of the still house branch where it empties into Buffalo creek," thence up the bank of the creek to the beginning, etc., and there was evidence that T. H. owned or was in possession of land on the east of the land conveyed and on the south of it on both sides of Buffalo creek, the legal method of locating a part of the boundary was to run directly from the last known point of the H. lines to the mouth of the still-house branch.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 66-76; Dec. Dig. ¶ 8.]

2. BOUNDARIES — LINES OF OTHER TRACTS.

The rule that the lines of another tract called for in a deed must be fixed and established with precision to be available to fix boundaries applies only where there is a conflict in the deed between the calls for the lines and the calls by course and distance, and does

not prevail where there is no conflict, and in that case the lines called for need not necessarily have been run and marked, but, where they are fixed and established by the usual rules adopted and recognized in the survey and location of deeds, they are sufficient.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 66-76; Dec. Dig. ¶ 8.]

3. TRIAL — EVIDENCE — OBJECTIONS — INSTRUCTIONS.

Where the court charged that declarations of a prior owner of real estate received in evidence could not contradict the description in a deed, and that the declarations were only relevant on the question of boundary and in so far as they tended to fix location of lines called for in the deed, objection to the declarations on the ground that they contradicted the description was unavailable.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 169, 170, 178; Dec. Dig. ¶ 74.]

4. EVIDENCE — DECLARATIONS OF DECEASED OWNER — ADMISSIBILITY.

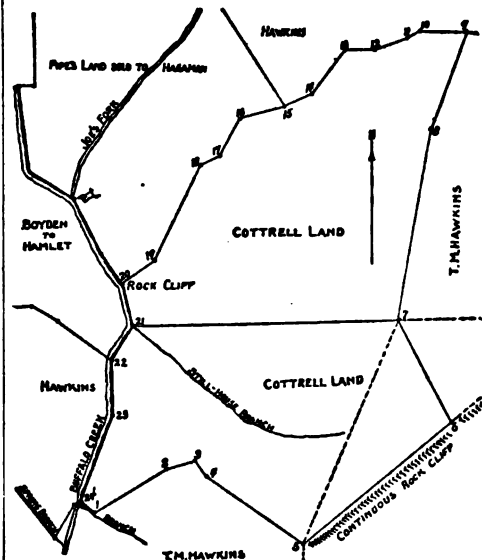
Declarations made by a trustee since deceased, while in possession and control of the property and in performance of his duty as trustee, with a view of executing a conveyance under which a party claims, may be proved by the party, though the declarations of a mere trustee are not, as a general rule, competent against the beneficiary.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 983-988; Dec. Dig. ¶ 251.]

Appeal from Superior Court, Caldwell County; Harding, Judge.

Action by John A. Boyden and others against John R. Hagaman. From a judgment for defendant, plaintiffs appeal. Affirmed.

The following illustrates matters referred to in the opinion:



There were facts in evidence tending to show that: In 1880 and 1881 John A. Boyden, now deceased, acquired title to several hundred acres of land in Caldwell county, lying on both sides of Buffalo creek, a portion of which he held in his own right under a

deed from Thos. Pipes, and the remainder he held under a deed of trust from F. P. Cottrell to secure a debt due to his wife, Mary; that Cottrell lost his right of redemption by reason of adverse possession and lapse of time in favor of John A. Boyden and wife, and, on suit brought to superior court of Caldwell county by Bernhardt, purchaser and assignee of Cottrell, it was so adjudged. See case of Bernhardt v. Hagaman, John S. Henderson, Trustee, and John A. Boyden, etc., reported in 144 N. C. 526, 57 S. E. 222. In that suit defendants also asserted title in John A. Boyden under a deed of the sheriff for taxes, etc. It further appeared that in December, 1889, John A. Boyden and wife, Mary, and John S. Henderson, trustee, conveyed a portion of said land lying east of Buffalo creek to defendant, John R. Hagaman, the deed containing descriptive terms as follows:

"Situate, lying, and being in the county of Caldwell and state of North Carolina, bounded as follows, to wit: Beginning at the intersection of Joe's fork and Buffalo creek, and runs thence up the east bank of Buffalo creek to the rock cliff or bluff some 25 yards above dwelling house; hence northeast along the highest part of the ridge to Richard Pipes' east and west line; thence east with Richard Pipes' line to John Hawkins' line; thence with his line to where it meets Thomas Hawkins' line; thence with his line around to the mouth of the still house branch where it empties into Buffalo creek; thence up the bank of said creek to the beginning. This deed is intended to include all the Thomas Pipes' land lying east of Buffalo creek and up along the east bank of said creek to the big rock cliff where the high foot log used to be, and then east of a line running N. E. from said cliff along the highest part of said ridge to Richard Pipes' east and west line; thence with his line and Thomas Hawkins' line to the east bank of Buffalo creek, and up said creek bank to the beginning. All mineral rights and privileges are excepted and reserved to the said parties of the first part and their heirs and assigns, with the right on the parties of the first part to enter upon the said lands and develop the mineral deposits and mines thereon, if there be any such; the number of acres hereby conveyed being 200, more or less."

That John R. Hagaman entered, claiming under said deed the land in controversy, cut the timber, and exercised other acts of ownership.

Mary Boyden, the wife and one of the grantors in defendant's deed, having died, this suit was instituted by John A. Boyden, the other grantor, and his children, who were also the children and heirs at law of Mary Boyden, deceased, and John S. Henderson, trustee and executor, against John R. Hagaman, alleging that the deed in question only conveyed the Thos. Pipes land or a portion of it, constituting the northern part of defendant's claim, and that it did not convey any of the Cottrell land east of Buffalo creek; this last being the land in controversy.

The defendant contended that his deed conveyed the Pipes land and all that part of the Cottrell land lying south of the Pipes land and east of Buffalo creek. It appeared, further, that John A. Boyden died in 1912, and

the suit was thereafter prosecuted by the other parties plaintiff, and, further, by estimate, that the land within the boundaries, as claimed by plaintiff, amounted to about 162 acres.

On the issue as to title, there was a verdict for defendant. Judgment pursuant to verdict, and plaintiffs excepted and appealed.

J. W. Whisnant and Edmund Jones, both of Lenoir, and Councill & Yount, of Hickory, for appellants. W. C. Newland, Mark Squires, and T. M. Newland, all of Lenoir, for appellee.

HOKE, J. We have given the case most careful consideration, and find no error in the proceedings below; assuredly none that gives the plaintiffs any just ground of complaint.

[1] The beginning corner of defendant's deed, at the junction of Joe's fork and Buffalo creek, was admitted, and there was no dispute between the parties as to the location of the lines around the northwestern and northern part of the land from that point to the figure 9, the northeastern corner of the land, being the point where the "John Hawkins' line meets the Thomas Hawkins' line," as set out in defendant's deed. There were facts in evidence tending to show that Thos. Hawkins owned or was in possession of and claiming lands on the east of the land in question, and on the south of it on both sides of Buffalo creek, and, under the charge of the court, the jury have necessarily found that from the figure 9 south to 8-7-6-5-4-3-2-1-24-23-22, to a point on the creek at 22, 16 poles south of the mouth of the still-house branch, there were lines of the Thomas Hawkins land called for in defendant's deed, fixed, established, and continuous. There were facts in evidence to support the finding, and, this being true, his honor correctly held that the legal method of locating the deed would be to run directly from 22, the last known point of the Hawkins lines, to the next call in the deed that was fixed and established, to wit, the "mouth of the still-house branch."

The ruling is in accord with our decisions applicable to the question (McPhaul v. Gilchrist, 29 N. C. 169; Shultz v. Young, 25 N. C. 385, 40 Am. Dec. 413; Hurley v. Morgan, 18 N. C. 425, 28 Am. Dec. 579; Sandifer v. Foster, 2 N. C. 237); and, applying the principle to the facts as accepted by the jury, justified the conclusion that the boundaries of defendant's deed were properly placed, and included all of the land in controversy.

[2] It was earnestly contended for plaintiffs that the location of the Hawkins lines, declared by the jury to be the eastern and southern boundaries of defendant's deed, should not be allowed to stand, because the evidence as to some portions of these lines failed to show that they had ever been run or marked, and therefore they could not properly be considered as "fixed and established," within the meaning of the principle; but, if it

be conceded that the rule requiring that the lines of another's tract called for in a deed should be "fixed and established with precision" applies in this case, the authorities are to the effect that these lines need not necessarily have been "run and marked," but, if they are fixed and established by the usual rules adopted and recognized in the survey and location of deeds, they may come within the meaning of the rule, and so fill the description. *Corn v. McCrary*, 48 N. C. 496, cited in *Lumber Co. v. Bernhardt*, 162 N. C. 460-465, 78 S. E. 485. As a matter of fact, this doctrine, requiring that the lines of another tract called for in a deed shall be fixed and established with assured precision, is one that is at times called for where there is conflict in a deed between such calls and that by course and distance, and does not always or necessarily prevail in deeds of the kind presented here, where no such conflict is presented.

[3] It was further objected for plaintiffs that the declarations of John A. Boyden were received in evidence in support of defendant's claim of ownership. In the brief of plaintiffs the objection was made to rest on the ground that, this suit not being an action to correct or reform the deed, the declarations of John A. Boyden in contradiction of the description appearing in the deed were inadmissible; but this position is not open to plaintiffs on the record, for the reason that his honor in the charge told the jury, in very explicit terms, that such declarations could in no wise change the description as it appeared in the deed, and that these declarations were only relevant on the question of boundary and in so far as they tended to fix the location of the lines as called for.

[4] In that aspect of the evidence the only declarations having appreciable significance or which could have affected the result were as to the existence and placing of the Hawkins lines on the east and south of the tract, as claimed by defendant, and these were made at a time when John A. Boyden, as trustee, was in possession and control of the property, having a survey and examination made, and with a view of executing this very deed under which defendant claims, and such declarations were competent, both as being against interest and by one in possession of property defining the limit of this claim. *Smith v. Moore*, 142 N. C. 277-290, 55 S. E. 275, 7 L. R. A. (N. S.) 684; *Ellis v. Harris*, 106 N. C. 395, 11 S. E. 248; *Clifton v. Fort*, 98 N. C. 173, 3 S. E. 726; *Magee v. Blankenship*, 95 N. C. 563.

True, as to the position of the land in controversy, John A. Boyden may have been only a trustee, and the declarations of a mere trustee are not, as a general rule, competent as against the interest of the beneficiary, but the position does not obtain where, as in this instance, the declarations were made in

the course and performance of declarant's duties as trustee and when he was in present possession and control of the land, asserting his ownership under the deed. *Chamberlain's Evidence*, § 1327; *Jones on Evidence* (2d Ed.) § 253, p. 319.

As heretofore stated, we find no reversible error in the trial, and the judgment for defendant must be affirmed.

No error.

(169 N. C. 261)

IVIE v. KING. (No. 327.)

(Supreme Court of North Carolina. May 25, 1915.)

1. APPEAL AND ERROR ⇐835—MOTION FOR REHEARING.

Under court rule 53 (164 N. C. 556, 81 S. E. xiv), only those matters for which a petition for rehearing is ordered docketed will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3248; Dec. Dig. ⇐835.]

2. LIBEL AND SLANDER ⇐123—LIBEL—AGGRAVATION.

Where defendant pleaded justification of a libel, but offered no evidence in support of his plea, the jury may consider whether such plea was an aggravation of damages; plaintiff not being bound to controvert the plea in the first instance.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. ⇐123.]

Appeal from Superior Court, Rockingham County; Devin, Judge.

On petition for rehearing. Petition denied, and former opinion affirmed.

For former opinion, see 167 N. C. 174, 83 S. E. 339.

W. P. Bynum, of Greensboro, H. R. Scott and P. W. Glidewell, both of Reidsville, Thomas S. Beall, of Greenville, and Manly, Hendren & Womble, of Winston-Salem, for plaintiff. Manning & Kitchin, of Raleigh, and A. W. Dunn, of Leaksville, for defendant.

PER CURIAM. [1] This is a petition by defendant to rehear this case reported. *Ivie v. King*, 167 N. C. 174, 83 S. E. 339. The order to docket the petition for rehearing is restricted to the second ground of the petition, the question of punitive damages. Rule 53 of this court (164 N. C. 556, 81 S. E. xiv). It is therefore unnecessary to consider matters arising on the first and second issues.

[2] The defendant, as authorized by Revision, § 502, pleaded justification, as well as matters in defense. The opinion of this court (167 N. C. at page 179, 83 S. E. at page 341), is as follows:

"Exceptions 16 and 17 were to instructions that on the question of punitive damages the jury could consider, in aggravation of damages, that the defendant had pleaded justification of his answer, and that he had failed to prove that the plaintiff was guilty of the matters which the defendant had charged in his answer. The

court had already instructed the jury that punitive damages could not be awarded unless they found that the defendant was actuated by express malice. If that was so found, the court told them that in assessing the damages they could consider that the defendant, not content with the publication sued on, had answered, pleading its truth, thus making it a part of the permanent court records."

The petition asserts that this is error because the court below should have told the jury:

"That a plea of justification interposed bona fide for the lawful purpose of defending an action is not an aggravation, and that unsuccessful justification can only be considered aggravation when interposed for the wrongful purpose of repeating the original slander."

And, further, that an instruction, such as the ones excepted to, which fails to require the jury to find bad faith in interposing the plea, is error.

In *Newell on Slander and Libel*, §§ 430, 431, it is shown that the question whether the plea of justification is unsupported by evidence is an aggravation is a matter in regard to which the decisions are conflicting, but the author thought that the better rule would be that the jury should decide in each case whether the justification was interposed in good faith or not.

In *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 864, it was held that the mere failure to make out justification does not aggravate damages if the jury found that the defendant was free of malice and had good reason to believe that the libel he published was true.

In this case the court charged that the jury could not award punitive damages unless they found that the defendant was actuated by express malice. On the trial the defendant did not introduce any evidence to prove the truth of his charges. It was the duty of the defendant, in such case, to disclose in the evidence facts and circumstances tending to show that his plea was interposed in good faith, and it was not the duty of the plaintiff to negative this proposition. If on the trial the defendant had introduced evidence to prove the truth of his publication, and, further, that his plea in justification was interposed in good faith, then the question whether such defense was made in good faith or not should have been submitted to the jury. But, in the absence of evidence that the plea of justification was interposed in good faith, and more especially when there was no evidence of the truth of the publication, the issue of good faith was not presented. If the plea was interposed in good faith, that was a matter of defense and within the knowledge of the defendant. It devolved on him to introduce evidence to that effect and to ask an instruction upon that phase of the case. This he did not do, and we cannot see that he has suffered any prejudice.

Petition dismissed.

(169 N. C. 173)

ROUSSEAU v. CALL. (No. 520.)

(Supreme Court of North Carolina. May 25, 1915.)

1. TRUSTS — §30½ — CREATION OF TRUST FUND—SUBSCRIBERS FOR SPECIFIED PURPOSE.

Persons who subscribe money for a specified purpose and who bind themselves to pay in cash, as called for by the treasurer of the fund, the amount opposite their names, create a trust fund available to creditors making advancements and furnishing supplies to the person designated as manager of the enterprise.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 41, 41½; Dec. Dig. —§30½.]

2. TRUSTS — §17, 18—CREATION OF TRUST IN PERSONALTY.

A trust in personalty may be created by parol, provided it is manifest from the words used that a trust is intended, and the subject-matter, purpose, and beneficiaries are designated with reasonable certainty.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. —§17, 18.]

3. TRUSTS — §30½—CREATION OF TRUST IN PERSONALTY.

A trust in personalty may be created when one directs that a specific debt due him or a part of it be retained or paid over by the debtor in trust for another, or where he gives his own note for a like purpose.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 41, 41½; Dec. Dig. —§30½.]

4. TRUSTS — §13 — EXECUTORY TRUSTS—CONSIDERATION.

Where a trust is executory, a valid consideration is essential.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 11; Dec. Dig. —§13.]

5. RECEIVERS — §11 — POWER TO APPOINT—PRESERVATION OF TRUST FUND.

Where a trust fund is created by persons subscribing money for a designated purpose and binding themselves to pay specified sums to the treasurer of the fund, the court may appoint a receiver of the fund when necessary to its preservation or a proper execution of the trust.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 17; Dec. Dig. —§11.]

6. RECEIVERS — §59 — APPOINTMENT—JURISDICTION—COLLATERAL ATTACK.

A judgment of a court appointing a receiver of a trust fund is not open to collateral attack in an action by the receiver to recover trust funds.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 103, 104; Dec. Dig. —§59.]

7. RECEIVERS — §34 — APPOINTMENT—JURISDICTION—PARTIES.

Persons who sign a subscription for a designated purpose and bind themselves to pay specified sums in cash, as called for by the treasurer of the fund, are not necessary parties in a suit for the appointment of a receiver to preserve the fund, in which the creditors, the beneficiaries, the treasurer, and the trustee of the fund are parties.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 52, 53; Dec. Dig. —§34.]

8. SUBSCRIPTIONS — §5—CONSIDERATION.

Where persons mutually subscribe a stated sum for a definite and lawful object, the subscription of one is a consideration for the subscription of the other.

[Ed. Note.—For other cases, see *Subscriptions*, Cent. Dig. §§ 6, 7; Dec. Dig. —§5.]

9. SUBSCRIPTIONS ⇨10—ENFORCEMENT.

Where work has been done, expenditures made, or debts incurred on the faith of a subscription made by persons subscribing a stated sum for a lawful object, the subscription is a binding obligation.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 10, 23; Dec. Dig. ⇨10.]

10. EVIDENCE ⇨423 — PAROL EVIDENCE — VARYING TERMS OF WRITTEN SUBSCRIPTION.

A written subscription to build a road, which recites that the subscribers bind themselves to pay in cash, as called for by the treasurer of the fund, the amount opposite their names, evidences a complete contract, which cannot be varied by parol evidence limiting the liability of any subscriber.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. ⇨423.]

Appeal from Superior Court, Wilkes County; Harding, Judge.

Action by J. A. Rousseau, receiver, against Clarence Call. From a judgment for plaintiff, defendant appeals. Affirmed.

There were facts in evidence tending to show that defendant and others, desiring to have constructed a dependable road from railroad station in North Wilkesboro to the courthouse in Wilkesboro, the road crossing the Yadkin river between the two points, made a written subscription for the purpose in terms as follows:

"For the purpose of building a sand clay or a macadam road from the depot in North Wilkesboro, N. C., to the courthouse in Wilkesboro, N. C., under the direction of a government expert, we, the undersigned citizens of Wilkes county, N. C., hereby subscribe, and bind ourselves to pay in cash, as called for by J. L. Hemphill, treasurer of the road fund, the amount set opposite our respective names."

To which list the defendant subscribed \$100.

The road was in part built on the north side of the river, and defendant and other subscribers, having paid one-half of the subscription, refused to pay the remainder, claiming that it was the understanding and agreement of the parties, at the time the subscription was made, that one-half was to be paid for work on the north side of the river, and one-half on the south side, and that, as nothing had as yet been done on the road south of the river, no further amount was presently collectible. It was further shown in evidence that J. L. Hemphill, designated as treasurer, and C. H. M. Tulbert, appointed as manager, for the purpose of building the road, had entered on the work, and had, as stated, built a portion of the road lying on the north side of the river, and had contracted debts for same, as treasurer and manager of the enterprise, and, these not being paid, and a number of the subscribers having failed and refused to pay their subscriptions or some part of same, a suit was instituted in the superior court by a creditor against said treasurer and manager for the purpose of subjecting the fund to the payment of debts incurred in prosecuting the work, and present plaintiff was therein ap-

pointed receiver, and directed to make demand and collect subscriptions for the purpose indicated. This suit was then instituted, and, it being made to appear that there was an unpaid balance of \$50 on defendant's subscription and debts due and owing, contracted by the treasurer and manager on the faith of the fund, the court charged the jury, if they believed the evidence, the plaintiff was entitled to recover. Judgment for the \$50 unpaid balance.

Defendant excepted and appealed, assigning for error, chiefly: (1) That, as to defendant, the decree appointing plaintiff receiver was void, and conferred no right to maintain the present suit; (2) that his honor committed error in excluding parol testimony offered to the effect:

"That it was the understanding and agreement, at the time of subscription made, that one-half of the subscription was for work on the north side and one-half on the south side of the river."

W. W. Barber, of Wilkesboro, for appellant. Frank D. Hackett, of North Wilkesboro, for appellee.

HOKE, J. (after stating the facts as above). [1] A perusal of the facts in evidence leads to the conclusion that this subscription list should properly be considered a trust fund, dedicated by the parties to the purposes of building the road, and that, under recognized, equitable principles, it may be made available to creditors who have made advances and supplies to the trustee and manager engaged in the prosecution of the enterprise.

[2-4] It is well established in this jurisdiction that a trust in personalty may be created by parol, and that no particular form of words is required for the purpose, and that the same will be recognized and enforced whenever it is manifest that a trust is intended, and the subject-matter, the purpose, i. e., the disposition of the property, and the beneficiaries are designated with a reasonable degree of certainty (*Witherington v. Herring*, 140 N. C. 495, 53 S. E. 303, 6 Ann. Cas. 188; *Riggs v. Swann*, 59 N. C. 119; *Perry on Trusts* [6th Ed.] § 82 et seq.; 3 *Pomeroy*, Eq. Juris. §§ 1008-1010; 39 *Cyc. p.* 56 et seq.); and, while a transfer of property is usually involved, this is not at all an essential requirement, and a trust in personalty may be, and not infrequently is, created when one directs that a specified debt due him or a part of it be retained or paid over by the debtor in trust for another, or gives his own note for a like purpose, the instance more nearly presented here (*Burris v. Brooks*, 118 N. C. 789, 24 S. E. 521; *Eaton v. Cook et al.*, 25 N. J. Eq. 55; *Baylies et al. v. Payson*, 5 Allen [87 Mass.] 473; *Fletcher et al. v. Morey*, 2 Story, p. 555; *Legard v. Hodges*, 1 Ves. Jr. p. 477), the statement be-

ing made always in reference to the position that, when the trust is executory, a valid consideration must be shown (2 Perry on Trusts [6th. Ed.] § 359).

[5, 6] This, then, in our opinion, being a trust fund for a designated purpose, it was clearly within the power of the court, exercising jurisdiction in law and equity, to appoint a receiver whenever it was sufficiently made to appear that such a course was necessary to the preservation of the fund or a due and proper execution of the trust. 5 Pomeroy, Equity Jurisprudence, § 89; Kerr on Receivers, pp. 20, 21; Alderson on Receivers, § 474. True it is that the possession and control of a trustee will not be disturbed on light or insufficient grounds (2 Perry on Trusts, § 319), but, the power being conceded or existent beyond question, and the court, in the exercise of its jurisdiction, having entered judgment appointing plaintiff receiver, its judgment is not open to collateral attack, and, even if the order was improvidently made, its propriety is not open to question on this suit.

[7] The position urged that defendant was not notified in that action, and therefore the decree is void as to him, is without merit. That was an action looking only to the preservation of the trust fund, and in which the creditors, the beneficiaries, and the treasurer, the trustee of the fund, and also the general manager of the enterprise were made parties. So far as we can now see, the defendant was not interested in any issue there presented. Assuredly he could not be considered a necessary party to that suit, and his presence or absence, therefore, does not present a jurisdictional question.

[8-10] The plaintiff, then, having been properly appointed receiver by a court having jurisdiction of the cause, and, as such, representing the rights of the treasurer, the trustee, and the creditors, the cestui que trust, having made demand required by the terms of the subscription, is entitled to recover the balance due, and we concur in the ruling of his honor that, on the facts in evidence, it was not open to defendant to show that one-half of his subscription was to be expended on the portion of the road lying south of the river.

It is held in this jurisdiction that, when persons mutually subscribe a stated sum for a definite and lawful object, the subscription of one may be regarded as a proper consideration for that of the other (Univer-

sity v. Borden, 132 N. C. 477-491, 44 S. E. 47, 1007), and it is very generally recognized that, when work has been done or expenditures made or debts incurred on the faith of such a subscription, it then becomes a binding obligation (Pipkin v. Robinson, 48 N. C. 152, and 37 Cyc. p. 486), and when or to the extent that it has been expressed in writing it comes under the principle obtaining in other written contracts that it may not be changed or sensibly impaired by parol (Crane v. Library Association, 29 N. J. Law, 302; Burhans v. Johnson, 15 Wis. 286; 37 Cyc. p. 504).

True, it is subject also to another position, equally well recognized, that when part of a contract only is in writing, the additional terms may be established by parol evidence, but this position is not allowed to prevail against the part which is written; for in such case, as said by the Chief Justice, in Walker v. Venters, 148 N. C. 388, 62 S. E. 510, "the written word abides." In the present case the subscription contains in writing the provision that the signers "subscribe and bind ourselves to pay in cash, as called for by J. M. Hemphill, treasurer of the road fund, the amount set opposite our respective names." Here is express and definite stipulation as to character and time of payment, and it was not permissible to vary such a provision by the parol evidence offered in direct contradiction of its written terms. We are not inadvertent to the case of Kelly v. Oliver, 113 N. C. 442, 18 S. E. 698, in which it was held competent for a defendant, sued on a subscription list, to show that this was not to become a binding obligation, except on certain conditions that had not been complied with, a position which has been frequently approved and applied with us, as in Pratt v. Chaffin, 136 N. C. 350, 48 S. E. 768; Bowser v. Tarry, 156 N. C. 35, 72 S. E. 74; Garrison v. Machine Co., 159 N. C. 285, 74 S. E. 821; and other cases. That evidence was admitted to show that the written instrument or stipulation in question had never become the contract of the parties, and the ruling was not, and was not intended, to affect the principle that a written contract could not be changed or varied by parol. The present case comes rather within the decision in Pipkin v. Robinson, 48 N. C. 152.

We find no reversible error, and the judgment in plaintiff's favor is affirmed.

No error.

(159 N. C. 222)

BUCHANAN v. HEDDEN et al. (No. 590.)
(Supreme Court of North Carolina. May 25, 1915.)

1. DEEDS ⚡83—INSTRUMENTS ENTITLED TO RECORD—DEFECTIVELY ACKNOWLEDGED INSTRUMENTS.

A deed or other instrument acknowledged or proven before any other officer than the clerk of the superior court is not entitled to record until probated before the clerk and ordered by him to be recorded.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 218-221; Dec. Dig. ⚡83.]

2. EVIDENCE ⚡343—RECORDS—DEFECTIVELY ACKNOWLEDGED INSTRUMENTS—ADMISSIBILITY IN EVIDENCE.

Where the record of a deed or other instrument shows no probate before the clerk, necessary to entitle it to be recorded, the instrument cannot be proved by the record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1315-1330; Dec. Dig. ⚡343.]

3. EJECTMENT ⚡117—JUDGMENT—EFFECT TO PASS TITLE.

In an action to recover land, a prior judgment in ejectment by the plaintiff against the grantor of the defendant, holding that plaintiff was the owner of the land, and directing that a writ of possession issue, was properly admitted in evidence, as having the force of a deed, over objection that it was not a connecting link in plaintiff's title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 379; Dec. Dig. ⚡117.]

4. JUDGMENT ⚡678—RES JUDICATA—PERSONS CONCLUDED.

A judgment for plaintiff in ejectment is conclusive on defendant and persons claiming under him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195-1199, 1221; Dec. Dig. ⚡678.]

Appeal from Superior Court, Jackson County; Justice, Judge.

Action by M. Buchanan against E. C. Hedden and another. From a judgment for plaintiff, defendants appeal. No error.

J. Frank Ray and H. G. Robertson, both of Franklin, for appellants. Coleman C. Cowan, of Sylva, and Manning & Kitchin, of Raleigh, for appellee.

WALKER, J. [1, 2] This is a civil action for the recovery of 640 acres of land. Plaintiff introduced evidence of a grant, No. 144, from the state for the land in dispute, to J. F. Foster, and mesne conveyances showing that W. N. Hedden had acquired the title so granted. He then showed a judgment of the superior court of Jackson county, rendered in a civil action, wherein he was plaintiff and W. N. Hedden was defendant, at spring term, 1897, involving title to the land described in grant No. 144, by which it was adjudged that the said W. N. Hedden was not the owner of the said land, but that the plaintiff was the owner thereof, and that a writ of possession issue to put him in possession of the same. This established that the title was in the plaintiff to this suit, so far as the parties thereto are concerned, and

at least prima facie. *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142; *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201. The defendants assert title to the land under a mortgage made by W. N. Hedden to Frank B. Mayer, a power of attorney of Frank B. Mayer to E. C. Hedden, authorizing him to sell the land under a power contained in the mortgage, a sale thereunder, and a deed by E. C. Hedden, in his own name, to Sarah C. Hedden, one of the defendants. The power of attorney, which was offered in evidence, had been acknowledged in Maryland before George Wells, clerk of the circuit court of Anne Arundell county, by Frank B. Mayer, who executed the letter of attorney, and a certificate of said clerk was annexed, but it was never passed upon by the clerk of the superior court of Jackson county, N. C., and was placed on the registry of that county without, as appears, his authority or order. The deed, therefore, was not properly registered (*Revisal*, § 909; *Lumber Co. v. Branch*, 158 N. C. 251, 73 S. E. 164), and was not, therefore, evidence. "Until a deed is proved in the manner prescribed by the statute, the public register has no authority to put it on his book; the probate is his warrant, and his only warrant, for doing so." *Todd v. Outlaw*, 79 N. C. 235; *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889; *Williams v. Griffin*, 49 N. C. 31; *Burnett v. Thompson*, 48 N. C. 113; *Lambert v. Lambert*, 33 N. C. 162; *Carrier v. Hampton*, 33 N. C. 307. The court properly excluded the power of attorney, upon objection by the plaintiff. The deed from E. C. Hedden was not properly executed by him as attorney, and, besides, was never probated, so as to authorize its registration and introduction in evidence. Proof before a justice of the peace was not sufficient for this purpose, as it is required by the statute that the clerk of the superior court shall pass upon his certificate and order the deed to registration. Nothing of this kind was done. The law requires that the deed, or other instrument, shall be properly probated "before the same shall be registered." *Revisal*, § 909. The originals of the power of attorney and the deed were not produced, and we are not, therefore, informed as to whether they would show sufficient certificates of probate, or that the radical defects appearing upon the registry were mere misprisions of the register of deeds. *Strain v. Fitzgerald*, 130 N. C. 600, 41 S. E. 872; *Patterson v. Gallher*, 122 N. C. 511, 29 S. E. 773; *Heath v. Cotton Mills*, 115 N. C. 202, 20 S. E. 369. It may be seriously questioned whether proper search was made for the originals. *Greene v. Grocery Co.*, 159 N. C. 119, 24 S. E. 813; *Blair v. Brown*, 116 N. C. 631, 21 S. E. 434. No proof of their contents was made which is sufficient to cure the defects, if curable in that way. The defendants did not contend that they had been in adverse

possession long enough to ripen their title without color, and, as the deed under which they claimed title was not registered, and as both parties derived title from the same source, there was no color of title. *Janney v. Robbins*, 141 N. C. 406, 53 S. E. 863; *Gore v. McPherson*, 161 N. C. 638, 77 S. E. 835; *King v. McRackan* (at this term) 84 S. E. 1027.

[3, 4] The plaintiff, we have said, had shown title to the land, at least prima facie. The defendant contends, though, that the judgment was not properly a connecting link in his title, but we have held that it is, and that it has the force and effect of a deed. *Finch v. Finch*, 131 N. C. 271, 42 S. E. 615; *Webb v. Den.*, 17 How. 577, 15 L. Ed. 35; 23 Cyc. 1287, and note 42; *Keenan v. Commissioners of New Hanover*, 85 S. E. 5, at this term. As W. N. Hedden was a party to the civil action in which the judgment was rendered, he and his privies are estopped by the judgment. *Le Roy v. Steamboat Co.*, 165 N. C. 109, 80 S. E. 984; *Cavanaugh v. Jarman*, 164 N. C. 372, 79 S. E. 673. The case of *Burns v. Stewart*, 162 N. C. 360, 78 S. E. 321, is more in point upon both propositions. It decides that such a judgment has the legal effect of a deed, and therefore, of necessity, is sufficient to constitute a link in the chain of title, and, besides, that as to parties and privies it operates as an estoppel and passes the title to the successful party to the suit in which the judgment was rendered. We there said:

"The effect of the judgment was to pass any title in the land which the other parties may have had to Stewart, at least by estoppel."

And further:

"The judgment in the suit of Stewart against Calloway and others vested the title in Stewart as much so as if the other parties had been required to execute deeds to him for the land. It is a solemn adjudication, after trial and investigation, that the true title is in him."

On a careful review of the whole case, we are satisfied that there was no error in the trial below.

No error.

(169 N. C. 333)

BICKETT, Atty. Gen., v. KNIGHT.
(No. 547.)

(Supreme Court of North Carolina. May 25, 1915.)

1. ELECTIONS §63 — QUALIFICATIONS OF VOTERS—CONSTITUTIONAL PROVISIONS.

Under Const. art. 6, § 1, providing that every male person possessing specified qualifications shall be entitled to vote at any election, a woman is not a voter, as the right to vote is not a natural right, but one conferred by law, which can be exercised only by those upon whom it is conferred.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 60; Dec. Dig. §63.]

2. OFFICERS §19—ELIGIBILITY—CONSTITUTIONAL PROVISIONS—"PERSON."

Under Const. art. 6, § 7, providing that every voter, except as in that article disquali-

fied, shall be eligible to office, and section 8, providing that the classes of "persons" therein specified shall be disqualified for office, only a voter is qualified to hold office; the word "persons," in section 8, though comprehensive enough to include women, applying only to voters, as they are the only persons referred to in that article.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 22, 23; Dec. Dig. §19.

For other definitions, see Words and Phrases, First and Second Series, Person.]

3. NOTARIES §2 — ELIGIBILITY — CONSTITUTIONAL PROVISIONS—"OFFICE."

Revisal 1905, § 989, provides that the execution of all deeds may be proved or acknowledged before any of the "officials" therein specified. Section 2347 authorizes the Governor to appoint notaries, who shall hold their "office" for two years, and shall qualify by taking an oath of office and the oaths prescribed for officers. Section 2350 gives notaries power to take and certify the acknowledgment of deeds, to administer oaths and affirmations in matters incident to their "offices," etc., and subsequent sections refer to their "office," their "official acts," etc. Held, that the position of notary public is an "office," within Const. art. 6, § 7, providing that every voter, except as in that article disqualified, shall be eligible to office, especially as the probate of a deed is a judicial act, and the judicial function is performed by the notary, and not, as claimed, by the clerk of the court.

[Ed. Note.—For other cases, see Notaries, Cent. Dig. §§ 1½-6, 8-10; Dec. Dig. §2.

For other definitions, see Words and Phrases, First and Second Series, Office.]

4. NOTARIES §2 — ELIGIBILITY — CONSTITUTIONAL AND STATUTORY PROVISIONS—"OFFICE."

As the position of notary public is an "office," the Legislature cannot change its character by calling it a place of trust and profit, and Pub. Laws 1915, c. 12, authorizing the appointment of women as notaries public, and providing that this position shall be deemed a place of trust and profit, and not an office, is invalid.

[Ed. Note.—For other cases, see Notaries, Cent. Dig. §§ 1½-6, 8-10; Dec. Dig. §2.]

5. CONSTITUTIONAL LAW §45—DETERMINATION OF CONSTITUTIONAL QUESTIONS — JUDICIAL FUNCTIONS AND DUTIES.

It is not only within the power, but it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, as the Constitution is the supreme law which all judges are sworn to support, and the courts, in declaring what the law is, must, in case of a conflict between the Constitution and a statute, sustain the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. §45.]

Clark, C. J., and Brown, J., dissenting.

Appeal from Superior Court, Buncombe County; Webb, Judge.

Action by the State, on the relation of the Attorney General, against Nolan Knight. Judgment for defendant, and the State appeals. Reversed.

This is an action instituted by the state, upon the relation of the Attorney General, against the defendant, a married woman, to inquire into and test her right to hold the position of notary public under chapter 12 of the Public Laws of 1915, which provides:

"That the Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed a place of trust and profit, and not an office."

There was a judgment in favor of the defendant, and the state appealed.

T. W. Bickett, Atty. Gen., for the State. Martin, Rollins & Wright, of Asheville, and John A. McRae, of Charlotte, for appellee.

ALLEN, J. There are five questions directly or indirectly involved in this appeal:

- (1) Is a woman a voter in North Carolina?
- (2) If not a voter, is she eligible to office?
- (3) Is the position of notary public a public office?

(4) If an office, can the General Assembly affect its character by calling it a "place of trust and profit," without changing its functions?

(5) Has this court the power to say that the General Assembly has exceeded its authority, and that the act passed by it is unconstitutional?

The right to hold the position of notary public is of slight moment to the women of the state or to the public, but it is of supreme importance that these questions shall be correctly decided, because they involve constitutional principles, and we approach their consideration mindful of our duty to declare what the law is, and not what we would have it to be, and of our obligation to maintain and uphold the Constitution until it is changed by the people, in whose hands the power of amendment rests.

[1] 1. Is a woman a voter in North Carolina, and can she be one without Constitutional amendment?

The law writers agree that the right of suffrage is not a natural or inherent right, and that it is a privilege conferred by the state.

Judge Cooley, in his treatise on Constitutional Law (page 280) says:

"Suffrage cannot be the natural right of the individual, because it does not exist for the benefit of the individual, but for the benefit of the state itself. Suffrage must come to the individual, not as a right, but as a regulation which the state establishes as a means of perpetuating its own existence, and of insuring to the people the blessings it was intended to secure. Suffrage is never a necessary accompaniment of state citizenship, and the great majority of the citizens are always excluded, and are represented by others at the polls."

And in 15 Cyc. 280, the editor sums up the authorities in the following statement of the law:

"In all periods and in all countries it may be safely assumed that no privilege has been held to be more exclusively within the control of governmental power than the privilege of voting; each state in turn regulating the subject by sovereign political will. The right of suffrage once granted may be taken away by the exercise of sovereign power, and, if taken away, no vested right is violated or bill of attainder passed. None of the elementary writers include the right of suffrage among the rights of property or of person. It is not an absolute

unqualified personal right, but is altogether conventional. It is not a natural right of the citizen, but a franchise dependent upon law, by which it must be conferred to permit its existence."

If, therefore, the right to vote is not a natural right, but one conferred by law, only those can exercise the privilege upon whom it is conferred, and when we turn to our Constitution (article 6, § 1) we find it provided that:

"Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the state, except as herein otherwise provided."

And, as the privilege of voting is not a natural right, and is conferred on males alone, this, of course, excludes females.

The exact question was considered in *Spencer v. Board*, 1 McArthur, 169, 29 Am. Rep. 582, *Gougar v. Timberlake*, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487, and in *People v. Barber*, 48 Hun (N. Y.) 198, and it was held in each that women are excluded from voting under a constitution which confers the right to vote on males, and in *Minor v. Hepperset*, 88 (21 Wall.) U. S. 162, 22 L. Ed. 627, the whole decision rests upon the assumption that this is the law.

[2] 2. If not a voter, can a woman hold office in North Carolina?

We turn again to the Constitution, and find it provided in article 6, § 7, that:

"Every voter in North Carolina, except as in this article disqualified, shall be eligible to office."

And the construction placed upon this section by our court in an opinion written by Chief Justice Clark in *Pace v. Raleigh*, 140 N. C. 65, 52 S. E. 277, is that no one can hold office who is not a voter. He says in that case:

"Nor have we been inadvertent to the fact that under the former constitutional provision one who was an 'elector,' that is, qualified to register, was eligible to office, though not registered, and that under the 'amendment' no one is eligible to office unless he is 'voter.'"

The language "except as in this article disqualified" refers to voters—males—who deny the existence of God, or who have been convicted of crime. Article 6, § 8. In other words, voters are eligible to office except as they are disqualified, and the word "persons," appearing in section 8, while comprehensive enough to include women, only applies to voters, as they are the only persons referred to in the article. This is the construction placed on these sections of the Constitution in *Lee v. Dunn*, 73 N. C. 602, which is cited with approval in *State ex rel. Attorney General v. Bateman*, 162 N. C. 588, 77 S. E. 768. The court says:

"The Constitution (article 6, § 1) prescribes the qualification of voters to be as follows: 'Every male person, etc., twenty-one years old or upwards, who shall have resided in this state twelve months next preceding the election, and thirty days in the county in which he of-

fers to vote, shall be deemed an elector.' The fourth section is as follows: 'Every voter, except as hereinafter provided, shall be eligible to office', etc. The exception above is contained in the fifth section, as follows: 'The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted of treason, perjury, or of any other infamous crime; or of corruption or malpractice in office; unless such person shall have been legally restored to citizenship.' So that every voter who does not deny the being of God, and has not been convicted of crime, is eligible to office in this state. And this comes so near including every man that it may be said that almost every man is eligible to office; that is to say, is electable, if the people choose to elect."

This statement of the law is in accord with authority elsewhere.

In *Mechem on Public Officers*, § 64, the author says:

"The right to hold a public office under our political system is not a natural right. It exists, where it exists at all, only because and by virtue of some law expressly or impliedly creating and conferring it."

And in section 69:

"Where no limitations are prescribed, however, the right to hold a public office under our political system is an implied attribute of a citizen, and is presumed to be coextensive with that of voting at an election held for the purpose of choosing an incumbent of that office; those and those only who are competent to select the officer being competent to hold the office."

And in *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, the court says:

"We have already seen that the grounds upon which a person not an elector is excluded from holding public office is that the powers and functions of a free and independent government must be exercised by those by whom such government was instituted; that is, by the electors thereof. So if a person who is not an elector attempts to exercise the functions of a public office, the courts, upon proper proceedings being instituted for that purpose, will oust him."

This conclusion that only voters are eligible to office under our Constitution is an application of the maxim, "*Expressio unius est exclusio alterius*," of which the Supreme Court of Illinois said, in *People v. Hutchinson*, 172 Ill. 498, 50 N. E. 599, 40 L. R. A. 770, quoting from *State v. Wrightson*, 58 N. J. Law, 201, 28 Atl. 56, 22 L. R. A. 548:

"In the construction of statutes it is a cardinal rule, which applies as well to constitutional provisions, that when the law is in the affirmative that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner, upon the maxim, '*Expressio unius est exclusio alterius*.'" 1 Flow. 206; 9 Bac. Ab. 235; Sedg. Stat. Con. 30.

Under this rule, as the Constitution says affirmatively that "every voter, etc., shall be eligible to office," the affirmation contains the negative that no one except a voter can hold office. It follows that, as a woman is not a voter, she is not eligible to office.

[3] 3. Is the position of notary public an office?

What is the definition of "notary public" as given by the lexicographers? *Black's Law Dictionary*: "A public officer whose functions are," etc. *Bouvier's Law Dic.*: "An officer appointed by," etc. *The Century*: "A public officer authorized," etc. *Webster*: "A public officer who," etc.

What do the text-writers on the law say? *Mechem on Public Off.* § 47: "A notary public is a public officer." 21 A. & E. Ency. Law, 555: "The office of a notary public is a public office." 29 Cyc. 1068: "The office of a notary public has long been known both to the civil and to the common law. It exists and is recognized throughout the commercial world, and has been said to be 'known to the law of nations.' It is a public office; being in most of the states a state office, although in few states it has been regarded as a county office, and its functions, once simple, have now a wider scope."

That the position was recognized as an office at common law is shown by the following taken from 5 *Comyn's Dig.* 140, when speaking of protests of bills of exchange: "The protest must be made by a public notary upon all foreign bills of exchange because he is a *public officer* to whom credit is given"—and by the opinion of Buller, J., in *Lefty v. Mills*, 4 T. R. 175 (1791) that: "The demand of a foreign bill must be made by a notary public, to whom credit is given because he is a *public officer*." (Italics ours.)

What is the opinion of the judges? In each of the following cases it is held that a notary public is a public officer: *Emmerling v. Graham*, 14 La. Ann. 389; *State v. Davidson*, 92 Tenn. 531, 22 S. W. 203, 30 L. R. A. 311; *Loan Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; *Opinion of Justices*, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842; *State v. Hodges*, 107 Ark. 272, 154 S. W. 506; *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254; *Ohio Nat. Bk. v. Hopkins*, 8 App. D. C. 146; *Kirksey v. Bates*, 7 Port. (Ala.) 529, 31 Am. Dec. 722; *State v. Adams*, 58 Ohio St. 612, 51 N. E. 135, 11 L. R. A. 727, 65 Am. St. Rep. 702; *Governor v. Gordan*, 15 Ala. 72; *Sonfield v. Thompson*, 42 Ark. 46; *Smith v. Meador*, 74 Ga. 416, 58 Am. Rep. 438; *Browne v. Bank*, 6 Serg. & R. (Pa.) 464, 9 Am. Dec. 463; *Keeny v. Leas*, 14 Iowa, 464; *Britton v. Niccolls*, 104 U. S. 766, 26 L. Ed. 917; *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 334; *Bettman v. Warwick*, 108 Fed. 47, 47 C. C. A. 185; *Ashcraft v. Chapman*, 38 Conn. 232; *Opinion of Justices*, 73 N. H. 621, 62 Atl. 969, 5 L. R. A. (N. S.) 415, 6 Ann. Cas. 283; *State v. Clarke*, 21 Nev. 335, 31 Pac. 545, 18 L. R. A. 313, 37 Am. St. Rep. 517; *Gharst v. Transist Co.*, 115 Mo. 409, 91 S. W. 453; *Carroll v. State*, 58 Ala. 396. We quote from only a few of these citations, but all are to the same effect.

In the case from Connecticut Chief Justice Butler says:

"Notaries were originally mere commercial scribes. Becoming important to the commercial world, their appointment was provided for and their duties regulated by public law, and they became sworn public officers."

In the case from New York:

"The very designation of 'notary public' indicates a relation * * * the office sustains to the body politic. It is impossible to regard him as other than a public officer."

In the case from Indiana:

"A notary public is a public officer. The office originated in the early Roman jurisprudence, and was known in England before the Conquest."

In the case from District of Columbia:

"It is a well-known attribute of a notary public that he is a public officer, recognized as such by the common law * * *, and the law of nations."

In the case from 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254:

"The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world."

The executive, legislative, and judicial construction in this state also favors the view that the position of notary public is a public office.

The executive because until the last General Assembly met no woman had been appointed by the Governor a notary public, except in one instance, and then by mistake, as only the initials of the person applying for appointment were given, and when the mistake was discovered the commission was withdrawn.

The legislative because for more than 100 years the position has been spoken of in the statutes as an office. The earliest reference to the position we have been able to find is in the Acts of 1777, vol. 1, Laws of N. C., c. 8, § 15, which provides that:

"The Governor, for the time being, shall * * * appoint one or more persons * * * to act as notaries or notaries, * * * who shall take the oath appointed to be taken for the qualification of *public officers*, and also an oath of office."

In the Revised Statutes of 1836-37, c. 78, § 1, it is provided that:

"The Governor may, from time to time, at his discretion, appoint one or more fit persons in every county, to act as notaries; who, on exhibiting their commission to the county court of the county in which they shall act, shall be duly qualified, by taking before said court an *oath of office*, and the oaths prescribed for *officers*."

This section was re-enacted in the Revised Code of 1854, c. 75, § 1, and in the Revision of 1905, § 2347, except in the latter act it is added:

"Who shall hold *their office* for two years from and after the date of their appointment." (Italics ours.)

By the judicial because in *Long v. Crews*, 113 N. C. 256, 18 S. E. 499, it was held that the probate of a deed in trust before a notary public who was a preferred creditor was invalid, upon the principle of the common law

that no one can sit in judgment upon his own cause, and the present Chief Justice, writing the opinion, says for the court: "The attempted acknowledgment of the deed in trust before a notary public who was a preferred creditor therein, *was before an officer disqualified to act and hence a nullity.*" And the same learned judge says in *Smith v. Lumber Co.*, 144 N. C. 49, 56 S. E. 555: "That the *officer, here a notary public.*" And in his concurring opinion in *Nicholson v. Lumber Co.*, 160 N. C. 37, 75 S. E. 730, Ann. Cas. 1914C, 202: "*It cannot be doubted that a notary public is a public office.*" (Italics ours.)

The only expression we have found in our reports apparently in conflict with these authorities is in *Worthy v. Barrett*, 63 N. C. 199, in which an opinion of the Attorney General of the United States of 1867 is quoted which classifies notaries public among those positions that are not officers. The case of *Worthy v. Barrett* was this: *Worthy* was elected sheriff of Moore county in 1868, and the commissioners of the county refused to induct him into office, because he had been sheriff of the county before and during the War, and the question presented to the Supreme Court was whether he was an officer within the meaning of the reconstruction acts, and therefore disqualified until his disabilities had been removed. The court held that he was an officer, because he was required to take an oath to support the Constitution, saying, "The oath to support the Constitution is the test," and quoted the opinion of the Attorney General in support of this position, because he said in his opinion, in speaking of county offices, "I have arrived at the conclusion that they are subject to disqualification if they were required to take as part of their official oath the oath to support the Constitution of the United States." We do not concur in the view that the oath to support the Constitution is the test, but, if this should be adopted, and the point decided in this case of *Worthy v. Barrett* approved, it would be decisive against the defendant, because notaries public both before and since the act of 1915 now under consideration have been and are required to take an oath to support the Constitution. The opinion quoted in the case by the Attorney General of the United States that notaries are not public officers is also in direct conflict with the opinion of the Supreme Court of the United States in *Pierce v. Indesth*, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254, thereafter decided, that notaries "are officers recognized by the commercial law of the world."

The case of *Lawrence v. Hodges*, 92 N. C. 672, 53 Am. Rep. 436, has, in our judgment, no bearing upon the question involved in this appeal. It was held in that case that it was competent for the Legislature to authorize clerks of the superior court to act as notaries public, and this is no more than an applica-

tion of the principle stated by Associate Justice Brown in *McCullers v. Commissioners*, 158 N. C. 80, 73 S. E. 816, Ann. Cas. 1913D, 507, of simply annexing additional powers and duties to an office already existing. He says, among other things:

"This legislation is not novel in North Carolina. * * * In 1901 the Legislature passed a similar act. * * * We also have the familiar case of the Governor, who is made by law a trustee of the University of the state and chairman of the board, and is required to perform these duties, and also act as chairman of the executive committee of the trustees. * * * In West Virginia the law requires the Governor, auditor, treasurer, superintendent of schools, and Attorney General to serve on the board of public works, and prescribes the duties of said board. The Court of Appeals in an elaborate opinion held the act valid, saying, in substance, it simply prescribes additional powers * * * to be performed by officers already elected by the people, and that it does not amount to an appointment to an office created by law, but that it only amounts to requiring the officers of the executive department, by virtue of their respective offices to which they have been elected by the people, to act as members of the board of public works; that it, in substance, simply annexes additional powers and duties to their respective offices. * * * We could multiply authorities in support of these views."

We have no means of knowing the opinion of the Attorney General of the state except from his public conduct and public utterances. He is a plaintiff in the action, and filed a complaint alleging that the defendant was unlawfully using the powers and duties of the position of notary public, and, when there was an adverse judgment against him in the superior court, appealed to this court, and, upon the argument, strenuously insisted that the act of the General Assembly passed in 1915 was invalid if the position of notary public was a public office prior to its enactment, and that the only debatable question was whether it was a public office, and he cited perhaps 20 authorities holding the position to be a public office. The Governor has declined to make more than one appointment until the courts have determined the validity of the act.

We have, then, the opinion of a General Assembly which refused to pass the act until the Governor had agreed that he would make only one appointment before its constitutionality was determined, the opinion of the Governor, who has made only one appointment, and then for the purpose of presenting the question to the courts, and the opinion of the Attorney General, if he has given one, who is a plaintiff in the action, and is seeking to oust the defendant from office. Is it not clear that these officials have not expressed any opinion, and that they have simply acted so that the question might be considered, and have placed the responsibility of final decision upon the courts? It is but fair and just to the Attorney General to say that he has acted in this matter as he has in all others coming before our court. He is always candid, and presents his contentions with learning and ability, but he feels that it is

his duty to give the court the benefit of all authority he finds, whether in support of his contention or not.

It is also suggested that women are admitted to practice law in this state, and that lawyers are officers, and are required to take oaths to support the Constitution, and, in addition, an oath of office, but, as is said in 4 Cyc. 898:

"An attorney does not hold an office in the constitutional or statutory sense of that term, but is an officer of the court, exercising a privilege or franchise."

If, however, we discard the definition of the term and the opinion of the law writers and of the judges and the construction placed upon it by the different departments of state, and apply the test of the functions to be performed by the incumbent of the position, we reach the same conclusion.

In *Mechem on Public Officers*, § 1, it is said that an "office" is "a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public," and this definition was adopted and approved in a unanimous opinion of this court in *State ex rel. Wooten v. Smith*, 145 N. C. 476, 59 S. E. 649, and again at this term in the case of *Groves v. Barden*, and in the latter case it was also said that the performance of an executive, legislative, or judicial act is the test of a public office.

The extent to which the power may be exercised is not material. It is the fact that the power exists which is determinative. It was held in *Midgett v. Gray*, 159 N. C. 443, 74 S. E. 1050, by the unanimous opinion of the court, that the position of school committeeman is a public office, and, although the scope of the duties are confined, the position was regarded of such importance that its acceptance vacated the office of clerk of the superior court under the constitutional provision forbidding the holding of two offices. One of the duties which a notary public may perform is taking the probate of deeds, and this is a judicial act.

In *Paul v. Carpenter*, 70 N. C. 508, Rodman, J., speaking for the court, says: "To take the acknowledgment and privy examination of a feme covert to a deed conveying her land is a judicial act." And in *White v. Connelly*, 105 N. C. 68, 11 S. E. 177, Associate Justice Clark says: "Admitting to probate is a judicial act." And this is approved in *Piland v. Taylor*, 113 N. C. 1, 18 S. E. 70, and in *Long v. Crews*, 113 N. C. 256, 18 S. E. 499. "The officer who takes an acknowledgment [of the execution of a deed] acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance, actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge be-

fore him that he executed the instrument." *Wasson v. Connor*, 54 Miss. 352. "It is well settled that the certificate of a judge or a justice of the peace of the acknowledgment of a deed or mortgage is a judicial act. * * * Conceding such to be the effect of a certificate of a judge or justice, yet it was contended on the argument that like effect should not be given to the certificate of a notary. Why not? He is a public officer commissioned by the Governor. He is acting under oath, like other officials in the performance of judicial duties. * * * Whatever officer is authorized to take the acknowledgment to him is given a judicial duty." *Com. v. Haines*, 97 Pa. 228, 39 Am. Rep. 805.

The defendant contends, however, that if it is conceded that the probate of a deed is a judicial act, the judicial function is performed by the clerk, and not by the notary public, that the notary takes and certifies the evidence, and the clerk upon this certificate adjudicates the probate. The authorities are, in our opinion, against this position. In section 989 of the Revisal it is provided that:

"The execution of all deeds of conveyance, etc., may be proven or acknowledged before any one of the following officials of this state: The several justices of the Supreme Court, the several judges of the superior court, commissioners of affidavits appointed by the Governor of this state, the clerk of the Supreme Court, the several clerks of the superior court, the deputy clerks of the superior courts, the several clerks of the criminal courts, notaries public and the several justices of the peace."

In this section notaries are not only classified among the officials of the state, but among its judicial officers, and all acquire jurisdiction to take the proofs and acknowledgments of deeds from the same source and in the same language. If so, by what rule of construction can it be said that a judge or clerk is exercising a judicial power when taking the proof or acknowledgment of a deed, and that a notary is not?

Again, the respective duties of the notary public and the clerk in admitting to probate, when both act, show that the notary is required to exercise discretion and judgment, while the duties of the clerk are mechanical and clerical. The notary is not required to certify the evidence, but "to take and certify the acknowledgment or proof" (Revisal, § 2350), and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed, (2) that they acknowledge the execution of it, (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto; while, on the other hand, the clerk is only required to examine the certificate and adjudge that it is correct and order registration, which only renders it necessary to compare the certificate of the notary with the form prescribed by statute for the purpose of seeing if they are substantially alike.

This position is, we think, fully sustained

by *Young v. Jackson*, 92 N. C. 147, and *Darden v. Steamboat Company*, 107 N. C. 446, 72 S. E. 46, in which it was held that the probate and registration of a deed was valid without an adjudication by the clerk that it was in due form, and without an order of registration; this requirement of the statute being held to be directory. In the *Jackson Case* the court says:

"The important thing required, with a view to registration, is that the deed or other instrument requiring registration shall be proven before a tribunal or officer authorized by law to take and certify the probate."

And in the *Darden Case*:

"We therefore hold that where an acknowledgment or proof of the execution of a deed or other paper required or allowed to be registered is lawfully taken by any officer other than the clerk of the superior court of the county where the land lies, it is not essential to the validity of its registration that the latter should add an adjudication or order of registration to the certificate and fiat of the officer taking the probate."

It is true that in both of these cases the probate was taken before a clerk of the superior court, but in a county other than that in which the land was situate, and the authority of such officer in regard to probate is derived from the same source as is the authority of a notary, and is no greater, and the cases make no distinction between the positions in this respect; the language in one of the cases being "before a tribunal or officer," and in the other, "before any officer." These cases were decided before the enactment of section 999 of the Revisal, but that does not affect them as authority for the position that taking proof is judicial. If, therefore, admitting to probate is a judicial function, and the duties imposed upon the clerk are directory, and not mandatory, it would seem that the performance of the judicial act is with the notary.

There is no conflict between these decisions and the case of *Evans v. Etheridge*, 99 N. C. 47, 5 S. E. 388, because in the latter case the court was dealing with the certificate of a commissioner of affidavits of another state under a statute which required the clerk, when acting upon the certificate of a commissioner, to "adjudge such deed or other instrument to be duly acknowledged or proved in such manner as if made or taken before him."

Another important function of a notary public is the power to protest commercial paper, and here his act, attested by his notarial seal, is recognized at home and abroad, because he is a public officer, and the maxim, "*Omnia præsumentur esse rite acta*," which is applied to the acts of officers, and not to those of the private individual, prevails.

"The protest must be made by a notary public upon all foreign bills of exchange, because he is a public officer to whom credit is given." 5 Comyn's Dig. 140.

"The demand of a foreign bill must be made by a notary public, to whom credit is given, because he is a public officer." *Lefty v. Mills*, 4 T. R. 175.

"The notary is a public officer commissioned by the state, and possessing an official seal, and full faith and credit are given to his official acts, in foreign counties as well as his own." 2 Dan. Neg. Ins. § 934.

"Notaries are public officers of the whole commercial world." *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 51.

"As public officers, notaries are entitled to the presumption of law in their favor that they have performed their duty, unless the contrary appears. * * * Every intendment is to be in favor of the fair performance of his duty by the notary." *McAndrew v. Radway*, 34 N. Y. 514.

Again, we said in *Groves v. Barden* that, while the final test of an office was the performance of a judicial, executive, or legislative act, there were the following evidences as to the character of the position:

"That an oath to support the Constitution is required, or that a bond for the faithful performance of duties must be executed, or that the duties are prescribed by law, and not regulated by contract, or that the incumbent discharges independent duties, and is not acting under the direction of others, or that the duties are permanent in their nature, and not occasional and intermittent, and that the term is fixed and continuing, and not temporary, or that the position is named an office or an employment in the statute creating it."

It will be found upon comparison that all these evidences were present as to the position of notary public prior to the passage of the act now before us, except the giving of a bond. He is required to take an oath to support the Constitution; his duties are prescribed by law, and not regulated by contract; he performs independent duties, and does not act under the direction of others; his duties are continuing and permanent; the term is fixed, and until the last General Assembly met the position had been called an office in all legislative acts since 1777. It is also evident that in the opinion of the General Assembly of 1915 it was an office. If not, why pass the act at all? The Governor has power under the general law to appoint notaries, and, if not an office, he could have appointed women to the position before the act was passed, and if this was the opinion of the General Assembly, that it was not an office, the act is no more than a suggestion or advice to the Governor. It was because the position was known and recognized as an office that the words were added to the act, "and this position shall be deemed a place of trust and profit and not an office," meaning it is an office now, but "shall be" hereafter a place of trust and profit. It is also significant that the General Assembly, in passing the act of 1915, did not undertake to amend chapter 55 of the Revisal, entitled "Notaries," and it leaves that chapter unimpaired, unless repealed by implication. That chapter provides:

"The Governor may * * * appoint one or more fit persons in every county, to act as notaries, * * * who shall hold their office for two years * * * and shall be duly qualified, by taking before said clerk an oath of office, and the oaths prescribed for officers." Section 2347. "The Governor shall issue to each a commission." Section 2348. "Notaries public

* * * shall have power to take and certify the acknowledgment or proof of * * * deeds, etc.; to take depositions and to administer oaths and affirmations in matters incident to or belonging to the duties of their office, and to take affidavits to be used before a court, judge or other officer, within the state, and shall have full power to take the privy examination of *femes covert*." Section 2350. "Notaries public shall have full power and authority to perform the functions of their office in any and all counties of the state, and full faith and credit shall be given to any of their official acts." Section 2351. They are required to state after their official signature the date of the expiration of their commissions, but the failure to do so shall not thereby invalidate "their official acts." Section 2351a. "Official acts by notaries * * * shall be attested by their notarial seals." Section 2352.

It seems, therefore, to be established by every test that can be applied that heretofore the position of notary public has been a public office.

[4] 4. If an office, can the General Assembly, by calling it a "place of trust and profit," without changing the functions, affect its character?

The contention of the defendant is that, as the position of notary public is not named in the Constitution, and is created by statute, the qualifications for holding office named in the Constitution do not apply to it, and that the General Assembly may determine who can hold the position; in other words, that, as the position is created by the Legislature, the constitutional provision as to holding office does not apply to it. We cannot approve this position without following it to its logical conclusion, and to do so it must be applied to all offices not named in the Constitution and created by legislative act, and, as to them, we must hold that the Legislature may call them "places of trust and profit," and say who may hold them, without regard to the Constitution. There is no such classification of offices as large and small, and we cannot yield to the suggestion that the position of notary public, if an office, is not of great importance, and that therefore we may hold that the constitutional qualifications for office do not apply to that position and stop, because when this case is decided it becomes a precedent, and as said by Disraeli: "A precedent embalms a principle." If the principle is not safe and sound, we may well adopt the words of Portia, who replied, when urged to do a little wrong that great good might come of it:

"'Twill be recorded for a precedent;
And many an error, by the same example,
Will rush into the state; it cannot be."

Let us then see to what conclusions the principle naturally and inevitably leads, and first as to the offices to which it must be applied.

We find among the offices created by legislative act now in existence, and not mentioned in the Constitution, three corporation commissioners, a commissioner of agriculture, an insurance commissioner, a commissioner of labor, the directors and superintendent of

the state's prison, the state librarian, the marshal of the Supreme Court, the keeper of the Capitol, the members of the historical commission, the Assistant Attorney-General, mayors, aldermen, police justices and constables, and, if the position of the defendant is sustained, the General Assembly may call all of these "places of trust and profit," and may say that a woman can hold them. This would produce an anomalous condition, as a woman could hold the position of commissioner of agriculture, because created by the General Assembly, and could not be superintendent of public instruction, because named in the Constitution; she could be a corporation commissioner, and not a coroner; she could be insurance commissioner, and not a county surveyor. This, however, would not be the end, because, if the principle is once admitted that the provisions in the Constitution as to qualifications for office do not apply to offices created by the General Assembly, it follows logically that the qualifications for voters in the Constitution do not apply to such offices, and the General Assembly would not only have the power to say that women could vote for all of these positions, but it could also strike down the educational and other qualifications of voters as to these offices, because the contention is as to offices created by the Legislature that they are under the control of the Legislature, and not under or bound by the limitations in the Constitution. This would be in direct conflict with the decision in *Van Bokkelen v. Canaday*, 78 N. C. 198, 21 Am. Rep. 465, in which the court had under consideration article 6, § 1, of the Constitution of 1868, of which article 6, § 1, of the present Constitution is an exact copy, and it was there held that the qualifications of electors prescribed by the Constitution applied to all elections, the court saying:

"The Constitution provides that every male person 21 years old, resident in the state 12 months, and in the county 30 days, shall be an elector. Article 6, § 1. An elector for what? The Constitution does not say for what. Does it mean elector for President, or for members of Congress, or for Governor, or for judges, or for members of the General Assembly, or for county officers, or for township or town officers, or for what else? There it stands by itself, without explanation, that every such person shall be an elector—a voter. It evidently means to designate those persons as a class, to vote generally whenever the polls are opened and elections held for anything connected with the general government, or the state or local governments."

Again, this construction would place it in the power of the General Assembly to nullify article 14, § 7, of the Constitution, forbidding the holding by one person of two offices, because the Legislature could simply say that a particular position was not an office, but an employment, and thereby enable one to hold two positions now known as offices. We cannot think that the framers of the Constitution intended such a result.

The Revolution of 1776 was largely a pro-

test against the exercise of arbitrary power, and one of the principal reasons for adopting a written Constitution was that limitations should be placed upon the exercise of power, and it is said in our Constitution (article 1, § 37) that "all power not herein delegated remain with the people." The Constitution is intended to be permanent, and was adopted not only to meet conditions then existing, but for the future, and it was the purpose of the people that it should remain unimpaired until changed by the people themselves. It is not an enemy to progress, but, as it is the result of deliberate consideration and mature judgment, first expressed in convention, and then approved by the people, it is so framed that it cannot be changed in a day. The people, then agreeing upon the fundamental law for the present and the future, and knowing that times of agitation and popular clamor would come, while reserving the power of amendment, in their wisdom imposed a restraint upon themselves, by making the powers of amendment slow enough to give time for reflection before final action.

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution: It is their commission, and therefore all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature, in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, * * * the Constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. * * * The Constitution is the origin and measure of legislative authority. It says to legislators, Thus far ye shall go, and no farther. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous; one encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the Constitution eventually destroyed. * * * Omnipotence in legislation is despotism." *Van Horne v. Dorrance*, 2 Dall. 304, 1 L. Ed. 391.

The functions of government were distributed in the Constitution among three departments, legislative, judicial, and executive, and all authority conferred by the people is exercised under one of these departments. As new agencies are required, the General Assembly has the power to create them, and, when no longer necessary, to abolish them; but, when created, they fall

within one of the departments, and exist under the Constitution and subject to its restrictions.

The language of the court in *Worthy v. Barrett*, supra, in reference to the Constitution of the United States, is applicable to our own Constitution, as the two are in this respect practically identical. The court says:

"The government of the United States is divided into three branches—legislative, judicial, and executive. These three parts make one whole. There is no other part or parcel. It follows that there can be no office in the government that is not in one of these departments. There can be no officer unless he be the incumbent of an office. Therefore there can be no officer except he be in some office in one of these three departments."

If they are not under the Constitution, by what authority do they exist? It cannot be that we are living as to a part of our government under the Constitution, and as to another part outside the Constitution, without restrictions or limitations. It is, however, doubtful if the General Assembly has made any change in the law by stating that the position of notary public is a "place of trust and profit."

In article 14, § 7, of the Constitution, it is provided that no person who shall hold any office or "place of trust or profit," etc., shall hold or exercise any other office or "place of trust or profit," and in construing this language it was said in *Doyle v. Raleigh*, 89 N. C. 136, 45 Am. Rep. 677:

"It is apparent from the association that 'places of trust or profit' are intended which approximate to, but are not, offices, and yet occupy the same general level in dignity and importance. The manifest intent is to prevent double office holding—that offices and places of public trust should not accumulate in a single person—and the superadded words of 'places of trust or profit' were put there to avoid evasions in giving too technical a meaning to the preceding words."

And this was affirmed in *State v. Smith*, 145 N. C. 477, 59 S. E. 649, in an opinion by Justice Brown, in which he adds:

"The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government. In this respect the terms 'office' and 'place of trust,' as used in our Constitution, are synonymous."

Both of these cases were approved at this term by the unanimous opinion of the court in *Groves v. Barden*. It is therefore at least debatable, conceding the power to exist, if the General Assembly made any change in the position by calling it a "place of trust and profit." Can we find a better definition of an "office" than that it is a "place of trust and profit." In 29 Cyc. 1361, it is said that:

"An office in the abstract sense may be defined as a duty, charge, or trust, a place of trust, a position to which certain duties are attached."

If, however, other words had been used, we are of opinion that by merely giving it a name the General Assembly has not changed

the character of the position. *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113.

The last case cited (*Wood v. Bellamy*) is historical. In 1896 there was a change of administration in the state, and a new political party came into power. The General Assembly of 1897 passed an act by which it attempted to give control to the new party of different state institutions, and, among others, of the state hospital at Raleigh. Among other things, it was provided in the act that the board of directors having charge of the institution should be abolished and that the powers, rights and duties heretofore prescribed by law to said board shall hereafter be granted to and imposed upon a board of trustees, and it was then further provided:

"It is not the intention of the General Assembly that the trustees herein provided for shall be officers within the meaning of section 7 of article 14 of the Constitution, and they are declared to be special trustees for the special purposes of this act."

The court, speaking of this part of the act, said:

"These places have been held to be offices, as we have declared in this opinion, and the Legislature, by simply declaring that they shall not be offices, does not change the nature of the thing. * * * It is as idle, under the decisions of this court, to say that such a position as these defendants hold is not an office as it would be to say that a horse is not a horse because one may choose to call him some other animal."

This principle was also fully recognized and approved at this term in the case of *Groves v. Barden*, in which it was held that the name given to a position by the General Assembly was evidence of the character of the position, but that this "was not determinative or conclusive."

The case of *Wood v. Bellamy* is one of the office-holding cases that was not overruled by *Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697, as is shown by the concurring opinion of Chief Justice Clark, who also concurred in the opinion in *Wood v. Bellamy*. He says at page 166:

"In *Wood v. Bellamy* there was an application of *Hoke v. Henderson* in a case where new incumbents were placed in offices as to which there had been no change of duties, but a change of names only. This decision was within the limits of the original decision. It was the subsequent cases, beginning with *Day's Case*, 124 N. C. 362 [32 S. E. 748], which carried it further, causing it to be denied, and its ultimate and inevitable overthrow."

The inference seems to be clear that, in the opinion of the writer, *Wood v. Bellamy* was correctly decided, and that the character of a position is not affected when there is "no change of duties, but a change of name only."

It is true there is language in the opinion in *Brown v. Turner*, 70 N. C. 93, which sustains the contention of the defendant that the character of the position is determined solely by the fact that it is or is not called an office in the legislative act, but this question was not before the court. The point in

controversy and decided was as to the power of the General Assembly to abolish the office of public printer, and to invest a joint committee of the House and Senate with the authority to contract for the public printing. If, however, the case is regarded as authority, it is in direct conflict with the subsequent case of *Wood v. Bellamy*, and with *State v. Smith*, 145 N. C. 476, 59 S. E. 649, and *Groves v. Barden*, 84 S. E. 1042, at this term, both holding that the character of the position is determined by the functions to be performed, and not by the name. It is also expressly declared in the latter case that "the fact that the lawmaking power may have declared the position an office or employment, although not conclusive, is entitled to consideration," and we are asked to say, in direct opposition to that opinion, that, as the General Assembly has said that the position of notary public is a place of trust and profit, and not an office, this declaration is conclusive.

There are also a number of decisions from the courts of other states of eminent learning and ability supporting the position of the defendant that the qualifications for holding office prescribed by the Constitution do not apply to offices created by the Legislature, and that as to such offices the Legislature may say who may fill them, but there are two insuperable objections to following them.

In the first place, these decisions are based on the Constitutions of the respective states, and in no one of these Constitutions can be found the provision which is in the Constitution of our state, "Every voter, except as in this article disqualified, shall be eligible to office," nor has it been declared by the courts of those states, as it has been with us, that "no one is eligible to office unless he is a voter." *Pace v. Raleigh*, 140 N. C. 70, 52 S. E. 277. In the next place, the doctrine that offices created by the General Assembly are not under the restrictions and limitations of the Constitution was repudiated in *State ex rel. Atty. Gen. v. Bateman*, 162 N. C. 588, 77 S. E. 768.

The office of recorder or police justice is not mentioned in the Constitution, and it owes its origin and existence to legislative action, and yet it was held in the *Bateman* Case that the qualifications of the Constitution for holding office applied to it, and that the General Assembly did not have the power to say that the recorder should be a licensed attorney, because this was not a qualification named in the Constitution, and, if this case stands and is authority, whatever else may be deduced from it, it cannot be held that offices created by the General Assembly are not under the Constitution, and not controlled by its provisions.

We are therefore of opinion that the General Assembly has not changed the character of the position by calling it a "place of trust and profit," and that it exceeded its power

when it declared that a woman could hold the position of notary public.

[5] 5. If so, has this court the power to say that the General Assembly has exceeded its authority, and that the act passed by it is unconstitutional?

The text-writers and the decided cases agree that it is not only within the power, but that it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is. The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

The principle is well stated in 6 *Ruling Case Law*, 72, that:

"Since the Constitution is intended for the observance of the judiciary as well as the other departments of government, and the judges are sworn to support its provisions, the courts are not at liberty to overlook or disregard its commands, and therefore, when it is clear that a statute transgresses the authority vested in the Legislature by the Constitution, it is the duty of the courts to declare the act unconstitutional, and from this duty they cannot shrink without violating their oaths of office. The duty, therefore, to declare a law unconstitutional in a proper case cannot be declined, and must be performed in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question."

The first exercise of this power in this state was in 1787, in *Bayard v. Singleton*, 1 N. C. 42, and one of the latest was in 1912, in *Commissioners v. Webb*, 160 N. C. 594, 78 S. E. 552, in which an act was held unconstitutional by the unanimous opinion of the court written by the present Chief Justice.

In *Sutton v. Phillips*, 116 N. C. 504, 21 S. E. 968, in an opinion written by Chief Justice Clark, the court says:

"While the courts have the power, and it is their duty, in proper cases, to declare an act of the Legislature unconstitutional, it is a well-recognized principle that the courts will not declare that this co-ordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case."

And this language was approved and affirmed in the case of *In re Watson*, 157 N. C. 349, 72 S. E. 1049.

In 1913 an act of the General Assembly was declared to be unconstitutional in *Asbury v. Albemarle*, 162 N. C. 248, 78 S. E. 146, 44 L. R. A. (N. S.) 1189, and in *Sewerage Company v. Monroe*, 162 N. C. 275, 78 S. E. 151, and in each case the judge of the superior court sustained the constitutionality of the act, and two members of this court dis-

sented, Associate Justice Hoke and the writer of this opinion.

Between these cases that are cited, running from the first volume of our reports to the one hundred and sixtieth, covering a period of 125 years, there could be cited 50 or more cases in which acts of the General Assembly have been declared unconstitutional, and we find no judicial opinion to the contrary. The legislative and executive departments have recognized the existence of this power in the courts in the passage and execution of the act now before us, because it is a part of the history of the act that, after its introduction, the General Assembly hesitated and refused to take final action until assured by the head of the executive department that only one appointment would be made until the constitutionality of the act was passed upon by the courts.

We are therefore of opinion upon the whole case:

(1) That a woman is not a voter in this state.

(2) That, as she is not a voter, she is not eligible to office.

(3) That the position of notary public is a public office.

(4) That, being a public office, the General Assembly cannot change its character by simply making a change in the name.

(5) That the act of the General Assembly declaring that a woman may hold the office of notary public is unconstitutional and void.

Our state government and the right to hold office are based on male suffrage, and, if this policy is to be changed, it must not be done by the courts, as the power to amend is reserved to the people alone. If we exercise the power, we violate the Constitution we are required to support and maintain, and establish a precedent which will furnish an opportunity to change the policy of our government in a way not contemplated by the Constitution. We cannot hold that a woman may hold the office of notary public, and stop. If we take the first step, we must do so upon the principle that offices created by the General Assembly are not bound by the limitations of the Constitution, and, if this principle is established, we must follow it to its legitimate and logical conclusion, and apply it to all offices created by the Legislature. We have no right to deal with the question upon ground of sentiment or personal inclination. Our duty is performed when we declare the law as we understand it to be, giving to the subject careful consideration, and exercising our deliberate judgment, and it cannot be performed otherwise. Neither the wisdom of extending the right of suffrage to women nor their fitness to hold office is remotely involved in this appeal. These are questions which must be submitted to and determined by the people.

We have not been inadvertent to the statistics which have been urged upon our consideration. These may be important upon

the question as to the desirability of changing the Constitution, but cannot aid us in the construction of our written Constitution, unless it is shown that in states where women are notaries the Constitutions are like ours, and this has not been done. In some of these states women are voters, and can, of course, hold any office, and in others they have qualified and restricted suffrage, and in England there is no written Constitution.

The number of questions urged upon our consideration on the oral argument and in the briefs, some of them new and important, and the propriety of giving satisfactory reasons for denying a request or demand of woman, whether addressed to the individual or to the judge, have rendered it necessary to extend the discussion further than would otherwise be required.

Reversed.

CLARK, C. J. (dissenting.) There is but one question presented by this appeal. The General Assembly of North Carolina at its late session enacted chapter 12, Laws 1915, as follows:

"The Governor is hereby authorized to appoint women as well as men to be notaries public and this position shall be deemed a place of trust and profit and not an office."

Upon this authority from the lawmaking department of the government, to whom by the Constitution that duty is intrusted, the Governor of the state issued his commission to Mrs. Noland Knight, the plaintiff, as a notary public. Thereafter this quo warranto proceeding was brought, averring that a notary public was not a place of trust or profit, as the Legislature had enacted, but was, in truth, an office, and therefore that the commission issued to her by the executive department of the state under the authority of the Legislature was a nullity because she was a woman. The action was brought before Judge Webb of the superior court, who sustained the action of the General Assembly and of the Governor, and declined to hold their acts void. On argument in this court, the Attorney General, while he combated some of the propositions of the defendant's counsel admitted that the act was valid, saying then, and also in a written opinion:

"In the face of the legislative declaration, there ought not to be any serious trouble about the matter."

The sole question therefore is, after this action of the lawmaking department and the Governor, and the admission of the relator, the Attorney General himself, in open court: "Ought the plaintiff be deprived of her appointment?" There can, of course, be other questions, more or less collateral, discussed, but that is the sole question presented on this record. If this can be done, it can only be done upon the ground that the above acts of the Legislature and the Governor are in violation of the Constitution. It cannot be contended that the Legislature acted igno-

rantly or unadvisedly. In that body there were very many able men, among whom were lawyers of acknowledged prominence and recognized ability. They were under an oath to support the Constitution, as much so as the members of this bench. No one will impute to that body a desire to evade or fraudulently circumvent the Constitution, which they were sworn to support. No one has suggested that. The matter was fully discussed in both houses, was thoroughly understood, and passed the General Assembly by a large majority in both houses. If this court deems it is its duty to so decree, it ought to point out the paragraph in the Constitution which gives it the power, in its opinion, to hold this action of the Legislature and the Governor in violation of the Constitution; for the Governor, as well as the members of the General Assembly, are under the sanction of an oath to maintain the Constitution. The act "authorized," but did not require, him to appoint women notaries public.

The General Assembly of 1913 (Pub. Laws 1913, c. 170) passed an act in almost identical terms authorizing the appointment of women as trustees upon the public school boards and with the same provision that such "position shall be deemed a place of trust and profit and not an office." That act has been recognized without question and acted upon. One hundred and fifty women have been appointed to such positions, and have discharged the duties thereof with credit to themselves and to the benefit of the public.

There is no provision of the Constitution which defines an "office," and none which creates the position of notary public. The Legislature therefore could not act in violation of the Constitution in drawing the line, as it did, between positions of trust and profit and offices; certainly not, unless the duties of a notary public are of themselves so inherently an office, and it is so generally recognized as such, that to term it not an office would be a fraud in legislation. The word "office" and "public office" are very frequently used loosely, without any intention to draw the line as to whether a position is an "office," a "place of trust or profit," or a "public employment," and it is due to that fact that many opinions have spoken of the position of notary public as an office. "Office" means simply a "duty," from the Latin word "officium." And, as this position is called "notary public," it has been frequently, in casual writing of opinions, referred to as a public office. But there has been no opinion of the Supreme Court of this state, nor, I believe, of any other state, which has ever held the position to be a "public office" when the line was being drawn between "public offices" and "places of trust or profit" or "public employment." It is stated positively, after much research, that no court at any time, in any state or country whatever, has held the position to be a public office, when there was an act of the Legislature decreeing it not to be

public office. In *Opinion of the Judges*, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350, the court held that in that state the position of notary public was named and created by the Constitution, and therefore the Legislature could not make it a "place of trust or profit" or a public employment merely, stating, however, that if the position was created (as it is in this state) by the Legislature, that body would be competent to make it such position as they saw fit.

In this state there have been two or three decisions which loosely refer to the position of notary public as an "office," but that was at the time when the statute referred to it as an office. It took its rank as an office from such statute, and, if the General Assembly had the power to pass the act recognizing it as an office, the General Assembly of 1915 had the power to make it a "place of trust or profit." Nothing is better settled than that the act of one Legislature can be repealed or amended by a succeeding one. Neither act has any validity except as the organized expression of the public will of the time, which is subject to change or modification by any subsequent Legislature.

In our own state this court has followed the decisions, universal elsewhere, that the Legislature has entire power over offices created, not by the Constitution, but by the Legislature itself (*Scown v. Czarneski*, 264 Ill. 305, 106 N. E. 276, Ann. Cas. 1915A, 772, and numerous cases there cited), and has said in words exactly applicable to the facts of this case (*Brown v. Turner*, 70 N. C. 100):

"When the Legislature created and called it an office, it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the lawmaking power impressed that stamp upon it; therefore, when that stamp was effaced by the repealing act, * * * it shrank to the level of an undefined duty. The authority that invested these duties with the name and dignity of a public office afterwards divested them of that name and dignity."

We have, however, had two instances in this state in which the question was sharply presented whether the position of notary public was an office or not, and in both it was held not to be, and in those cases only has the question been squarely presented.

In 1867 it became an important matter to draw the line between what positions in this state were offices and what were not. The Attorney General of the United States on June 12, 1867, published his "considered opinion" (as our court styled it), in which he defined what positions were offices and what public employments were not offices. The thirteenth paragraph in his opinion, after reciting what were "offices," says as to those not offices:

"13. Persons who exercise mere agencies or employments under state authority are not disqualified, such as commissioners to lay out roads, commissioners of public works, visitors of state institutions, directors of state banks, or other state institutions, notaries public, commissioners to take acknowledgment of deeds, and lawyers."

That opinion of the Attorney General of the United States is quoted in full by the Supreme Court and adopted. *Worthy v. Barrett*, 63 N. C. at page 203. This court subsequently and continuously down to this time has recognized its correctness; for this court without question has been licensing women as lawyers, certainly a far more important position, and the statute requires that all lawyers take an oath of office and an oath of allegiance both to the state and federal Government.

The only other case in which the point has been exactly presented was *Lawrence v. Hodges*, 92 N. C. 681. The Constitution (article 14, § 7) provides:

"No person, who shall hold any office or place of trust or profit" under the United States, or this state, or any other state, "shall hold or exercise any other office or place of trust or profit under the authority of this state."

Revisal, § 2349, provides:

"The clerks of the superior court may act as notaries public in their several counties by virtue of their office as clerks and may certify their notarial acts under the seals of their respective courts."

It cannot be contested that clerks of the courts are public officers created by the Constitution. If, therefore, the position of notary public was an "office" also, the same person could not hold both positions. The act of Congress required certain mortgages on vessels to be acknowledged before a notary public, and in *Lawrence v. Hodges* the question was presented whether the clerks were valid notaries public, and it was held in 92 N. C. at page 681, that they were. It thus conclusively appears that in both the cases in which the point was presented the position of notary public was held not to be an office.

McCullers v. Commissioners, 158 N. C. 80, 73 S. E. 816, Ann. Cas. 1913D, 507, holding that the Governor and others can discharge certain functions *ex officio*, in no wise conflicts with *Lawrence v. Hodges*. If it did, all that would be necessary would be to provide that any woman who held the position of school trustee, to which she is eligible, can *ex officio* discharge the duties of a notary public. The position of "lawyer" has been often styled an "office"; but women were admitted to the bar in this state. To have held that an office would have disqualified a large part of the Legislature and many other office holders, state and federal. While the statute incidentally refers alike to notaries public and lawyers as officers, there has been no express decision that a notary public is an officer till now, when to so hold violates an express act of the Legislature.

But it has been argued by some that the position of notary public was an office at common law. But, if it was, the common law is simply the English law, the largest part of which was the decisions of the English judges based upon their customs and

the construction of their statutes, and, of course, subject to be changed at will by the Legislature of North Carolina in all matters that concern our self-governing people. In fact, however, a letter from Sir John Simon, at present Attorney General of England, written in January of this year, says:

"No act of Parliament has ever disqualified women from holding the position of notary public in this country, and it is very certain that none such could be passed."

Even if it had been otherwise, it would not have disqualified the General Assembly of North Carolina from defining it to be a mere place of trust or profit, and authorizing women to hold it.

In *U. S. v. Bixby* (D. C.) 10 Biss. 520, 9 Fed. 78, it was held by Gresham, J. (a very great judge) that: "At common law a minor is eligible to the position of notary public." In Virginia, which naturally more nearly follows the English law than any other state in this Union, its Attorney General says: "In this state any man or woman over 18 years of age can be a notary public."

But, aside from any statute which (like our act of 1915) expressly makes the position "a place of trust or profit," or our previous statute which, without expressly making it an office, required an oath of office (as is also required of lawyers, public administrators, and others who have been held to be not officers), the position in itself inherently is not an "office." The duties of a notary public are prescribed by Revisal, 2350, and are purely those of certificate and analogous to those of a commissioner to take affidavits, and have in them no element of an office.

The decisions have all held that, to be a "public office," as distinguished from a "place of trust or profit" or a "public employment," the officers must possess and exercise some of the sovereign powers of the state, either executive, legislative, or judicial. *State v. Smith*, 145 N. C. 477, 59 S. E. 649, citing *Mechem on Pub. Off.* § 1. A notary public cannot legislate. The notary cannot execute the law, and has no judicial functions. The duties of the position are simply to take down and certify evidence. For the purpose of certification, the notary has a seal, just as formerly any grantor in a deed had to authenticate his conveyance by his seal. This did not make every grantor a public officer. It is true that in certain rare cases a notary public has the power of contempt, but so by statute has every referee in North Carolina (Revisal, 942), and a referee certainly is not therefore an officer.

The entire experience and recognition of the rest of the world is against the position being *ex vi termini* a public office. In Massachusetts and in Ohio and one or two others the position has been made an office by the Constitution or a statute. After the passage of this act of our General Assembly an official inquiry was instituted as to the

status of notary public in the other states. The replies from their judicial departments show that out of the 53 jurisdictions in the United States (i. e., 48 states, the District of Columbia, and the territories of Alaska, Porto Rico, Hawaii, and the Philippines) women are competent to be notaries public in all except 10, and in those 10 they were held incompetent either because, as in Massachusetts, the Constitution had made the position an office, or a statute had made it an office, or as in a few of them, "it had not been the custom to admit women to hold the place, and there was no statute as yet authorizing them to fill the position." In no case was there found or reported a decision holding women incompetent to fill the place when there was a statute authorizing them to do so, or providing that the position was not an office. Outside of these 10 states (of our 53 jurisdictions) there is no country which disqualifies a woman to hold the position of notary public. There are semicivilized and barbarous countries in which they are allowed to hold no position whatever, and in those countries there is probably no such position.

There have been many cases in this court, of course, holding acts of the Legislature unconstitutional. But this court has almost in every instance taken the pains to say that it will not exercise this supreme judicial power of setting aside the action of the other departments of the government unless such action was clearly unconstitutional, and has repeatedly quoted on this point *Ogden v. Saunders* (U. S. Supreme Court) 12 Wheaton, 270, 6 L. Ed. 606, in which it was held that the highest court in the Union would not even hold a state act unconstitutional as in violation of the federal Constitution unless it were so "beyond all reasonable doubt." This is the considerate language of that high court.

"It is but a decent respect due to the wisdom, integrity, and patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

Ought not this court to follow what we have so often quoted and approved, and out of a "decent respect to the wisdom, the integrity, and the patriotism of the legislative body" hold that the violation of the Constitution by that body in this case "is not proved beyond all reasonable doubt." This position had its origin in the Roman civil law. Its duties were, and still are, like those of a stenographer, with power only to certify the evidence taken down or acknowledgments made of instruments. The notary public has no legislative, executive, or judicial authority. He cannot even probate a deed, but merely certifies its acknowledgment (*White v. Connelly*, 105 N. C. 65, 11 S. E. 177), though it is held that even a deputy clerk, who can probate it, is not an officer.

The Attorney General of the state, in this

very case, appearing in open court, admitted the validity of this statute. The Attorney General of the United States has said in an official opinion that "commissioners of affidavits, notaries public, and lawyers" are not public officers, and this court in a unanimous opinion affirmed that ruling, and have acted upon it ever since as to the other two positions. Why overrule it now as to notaries public alone? The Attorney General of Great Britain says that the law does not disqualify women from being notaries public. Why should we disqualify them? In all the other states and territories of the Union, except 10, women are admitted to be notaries public. In our own state the Revisal, § 2349, permits the clerk of the court to be a notary public, which he could not be if it was an office, and this court held, as above stated, that he was a valid notary public where the validity of a mortgage under a United States statute required the instrument to be acknowledged before a notary public. In the 10 states not permitting women to be notaries public there is no statute permitting them to be. In none of the other countries of the world is a woman disqualified anywhere to be a notary public.

Under changing conditions, due largely to the introduction of machinery, women are forced to seek new and wider employment. The Legislature, recognizing this, and learning that in some quarters there was opposition to their receiving fees in the purely clerical work of a notary public, owing to some passing references to the position as an "office" in two or three decisions, passed an act making the position merely "a place of trust or profit," and not an office, and specifically authorizing the Governor to appoint women. This was purely a political question, and the Legislature was acting with an intelligent understanding of changed economic conditions and in a humane desire to do justice to a deserving class, and with full recognition of their obligation to observe the Constitution. The Governor was "authorized," not "required," to appoint women. He is one of the foremost lawyers of the state, with the intelligence, firmness, and patriotism to know and maintain the limitations of the Constitution. He appointed the plaintiff to this position. The judge of the lower court, sworn also to obey the Constitution and a learned lawyer, held that there was no violation of the Constitution for the Legislature to so enact. Our Attorney General, who brought this action, stated on the argument, after fuller investigation, and also in writing his opinion, that the action of the Legislature is constitutional.

Ought this court, by three votes to two, hold that this action of the executive department and of the Legislature and by the other judicial officers who have passed upon this matter, has been beyond question a violation of the Constitution, and that too without specifying the provision of the Constitu-

tion that has been so dangerously and alarmingly violated when the Legislature has permitted women working for a living to earn a few needed fees by authorizing them when taking down and certifying evidence merely to authenticate their certificates by adding the impression of a seal? The statute provides that such impression of a seal does not make the position an office. It has been urged, however, that fees are paid for impressing the seal. "Ay, there's the rub." Women are not voters, and there are those who think that fees should be reserved exclusively for voters in recognition of their services. But these fees are not paid by the state or county, but by individuals, and notaries receive no salaries.

It was held in *Brown v. Turner*, 70 N. C. 100, that the position of public printer, worth many thousands of dollars, which the previous statute had made an "office," was reduced to the grade of a "place," because the Legislature said so, though the effect was that a Republican court thus admitted the validity of the act of a Democratic Legislature in filling the "place" with a Democrat, when the Republican Governor, holding it to be an "office," had appointed one of his own party.

In *State v. Smith*, 145 N. C. 476, 59 S. E. 649, this court held that a public administrator who has a term of eight years, gives bond, and takes an oath of office (Revisal, 19) is a mere "place," and not an "office." *Brown, J.*, quoting from Chief Justice Marshall that, "although an office is a public employment, it does not follow that every public employment is an office."

The Constitution of this state does not prohibit the Legislature from admitting women to any office. The prohibition is just the opposite, and forbids any one who is a voter from being disqualified to hold office. *State v. Bateman*, 162 N. C. 591, 77 S. E. 768.

Even if every position, created by the Legislature, however small, must be held to be an office, notwithstanding the Legislative enactment to the contrary, the Constitution of this state has never made the requirements for voting and for holding office the same. Prior to 1868 the Constitution imposed the ownership of property as a prerequisite for certain offices. The Constitution of 1868, discarding all that, imposed the limitation upon the Legislature that no voter should

be disqualified to hold office, with the exceptions therein named.

The majority opinion cites *Portia's* ruling refusing to accept payment in money of the judgment because "it will be recorded as a precedent." It will be recalled that this was immediately overruled, and the precedent which required the "pound of flesh" was most effectively denied and destroyed in that very case for an example to all future ages.

The General Assembly has all the powers of legislation that the people themselves have unless restrained by some provision of the Constitution. Cannot the Legislature of a sovereign state provide that the function of authenticating a certificate or acknowledgment or protest by making the impression of a seal on paper shall be a "place," and not an "office," and that women may receive the fees for such work, if appointed?

There is but one question in this case: "Can this plaintiff discharge that duty when so authorized by an act of the Legislature and commissioned by the Governor?" Or is she barred because she is a woman? Under the Constitution of the United States no one is debarred from holding any office from President down because of sex. What provision of the state Constitution will be shattered, and what detriment will the public welfare receive, if by legislative and executive authority a woman shall authenticate a certificate made by herself by impressing the seal upon a piece of paper? If the defendant were a man, he would not be debarred from holding this appointment unless he were an idiot, a lunatic, or a convict. The Legislature, voicing the sentiment of the people of the state, has enacted that it is neither a crime nor a defect that this appointee to discharge the clerical duties of a notary public is a woman. Shall the court hold that it is?

BROWN, J. (dissenting). I concur in the opinion of the court, except as to the conclusion that the position of notary public is a public office. Therefore I hold that a woman may well fill such place.

While I think the weight of authority is that it is a public office, there is some conflict of opinion upon the subject, and, as I think it is a position a woman may well fill, I do not agree to the judgment rendered.

(100 S. C. 483)

HALSALL v. ATLANTIC COAST LINE R. CO. et al. (No. 9070.)

(Supreme Court of South Carolina. April 19, 1915.)

APPEAL AND ERROR \S 1210—REMAND—PROCEEDINGS IN LOWER COURT.

Notwithstanding Supreme Court rule 27 (56 S. E. v. 63 S. E. v.), which provides that whenever an appeal to that court is sustained on the ground that a nonsuit should have been granted or a verdict directed because of a total failure of evidence or because the evidence could admit of but one inference, the reversal of the judgment shall have the same effect as if the nonsuit had been ordered or verdict returned under the direction of the circuit judge where the Supreme Court reversed a judgment on the ground that the verdict should have been directed for defendant and remanded the case for a new trial, it was not error for the trial court to refuse defendant's motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4670, 4710; Dec. Dig. \S 1210.]

Hydrick, J., dissenting.

Appeal from Common Pleas Circuit Court of Charleston County; H. F. Rice, Judge.

Action by John R. Halsall against the Atlantic Coast Line Railroad Company and others. From an order refusing defendant's motion for a nonsuit on remittitur, defendants appeal. Affirmed.

W. Huger Fitz Simons, of Charleston, for appellants. Logan & Grace, of Charleston, for respondent.

HYDRICK, J. This is the second appeal in this case. The facts appear in detail in the opinion of the court on the first appeal. 96 S. C. 308, 80 S. E. 467. As will be seen by reference thereto, plaintiff received judgment against defendant for \$8,000 damages for personal injuries. In brief, the facts were as follows: Plaintiff, as brakeman, was on the pilot of an engine, piloting it through defendant's yards at Charleston for the purpose of attaching it to a freight train. Defendant, Graham, was engineer in charge of this engine, which was approaching another track on which a freight train, of which defendant, Cameron, was conductor, was being moved through the yard. Plaintiff saw the freight train, and saw that his engine was approaching too near it, and, according to his testimony, he signaled Graham, the engineer, to stop. Graham did not heed the signal, and, when plaintiff saw that a collision was imminent he jumped and was thrown under the freight train, and seriously injured.

Defendant moved the circuit court for a nonsuit and the direction of the verdict on the following grounds: (1) That there is a total absence of testimony to support the material allegations of the complaint. (2) Because the plaintiff's own testimony shows that whatever injury plaintiff received was the result of his own negligence. (3) Because plaintiff's own testimony shows that whatever injury he received was the result of the

negligence of a fellow servant. (4) Because there is no testimony to show that the injury was the result of any negligence on the part of the defendant in this case.

The only specifications of negligence alleged appear in the fourth paragraph of the complaint, and were as follows: (a) In failing and omitting to give any warning whatever by lights, signals, or otherwise, of the presence of the train of box cars on said old main line track, and immediately in front of the engine on which said plaintiff was riding, and not in any way protecting, by lights or otherwise, what was the rear of said train as soon as each box car came upon said old main line track. (b) In failing and omitting to stop or slow up said engine upon which said plaintiff was riding in response to the signals given by said plaintiff in order to avoid collision with said train of box cars. (c) In failing and omitting to have said engine upon which said plaintiff was riding under such control that it could have been stopped without coming into collision with said train of box cars.

The sole contention of appellant on the former appeal was that its motion for nonsuit and direction of the verdict should have been granted, on the ground that Graham and plaintiff were fellow servants. This court sustained that contention, and held, in the opinion first filed, that two of the specifications of negligence, (b) and (c), were as to the performance by Graham of his duties as engineer; that, as engineer, he and the plaintiff were fellow servants, and therefore no recovery could be had against the defendant for the negligence of Graham.

On petition filed by plaintiff for a rehearing, one of the grounds was that the court had not considered the plaintiff's right to recover under specification (a) of negligence. The court dismissed the petition and, in response to that contention, said:

"The absence of light cannot affect the case. The object of lights is to enable those whose business it is to look for the train to see the train. This train was seen in time to stop. Besides, there is no requirement that every box car of a train should be lighted."

Rule 27 (56 S. E. v. 63 S. E. v.) of this court is as follows:

"Whenever an appeal to this court is sustained on the ground that a nonsuit should have been granted or a verdict directed because of a total failure of evidence, or because the evidence could admit of but one inference, the reversal of the judgment shall have the same effect as if the nonsuit had been ordered, or a verdict returned under the direction of the circuit judge. Provided, that this rule shall not be applicable when the cause of action was not barred by the statute of limitations at the time said orders were refused on circuit, but would be barred at the time they were reversed by the Supreme Court."

The judgment of this court on the former appeal was as follows:

"The judgment of this court is that the judgment of the circuit court is reversed, and the case remanded for a new trial."

When the case went back to the circuit court, the plaintiff moved for a new trial under the judgment of this court. The defendant moved for judgment dismissing the complaint with costs, under rule 27, *supra*.

The court below was in a dilemma, not knowing whether to violate the mandate of this court in the cause, or its rule. As the mandate and the rule were clearly inconsistent, and both could not be followed, the court held that specification (a) did not seem to have been entirely disposed of, and that, as the case had been remanded for a new trial, he felt compelled to obey that mandate, and therefore refused defendant's motion.

Now we are confronted by the dilemma. Shall we violate rule 27 under which the defendant was clearly entitled to an order for judgment of nonsuit, except for the peculiar wording of the judgment of this court, or shall we violate the formal judgment which we have pronounced, and say that, notwithstanding we have ordered a new trial, the court below erred in obeying that mandate?

In *Jones v. Railway*, 65 S. C. 410, 43 S. E. 884, the court said:

"When such questions are decided, they become *res judicata*, and when the remittitur has been sent down, the Supreme Court loses jurisdiction, and cannot render a different decision upon the question decided (even if it should be convinced that there was error), so as to affect the particular case in which the decision was rendered" (citing numerous authorities).

On petition for rehearing, suggesting that the doctrine of *stare decisis* and not that of *res judicata* was properly applicable in such cases, the court adhered to the decision applying the doctrine of *res judicata*, and quoted with approval the principle announced in *Sanders v. Bagwell*, 37 S. C. 150, 15 S. E. 714, 16 S. E. 770, that the effect of a judgment of this court granting a new trial was to place "the parties litigant in the same plight and condition they had been in before any trial of the action, with this restriction—that they could not again litigate the same matters that had been passed upon by this court, as evidenced by the opinion of the court accompanying its judgment."

In *Crosby v. Railway*, 83 S. C. 575, 65 S. E. 827, the action was founded upon an allegation of willful tort. The court was requested to instruct the jury that there was no evidence of willfulness. The request was refused and the plaintiff recovered judgment. On appeal, this court reversed the judgment on the ground that the request should have been granted. It was also adjudged that, as the complaint did not allege negligence, and as there was no evidence of willfulness, plaintiff could not recover actual damages. When the case went back to the circuit court, plaintiff

moved for leave to amend the complaint so as to allege negligence.

The motion was refused on the ground, among others, that the effect of the reversal of the judgment, under rule 27 *supra*, was the same as if the request had been granted and a verdict returned for defendant under the direction of the court. On the second appeal, this court approved the ruling, and said:

"As the action was founded exclusively on the allegation of willfulness and wantonness, the request for an instruction that there was no evidence of wantonness or willfulness was equivalent to a request for an instruction to find a verdict for the defendant. Therefore, under rule 27, when the judgment of the circuit court was reversed in the former appeal, on the ground that this instruction had not been given, the effect was the same as if a verdict had been rendered for the defendant. The case being at an end, when this judgment of the circuit court was reversed, the complaint could not be amended for the purpose of having a trial of another issue."

But it is argued, on the other side, that the judgment of this court granting a new trial is also *res judicata*, and cannot now be changed, even by this court, because it lost jurisdiction of the cause, when the remittitur was sent down, and the decisions cited by the court in the opinion in *Jones v. Railway*, *supra*, sustain that contention.

It is also suggested that it was the duty of appellant to call the attention of the court to any supposed error in the judgment before the remittitur was sent down. The remittitur is retained in this court ten days after filing the judgment for that purpose. *Sullivan v. Speights*, 14 S. C. 358; *Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881.

If every issue in the case had not been adjudicated, I would agree that, notwithstanding rule 27, the judgment of this court granting a new trial should be carried out. But, as I see it, there is nothing left to try, unless we allow matters to be relitigated which have already been decided, which cannot be done under the decisions above quoted. For these reasons, I think the order appealed from should be reversed and the case remanded, with instructions to grant a judgment of nonsuit.

But the majority of the court are of the opinion that there was no error in refusing the motion for nonsuit, and that, in accordance with the judgment of this court on the former appeal, plaintiff is entitled to a new trial.

It is therefore the judgment of this court that the order appealed from be affirmed.

Affirmed.

GARY, C. J., and WATTS, J., concur. FRASER, J., concurs in the result. GAGE, J., not participating.

(101 S. C. 237)

WILBURN v. WHITMIRE et al. (No. 9072.)

(Supreme Court of South Carolina. April 19, 1915.)

1. WILLS §324—ACTION TO PROVE WILL—DIRECTION OF VERDICT.

In an action to prove a will, where want of capacity and undue influence are alleged, a verdict may be directed upon either of such issues, where there is no testimony thereon.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767-770; Dec. Dig. §324.]

2. WILLS §292—ACTION TO PROVE WILL—EVIDENCE.

In an action to prove a will, evidence that the executor, who was not a devisee and his wife, who was a devisee, were financially worth more than the other devisees is inadmissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 665; Dec. Dig. §292.]

3. WILLS §164—ACTION TO PROVE WILL—UNDUE INFLUENCE—EVIDENCE.

Where defendants, in an action to prove a will, have charged undue influence, evidence that testatrix resided with the executor held admissible to show that she resided there because she had no other place to go, and not because he wanted to exert influence over her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. §164.]

Appeal from Common Pleas Circuit Court of Union County; S. W. G. Shipp, Judge.

Action by B. G. Wilburn, as executor of Sophronia Whitmire, against K. C. Whitmire and others. From a judgment setting aside the will, the executor appeals. Judgment set aside, and new trial ordered.

Wallace & Barron, of Union, for appellant. Sanders & De Pass, of Spartanburg, and John K. Hamblin, of Union, for respondents.

GAGE, J. The issue in the circuit court was will or no will. It was tried before a jury, and the verdict was against the will, on two grounds: incapacity and undue influence. By the usual procedure therefore had to prove the will in solemn form, the probate court sustained the will. The cause was appealed to the circuit court and was retried there. The appeal here is by the proponent and executor of the will from the judgment of the circuit court.

The testatrix was Sophronia Whitmire, an unmarried woman 63 years of age, who resided at Cross Keys in Union county. She died in February, 1913. She left as her sole heirs at law two sisters and a brother, parties hereto. One sister, Mrs. Sarah M. Hill, lives in Florida, one sister, Mrs. B. G. Wilburn, lives in the vicinity of Cross Keys, and the brother, K. C. Whitmire, resided in the same vicinity, and had been an invalid for two years before the death of testatrix. The brother and Mrs. Hill are the contestants of the will. The jury found that the instrument had been signed by the testatrix in due form of law, but that the testatrix did not have sufficient capacity to make a will, and that the instrument was executed

under undue influence. The verdict does not find by whom the influence was exercised, but there will be no denial that it was by the sister Mrs. Wilburn and her husband, the executor. The testatrix had a small estate; of it she devised her residence and 100 acres of land to her sister Mrs. Wilburn; she devised 50 acres to a half-brother for his life, with remainder to Mrs. Wilburn; the balance of her land, it does not appear how much, she devised in fee to her brother, K. C. Whitmire, and her sister Mrs. Hill; she made bequest of sundry articles of personal property to her other kin; the residue she devised to Mrs. Wilburn.

There are 20 exceptions. They consume 12 printed pages. Of them the first four relate to the admission of incompetent testimony; all the others relate to the charge and a refusal to set the verdict aside. Those which refer to the charge are much too diffuse, and ought to have been compressed in half the space. It was conceded by the appellant at the bar in oral argument that the general charge of the court was practically correct; but the complaint was the court erred in ruling upon the defendants' request. There were 13 requests to charge preferred by the defendants. In every instance except two the requests were modified by added words of the court. In the two instances named they were charged as written. The modification in more than one instance leaves somewhat in doubt what was the law declared. If there be error at all, it exists at that point. A half dozen of the requests are patently wrong. It would not be helpful or useful to critically consider the requests and their modifications. They embrace only five subjects: (1) Insanity; (2) undue influence; (3) unfairness of the will; (4) burden of proof of insanity; and (5) burden of proof of undue influence. On all these subjects the court had, before the requests were taken up, briefly but plainly and correctly instructed the jury. While most of the requests were an incorrect statement of the law, yet the modifications of them by the court and the general charge of the court reasonably eliminated the errors in the requests.

[1] We pass now to the court's refusal to set the verdict aside because, as it is claimed, there was no testimony tending to prove either (1) incapacity or (2) undue influence. There was no request for direction of a verdict; a verdict of course should have been directed, even in a case of will or no will, had there been no testimony upon either of those issues. But as the will may have been avoided upon either one of the two grounds, then if there was no testimony upon the issue of insanity, the jury ought to have been directed on request to answer that issue, "Yes," and if there was no testimony upon the issue of undue influence, the jury

ought to have been directed upon request to answer that issue, "No," or the court might have directed on one issue and sent the other issue to the jury. Though the request for direction was not proffered, and though error at that point may not now be charged, yet an examination of the testimony satisfies us that it was not a case for direction on either issue.

[2] The only other question to be decided is whether or not incompetent and hurtful testimony was admitted. Of that we have no doubt, and for that reason the verdict must be set aside and a new trial had.

The defendants proffered testimony by more than one witness, by Betsill, by Estes, and by Browning, tending to show that K. C. Whitmire was worth only a couple of thousand dollars, and that Mr. and Mrs. Wilburn were worth more than \$50,000. The worth of Mr. Wilburn was totally beside the question—he was not a devisee—and testimony about the worth of Mrs. Wilburn was altogether irrelevant and incompetent. The witnesses did not even say how much Mrs. Wilburn was worth independent of her husband, if anything.

The testatrix had the sole dominion of her property, and it was her exclusive right, and not the province of her neighbors, to direct how it should go after her death. One of the judges put it in this fashion, "the right to make a will is especially valuable to the old and infirm." That was true in the Means case.

[3] It is now contended by respondents that they were forced to bring out that testimony in reply to testimony by the plaintiff that he kept the testatrix in his home when her other kin had not done so. The particular testimony of the plaintiff to which respondents' counsel pointed at the hearing was that given on the cross-examination by Bailey, a witness for the defendants, and it was this:

"Q. Where did Miss Whitmire live during her last sickness, during the last few months? A. With Mr. Wilburn. Q. Where did she stay up to that time? A. She had a home. Q. She had certain families living there? A. She had families living in her house. Q. Did you ever hear of her living with her brother, Mr. Whitmire? A. No, sir. Q. How far from her brother? A. Just a mile."

The defendants had charged undue influence, and it was relevant and competent to prove by Bailey, on cross-examination, that the testatrix was at Wilburn's house because she had no other place to go, and not because Wilburn wanted her there to get what she had; and not because he was best able to keep her. His ability to care for her cast upon him no legal obligation to do so.

The respondents renewed the contention suggested by this testimony in their tenth request to charge, and both of the counsel for respondents referred in their printed briefs to the force of the testimony as a circum-

stance to impel the jury to invalidate the will. By parity of reasoning none of the estate of the testatrix ought to go to the Wilburns because they had no need of it. The circumstance of the unequal estates of the Wilburns and the two defendants K. C. Whitmire and Mrs. Hill, if dwelt upon, was well calculated to influence a jury to exercise a power which did not belong to it, to set aside the will and to divide the estate of the dead sister, share and share alike, betwixt all her heirs at law.

Our opinion is that the judgment of the circuit court be set aside, and a new trial is ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 20)

ROBINSON v. WESTERN UNION TELEGRAPH CO. (No. 9081.)

(Supreme Court of South Carolina. April 28, 1915.)

1. TELEGRAPHS AND TELEPHONES — FAILURE TO DELIVER MESSAGE—EXEMPLARY DAMAGES—WILLFULNESS—SUFFICIENCY OF EVIDENCE.

In an action by the person to whom a telegram was sent for damages caused by failure to deliver, evidence held sufficient to show the willfulness of the default necessary to render proper a verdict for exemplary damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.]

2. DAMAGES — PUNITIVE DAMAGES—NECESSITY OF ACTUAL DAMAGE.

For a willful failure by a telegraph company to deliver a telegram, the company was not liable in punitive damages, where there was no actual damage, however small.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 188-192; Dec. Dig. § 37.]

3. NEW TRIAL — SETTING ASIDE VERDICT—DISCRETION—SUFFICIENCY OF TESTIMONY.

It was not error to refuse to set aside a verdict after expressing the court's personal disbelief of the testimony, since it is the function of the jury to try the facts of a case.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 130; Dec. Dig. § 65.]

Gage, J., dissenting.

Appeal from Common Pleas Circuit Court of Kershaw County; Geo. E. Prince, Judge.

Action by J. C. Robinson against the Western Union Telegraph Company. Judgment for plaintiff and defendant appeals. Reversed.

George H. Fearons, of New York City, and Nelson, Nelson & Gettys, of Columbia, for appellant. B. B. Clarke, of Camden, for respondent.

FRASER, J. This is an action for actual and punitive damages for failure by the defendant to deliver a telegram to the plaintiff, announcing the serious illness of the plaintiff's daughter. The jury found only punitive damages.

There are 12 exceptions, some of which were abandoned. The appellant argues only three questions: (1) Was there any evidence to sustain a verdict for punitive damages? (2) Can a verdict for punitive damages be sustained where there are no actual damages? (3) Was it any abuse of discretion to refuse to set aside a verdict in a case in which the trial judge said he did not believe the testimony of the witnesses upon whose statement the verdict must have been based.

[1] 1. Was there any evidence to sustain a verdict for punitive damages?

There was evidence that a messenger boy carried the telegram to the neighborhood in which the plaintiff lived, and there met two men, one of whom was the son-in-law of the plaintiff; that they told him that they knew every one in the neighborhood, and either of them could and would have directed him to the plaintiff, but the messenger went off with the telegram undelivered, without asking for any information. If the jury believed that statement, they might infer from it a willful disregard of duty. The exception that raises this question cannot be sustained.

[2] 2. Can a verdict for punitive damages be sustained where there is no actual damages?

There is supposed to be a conflict between the case of *Doster v. Telegraph Co.*, 77 S. C. 56, 57 S. E. 671, and *Bethea v. Telegraph Co.*, 97 S. C. 385, 81 S. E. 675. The *Doster* Case states plainly that some actual damage, it may be nominal, is necessary to support a verdict for punitive damages. This is in accordance with the *Bethea* Case. It need not appear in the verdict, but it must exist. It may be only nominal; it may be so small as to be negligible, and need not appear in the verdict; but some actual damages, however small, must be alleged and proved.

The presiding judge charged the jury that, where there is a willful invasion of plaintiff's rights, the law presumes some actual damage, sufficient to sustain a verdict for punitive damages; that if the plaintiff learned of his daughter's illness in time to be with her before her death (the basis of actual damages) then he could recover nothing for actual damages; but, if the failure to deliver the telegram was willful, then the law presumes actual damages, and they might give a verdict for punitive damages. This was error, and the exceptions that raise this question must be sustained.

[3] 3. Was it an abuse of discretion to refuse to set aside a verdict in a case in which the trial judge said he did not believe the testimony of the witnesses upon whose statements the verdict must have been based?

To this question the answer is: It is not an abuse of discretion. The jury is presumed to know the witnesses, and the judge is not. It would rob the jury trials of all of their safeguards if the court should hold that it will reject all judgments based upon state-

ments that do not accord with the individual opinions of the members of this court as to what a man would do under a given set of circumstances, or that men do not act unreasonably, or it may be do not sometimes act foolishly. The exception that raises this question cannot be sustained.

The judgment appealed from is reversed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

GAGE, J. I dissent from that single view upon which this court orders a new trial. Both in the *Doster* Case and in the *Bethea* Case the verdict was like that in the instant case; that is, expressly for punitive damages. In these cases the verdict was sustained because the court thought there was testimony which tended to prove some actual damage, and the jury must have intended to include that small damage in the larger finding for punitive damages.

In the case at bar there was like testimony, and the verdict might have been sustained, but for the charge of the court. The court did charge the jury that "punitive damages will not lie where there is no injury." But the court went further, and charged that, in a case of willful invasion of a right, injury is presumed. The court only told the jury it might do that which it was assumed by this court the jury actually did in the *Doster* and *Bethea* Cases. In no transaction, it is true, may there be a recovery for tort unless some hurt has been done. Wrong and hurt must unite to make a case. But hurt may be actual, or it may be presumed. The doctrine is thus stated by a great judge and author:

"There are many cases in which in point of fact a showing of pecuniary damage is impossible, and some where it would be easy to show that none had been sustained, in which nevertheless the law adjudges that a tort has been committed. * * * The ground of liability is that by every distinct invasion of right some damage is presumed; and the law therefore makes some award, though no damages are proven, and none are susceptible of proof." *Cooley on Torts*, page 63.

An English judge (Buller) put it this way: "The right has been injured." This court has declared:

"Punitive damages are recoverable when there has been an intentional invasion of the plaintiff's rights [as in the instant case], although the damages sustained by him are nominal. If this was not the law, a wrongdoer would in many cases escape pecuniary punishment for his willful or reckless conduct." *Arial v. W. U. Tel. Co.*, 70 S. C. 424, 50 S. E. 7.

But nominal damages are not actual damages; they are constructive. They follow of course the intentional infraction of a plain right, hurt or no hurt. See *Cyc.* 14, and cases cited; *Black's Dictionary*, pp. 314, 821.

I think the circuit court charged the law right, and the judgment ought to be affirmed.

(169 N. C. 80)

W. M. RITTER LUMBER CO. et al. v.
MONTVALE LUMBER CO. et al.
(No. 586.)

(Supreme Court of North Carolina. May 25,
1915.)

1. BOUNDARIES \S 3—REFERENCE TO CONTEMPORANEOUS SURVEY.

The rule that, where a line is actually run by the surveyor and is marked and a corner made, a party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land, is not applicable, unless the line thus run and marked before the execution of the deed or contemporaneously therewith was clearly intended by the parties as one of the lines of the land to be conveyed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. \S 3-41; Dec. Dig. \S 3.]

2. DEEDS \S 93—CONSTRUCTION—ASCERTAINING INTENT—MEANING OF LANGUAGE.

Such construction should be made of the language of a deed or other written instrument as is most agreeable to the intention of the parties, the intent and design, and not the words being the principal things to be considered; and, while words cannot be altered or other words inserted, the words in the instrument that are merely insensible may be rejected.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 231, 232; Dec. Dig. \S 93.]

3. APPEAL AND ERROR \S 1008, 1017—REVIEW—FINDINGS OF FACT.

The findings of fact by the referee and trial judge are conclusive on the Supreme Court, unless they are based upon improper evidence or no evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3911, 3955-3969, 3996-4005; Dec. Dig. \S 1008, 1017.]

4. BOUNDARIES \S 3—CONSTRUCTION—CONFLICTING DESCRIPTIONS.

A grant described a line as beginning at a chestnut oak and running with B.'s line north to the state line at the head of D. ridge, cornering with B.'s northeast corner. B.'s northeast corner was some distance east of the ridge. Though a line running to D. ridge would have followed another ridge, which was prominent and well known, there was no reference to such ridge. B.'s line was marked at both of its ends and identified with certainty, and the other calls of the grant would fit in with such line, while, if the line to D. ridge was adopted, it would be necessary to greatly lengthen the lines to reach other physical monuments called for. Held, that the intent was that the line should coincide with B.'s line; the call for D. ridge being descriptive and not locative, and the rule giving natural objects greater weight than marked trees and lines not applying.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. \S 3-41; Dec. Dig. \S 3.]

5. EVIDENCE \S 274—DECLARATIONS OF FORMER OWNER OF LAND—ADMISSIBILITY.

In an action involving the location of a boundary, the declarations of a former owner of plaintiff's land as to its location were incompetent, where he was not shown to be disinterested at the time they were made, and it appeared, on the contrary, that he was interested, as the declarations of a grantor are not competent in favor of one claiming under him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1121-1134; Dec. Dig. \S 274.]

6. EVIDENCE \S 230—DECLARATIONS OF FORMER OWNER OF LAND—ADMISSIBILITY.

Where a declarant has parted with his interest, what he afterwards says about lines and boundaries cannot be used against those claiming under him to disparage their title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 835-851; Dec. Dig. \S 230.]

7. DEPOSITIONS \S 85—DESTRUCTION—PROOF OF CONTENTS.

Testimony as to the contents of a deposition, which had been destroyed, was properly excluded, where the witnesses were not able to give the substance thereof.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. \S 232, 233; Dec. Dig. \S 85.]

8. DEPOSITIONS \S 85—ADMISSIBILITY IN EVIDENCE—OPENING AND ALLOWING.

Under Revisal 1905, \S 1652, providing that depositions shall be sealed up and returned to the court, and that the clerk or judge shall open and pass thereupon upon notice to the parties, where a deposition had not been opened and passed upon when it was destroyed, and never had been restored for that purpose, evidence of its contents was not competent.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. \S 232, 233; Dec. Dig. \S 85.]

9. BOUNDARIES \S 35—LOCATION—ADMISSIBILITY OF EVIDENCE.

In an action involving a dispute as to the location of a boundary, the testimony of a witness that along in the '70's he noticed trees on a ridge marked as if they were line trees was too indefinite as to the kind of marks or their age and in other respects to be admissible.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. \S 153-155, 157-159, 163, 165, 177-183; Dec. Dig. \S 35.]

10. APPEAL AND ERROR \S 1050—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Even though the exclusion of such evidence was erroneous, it was not sufficiently harmful to require a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1068, 1069, 4153-4157, 4166; Dec. Dig. \S 1050.]

11. EVIDENCE \S 258—ACTS AND DECLARATIONS OF ATTORNEY—ADMISSIBILITY.

In an action involving a boundary dispute, evidence that the attorney for a party employed the witness to show such party's lands to prospective purchasers, that he instructed him to show the land west of a ridge, and never directed him to show the land east of a ridge, that he had in his possession a map, but later had another map containing more land than the first map, was properly excluded where it did not appear that he had any authority to bind his client by his acts or declarations, since the relation of attorney and client gave him no such authority, especially as such relation appeared to have been severed by the client's death at the time of such acts and declarations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1006, 1007; Dec. Dig. \S 253.]

12. EVIDENCE \S 183—DOCUMENTARY EVIDENCE—RECORDS OF GRANTS.

Revisal 1905, \S 988, provides that the registry of a deed or a duly certified copy thereof shall be evidence in any court without accounting for the nonproduction of the original. Sections 1598 and 1599 provide that the court may upon affidavit suggesting some material variance from the original in such registry, or upon other sufficient grounds, require the production of the original, in which case it shall be produced or its absence duly accounted for. In an action involving a disputed boundary, the court ordered defendants to allow plaintiffs to inspect the

original state grant, under which defendants claimed, and the plat and certificate of survey thereto attached, or to show that they had made diligent effort to find them and had failed, and that, upon failure to produce the original grant, they should procure and use a certified copy from the office of the secretary of state. *Held*, that a reasonable search having been made for the original papers and they not having been found, a certified copy was properly admitted in evidence, especially where there was no tangible or reliable proof that there was any variance between the originals and the copies.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. ¶183.]

13. EVIDENCE ¶130 — RELEVANCY — EXCLUSION AS RES INTER ALIOS ACTA.

In an action involving the location of one boundary of a grant, evidence that, in another action between other parties then interested in the lands involved, the court refused certain instructions, was properly excluded as *res inter alios acta*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. ¶130.]

14. BOUNDARIES ¶36 — LOCATION — ADMISSIBILITY OF EVIDENCE.

While the description in a junior grant may not be evidence of the location of lines or boundaries of a senior grant, where the survey for the junior grant was made prior to the date of the senior grant, and the senior grant called for a line fixed by such survey, the map and certificate of survey was properly admitted to corroborate the testimony of the surveyor, who made such survey in an action involving the location of such line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. ¶36.]

15. QUIETING TITLE ¶10 — TRESPASS ¶19 — BURDEN OF PROOF — RECOVERY ON WEAKNESS OF DEFENDANT'S TITLE.

In an action to quiet title and to recover for trespass, plaintiffs could not recover on the weakness of their adversaries' title nor by showing that defendants had no title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. ¶10; Trespass, Cent. Dig. §§ 18-31; Dec. Dig. ¶19.]

16. BOUNDARIES ¶37 — EVIDENCE — WEIGHT — REPUTATION.

In an action involving a disputed boundary, though there was evidence of reputation as to one boundary of a grant, the referee was not compelled to find in accordance with such reputation, but could consider such evidence in connection with the other evidence, as he was not bound to find a fact merely because there was some evidence of it, but had a right to weigh such evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. ¶37.]

17. WITNESSES ¶37 — COMPETENCY — KNOWLEDGE.

The testimony of a witness as to facts told him about the location of one corner of a grant was properly excluded, where he would not say positively who it was that called his attention thereto or what was said, merely testifying that it seemed to be agreed by all of the persons present, as such a witness must be able to give the substance of what was said and by whom, and the impression made on him will not answer the purpose.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. ¶37.]

Clark, C. J., and Brown, J., dissenting.

Appeal from Superior Court, Swain County; Carter, Judge.

Action by the W. M. Ritter Lumber Company and another against the Montvale Lumber Company and others. From the judgment, both parties appeal. Affirmed.

The witness Walker mentioned in the opinion testified that along in the '70's he noticed trees on Forester ridge marked as if they were line trees. The court excluded the statement that they were marked as if they were line trees, admitting the evidence that he noticed a line of marked trees. A witness testified that he was employed by Kope Elias to show the lands of Swepson to prospective purchasers; that Elias instructed him to show the lands west of Forester ridge, and never directed him to show the lands east of such ridge; that Elias had a map made of foolscap or legal paper pasted together; and that later he had another map containing more land than the first and which was a larger, better looking map than the first one. This evidence was excluded.

The judgment was as follows:

This action coming on for trial before the Honorable Frank Carter, judge holding the courts of the Twentieth judicial district, upon the report of the referee heretofore appointed in the cause, and exceptions thereto filed by the parties plaintiffs and defendants, and having been heard, and the findings of fact and conclusions of law having been found by the court as set forth in the record, it is now considered and adjudged by the court that the plaintiff W. M. Ritter Lumber Company is the owner in fee simple and entitled to the possession of so much of the land in controversy as is hereinafter described, to wit, an undivided five-thirteenths interest in state grant No. 1837, issued to R. M. Wikle, bearing date the 25th day of May, 1855, and of state grant No. 1838, issued to C. A. Wikle bearing date the 25th day of May, 1855, and the owners and are entitled to the possession of the timber, easements, and other rights on the land described in the A. M. Cable grants Nos. 7814 and 7815, more fully described and referred to in a deed from Horace F. Taylor and Ella F. Crate, trustees, to W. M. Ritter, dated July 2, 1903, and registered in the office of the register of deeds of Swain county, N. C., in Deed Book Y, p. 247, January 1, 1904, being Plaintiffs' Exhibit No. 57, and more fully described as beginning on a buckeye at or near the state line between Tennessee and North Carolina, standing in Starkey Gap, east of Briar knob and west of the head of Big Chestnut ridge, the said two tracts of land being located as shown upon the official map in this cause made by the surveyors appointed by the court, viz., H. S. Hayes and C. W. Slagle, and marked "A. M. Cable grants, as claimed by plaintiffs." And, as to that portion of one of the said Cable grants which laps upon the R. M. Wikle grant No. 1837, it is adjudged that the plaintiff W. M. Ritter Lumber Company is the owner in fee of five-thirteenths interest in addition to the timber, easements, and other rights herein adjudged to belong to the plaintiff W. M. Ritter Lumber Company.

And it is further adjudged that the beginning corner of the R. M. Wikle grant No. 1837 is a beech (now down) that formerly stood at or near the Indian Camp branch, a tributary of Bone Valley creek, being the beech claimed by the plaintiffs and found by the court to be the

beginning corner of the said tract of land, at the point marked "beech," the southwest corner of grant No. 1837, as found by the court and shown on the official map filed in this cause by H. S. Hayes and C. W. Slagle, surveyors as aforesaid; and it is further adjudged that grant No. 1837 covers and includes the land beginning at said beech, and running thence north 320 poles to a stake; thence east 320 poles to a stake; thence south 320 poles to a stake; and thence west 320 poles to the beginning.

It is further adjudged that the beginning corner of the C. A. Wikle grant No. 1838 is a chestnut on Bear Pen ridge found by the court to be at that point, blocked by H. S. Hayes and G. I. Calhoun, and claimed by the plaintiffs to be the beginning corner of the said grant; said chestnut being at the point marked "chestnut," the southeast corner of the C. A. Wikle grant No. 1838, as indicated on the official map filed in this cause by H. S. Hayes and C. W. Slagle, surveyors.

On motion of counsel for the defendants, it is adjudged that the eastern boundary line of grant No. 138 to George S. Walker from the chestnut oak marked A on said plat, made by H. S. Hayes and C. W. Slagle, is and extends in a straight line from that chestnut oak to a sugar maple, which stands or did stand at the Tennessee and North Carolina state line at the head of the Big Chestnut ridge, and that the western boundary line of grant No. 3290 to W. L. Love from said chestnut oak is the same as said eastern boundary line of grant No. 138, and extends from said chestnut oak to said point where the sugar maple stands, or did stand, at the line between Tennessee and North Carolina, at the head of the Big Chestnut ridge; said point at the head of the Big Chestnut ridge where the sugar maple stands, or did stand, being indicated on said plat by the letter D, and being on top of Smoky Mountains.

And it is further adjudged, on motion of counsel for the defendants, that the plaintiffs W. M. Ritter Lumber Company and Hazel Creek Lumber Company are not, and neither of them is, the owner of any land in controversy in this action under any interpretation of the pleadings west of said line extending from said chestnut oak at A to said sugar maple, or the point where it stood, at D, except as otherwise hereinbefore adjudged.

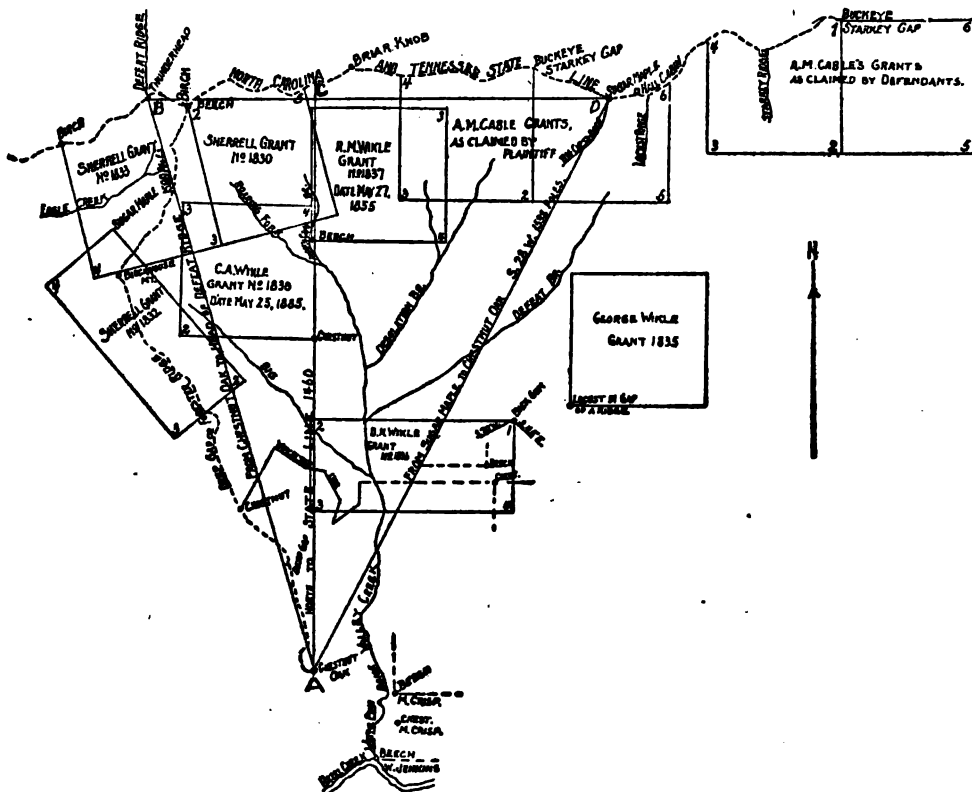
And on motion of defendants' counsel, it is further adjudged that the defendant Montvale Lumber Company is the owner in fee simple and entitled to possession of the following described land, lying and being in the county of Swain, state of North Carolina, to wit: Being part of the land granted George S. Walker in grant No. 138, and bounded and more particularly described as follows: Beginning at a sugar tree, at the head of Big Chestnut ridge, the northeast corner of grant No. 138, on top of the Smoky Mountains in the line between the states of North Carolina and Tennessee (said tree having fallen and being gone and the place where it fell being indicated by a stone), from which tree a forked beech on the Tennessee side bears north $28\frac{1}{2}^\circ$ east 68 links distant, a birch 24 inches in diameter on the Tennessee side bears north 5° west 71 links distant, a mountain oak on the North Carolina side 24 inches in diameter bears south 38° west 90 links distant, a forked buckeye north 68° east 37 links distant, a white flint rock north 80° east 34 links distant, and runs south 28° west down Big Chestnut ridge, crossing Defeat branch at 652 poles, the top of Little Chestnut ridge at 26 poles, crossing the Horse Cove branch at 992 poles, 1,060 poles to a stake and pointers in Taylor and Crate's line, tract No. 6604; then with that line west, crossing Bone Valley creek at 104 poles, 130 poles to a stake, northwest corner of Taylor and Crate's tract No. 6604; thence with the line of said tract No. 6604 south 47° poles to a stake on the line of Crate

Hall's tract No. 6219; then with Hall's line south 56° west 80 poles to a large rock and pointers in a cove on Sam Buchanan's line; then with Buchanan's line north 19° east 60 poles to a chestnut oak on top of a ridge, Buchanan's corner; then with said Buchanan's line north $27\frac{1}{2}^\circ$ west 79 poles to a large chestnut oak on top of the ridge and near a gap in the ridge; then north $72\frac{1}{2}^\circ$ west 52 poles to a chestnut; then north $58\frac{1}{2}^\circ$ west 83 poles to a small chestnut oak near the top of the ridge, Buchanan's northwest corner; then south $28\frac{1}{2}^\circ$ west, crossing a branch at 64 poles, crossing a second branch at 105 poles, 170 poles, to a chestnut oak on the top of Forester's ridge, Buchanan's corner; then up the Forester ridge, with its various meanders, north 25° west 18 poles, north 18° west 18 poles, north $26\frac{1}{2}^\circ$ west 26 poles, north $34\frac{1}{2}^\circ$ west 16 poles, north 25° west 28 poles, north $16\frac{1}{2}^\circ$ west 12 poles, north $48\frac{1}{2}^\circ$ west 9 poles, north 13° east 14 poles, north $22\frac{1}{2}^\circ$ east 5 poles, north 31° west 10 poles, north 12° poles, north $26\frac{1}{2}^\circ$ west 12 poles, north 3° west 9 poles, north 22° east 31 poles to the head of Mill ridge, north $23\frac{1}{2}^\circ$ west 20 poles, north 16° west 18 poles, north 39° west 20 poles, north $51\frac{1}{2}^\circ$ west 17 poles, north 40° west 7 poles, north $52\frac{1}{2}^\circ$ west 18 poles, north 32° east 34 poles, north 65° west 16 poles, north 72° west 10 poles, north $37\frac{1}{2}^\circ$ west 34 poles, north 31° west 20 poles, north 45° west 18 poles, north $68\frac{1}{2}^\circ$ west 22 poles, north 52° west 23 poles, north 23° west 40 poles, north $16\frac{1}{2}^\circ$ west 60 poles, north 22° west 46 poles, north 18° west 14 poles, north 27° west 14 poles to the top of Blockhouse Mountain, north 25° east 41 poles, north 47° east 23 poles, north 36° east 10 poles, north 32° east 26 poles, north $57\frac{1}{2}^\circ$ east 12 poles, north 39° east 26 poles, north $54\frac{1}{2}^\circ$ east 20 poles, north $20\frac{1}{2}^\circ$ east 18 poles, north $6\frac{1}{2}^\circ$ east 21 poles, north 41° east 24 poles, north 28° east 22 poles, north 61° west 10 poles, north $12\frac{1}{2}^\circ$ east 77 poles to the low gap at the head of Eagle creek; then up the side of the Smoky Mountains north 23° west 15 poles, north $27\frac{1}{2}^\circ$ west 18 poles, north 38° east 14 poles, north 35° east 14 poles, north 12° east 6 poles, north 15° east 7 poles, north 29° east 9 poles, north 32° east 7 poles, north 4° east 14 poles, north $32\frac{1}{2}^\circ$ east 23 poles, north 3° west 10 poles, north 8° west 2 poles, north 10° east 3 poles to a small beech in the edge of laurel on the state line at the head of Bone Valley creek (marked two large birches as witnesses); then with the state line north 45° east 14 poles; then north 55° east 20 poles to a stake on the state line; then east 1013 poles to the beginning, crossing the head of several small branches on line and containing 4,826 acres more or less, except the two Wikle grants Nos. 1837 and 1838 hereinbefore mentioned, and the Cable grant hereinbefore mentioned as 7815, and the part of said Cable grant hereinbefore mentioned as 7814, which is embraced within said boundary.

On motion of defendants' counsel, it is further adjudged that the defendant J. E. Coburn is the owner in fee simple and entitled to possession of the land particularly described in his answer herein, or an amendment to answer filed by him before J. D. Murphy, referee, in pursuance of leave given him so to do by said referee.

And it is further adjudged by the court that the plaintiffs have and recover of the defendants and their surety on their defense bond in this cause their costs in this action to be taxed by the clerk. And, it appearing to the court that the referee and the stenographer have heretofore been paid an ample compensation for their services, no further allowances in this respect are made.

The "Court Map," referred to hereinafter, is as follows:



This action was brought to quiet the title to a large tract of land in the county of Swain, formerly Macon, on the waters of Hazelnut creek, and alleged to be covered by a grant of the state to W. L. Love, and for damages on account of a trespass upon said land by the defendants. The case was referred to Hon. J. D. Murphy, who filed a report, which was reviewed by Judge Carter upon exceptions. We cannot do better than insert here an extract from the findings, showing the contentions of the parties:

"The plaintiffs claimed the land in controversy by mesne conveyances under state grant No. 3290, issued to W. L. Love, assignee of B. L. Sawyer, bearing date the 3d day of May, 1872, and recorded in the register's office for Macon county, in Book N, pp. 12 and 13, on the 18th day of June, 1873, and also registered in Swain county, in Book O, p. 601, on the 3d day of October, 1894. The first call in grant No. 3290 is as follows: 'On the waters of Hazelnut creek, beginning at a chestnut oak on the trail leading from the mouth of Sugar Fork creek to the Deep Gap, beginning and running with Col. T. D. Bryson's line 1,800 poles north to the Tennessee state line at the head of Defeat ridge, cornering with Bryson's northeast corner.' From the end of the first call, the grant runs in a general easterly direction with the top of the Smoky Mountains by various calls to a buckeye on the top of the Bald ridge; thence down the Bald ridge to a white oak at the high rocks; thence to the beginning. It was admitted that the beginning call of grant No. 3290 was at the point marked 'A' on the court map. The plaintiffs contended that the first line of said grant runs along the Deep Gap or Forester ridge in a northerly direction to the point on

said map marked 'B,' Thunderhead, being, at the point where Defeat ridge runs up to and forms a part of Thunderhead, and that from there it ran easterly with the Tennessee and North Carolina state line, passing the point marked 'Sugar Maple' at D on the court map, and thence continuing easterly to the Bald ridge, some distance east of the sugar maple. The defendants claim title to the land in controversy, under state grant No. 138, issued to George S. Walker, bearing date the 8th day of March, 1881, and recorded in the office of the register of deeds for Swain county, in Book No. B, p. 476, April 20, 1881. One of the calls in grant No. 138 extends from the chestnut oak at A on the court map in a northeasterly direction to the sugar maple at the head of Big Chestnut ridge, being the point marked 'D' on the court map; and the defendants contended that the first call of grant No. 3290 must run with this call in the Walker grant from the point A on the court map to the point D. It was admitted that the line A D was not actually run and marked (throughout its entire length) before the grant was taken out, but the defendant offered evidence tending to show that the line was actually run and marked for a short distance from the chestnut oak at A in the direction of the sugar maple at D, and for a short distance from the sugar maple D in the direction of the chestnut oak at A, but it was contended by the defendants that the line was ascertained by a method known to surveyors as triangulation and by plotting, except as to what had been actually run as aforesaid. By these adverse contentions of parties, the triangle A B D A defines the territory in controversy."

The referee found as a fact that the line A D was marked for a short distance at both ends, and the court, in its general findings of fact, states that it was marked at its

northeast end from the sugar maple at D in the direction of the chestnut oak, the place of beginning at A; the latter being admitted by the parties to be the beginning corner of grant No. 3290. It was further found that, in the survey made under the entries upon which grant No. 138 was issued, the first line was run from A, at the chestnut oak, to B, at Defeat ridge, not for the purpose of establishing that as a line of the T. D. Bryson tract, but for the purpose of triangulation, in order to fix the location and length of the line A D (that is, from the chestnut oak at A to the sugar maple at D); and this was done because it was represented that, between the chestnut oak and the sugar maple, the land was covered with thickets and infested with poisonous snakes. The method of triangulation was suggested by the surveyor, and it was adopted as a safe method of determining the line from A to D and as avoiding the dangers and difficulties of making a survey over the land between A and D. Both the referee and the judge have found as a fact that the line of the Bryson tract called for in the grant No. 3290 had been well established and runs from A to D, and the northeast corner of the tract is at the sugar maple, or D on the map. It is also stated as a fact by the referee and the judge that when Sawyer, by Kelly, surveyor, made the survey for grant No. 3290, it was intended by them that the line A D between the chestnut oak and the sugar maple should be the first line of the survey and the tract of land to be granted. The court also found as follows:

"In respect of the survey made in 1871 for grant 3290, the B. L. Sawyer entries, the court finds that said survey began at the chestnut oak at A, and was carried to the point B at Thunderhead, the same being the head of Defeat ridge, retracing the survey theretofore made in 1867, for the purposes heretofore stated, and that, from the point B upon the second line of said survey, the line was run easterly to the point where the Locust ridge reaches the North Carolina and Tennessee state line, the second line of said survey, following the general course of the second line of the triangle made upon the survey of 1867, as above found, and passing about 102 poles to the eastward of the head of Big Chestnut ridge. The court finds that B. L. Sawyer was present upon this survey, and that the intention of Sawyer and the surveyor upon said survey was to establish the chestnut oak at A, a corner in the Bryson survey, as the beginning point in said survey, and that the western line of said survey should coincide with the eastern line of the survey of 1867, and that the northwest corner of said last (first) mentioned survey should be identical with the northeast corner of the Bryson survey of 1867. And, in respect of both surveys, it was found as a fact that the line from A to B was not actually measured along said straight line, but was measured along the course of Deep Gap, or Forester ridge, and that a corner was marked at the point where the first and second lines of the triangle made upon the Bryson survey of 1867 intersect at the state line at Thunderhead. Defeat ridge is located as plaintiff claims, being the ridge going up between the prongs of Little river, in Tennessee, and the head of Defeat ridge culminates at and with other converging ridges, and forms the easternmost knob of the

group of knobs known as Thunderhead, on the state line between North Carolina and Tennessee; the said head of Defeat ridge being at the point marked 'B' on the official map."

There were other findings of the referee, which were approved by the judge, and should be stated here, viz.:

"I further find that B. L. Sawyer knew in 1871, at the time of said survey by M. L. Kelly, that there was no Bryson line along and up said Deep Gap or Forester ridge, and he further knew, as marker and guide of the surveying party under T. S. Siler, that the line of T. D. Bryson runs from a sugar maple at the head of Big Chestnut ridge, at the point marked 'D' on the official map, to the point marked 'A' on the official map. I further find that in 1871 the said B. L. Sawyer knew that the true eastern line of the T. D. Bryson lands runs from the sugar maple at the head of Big Chestnut ridge in a southwestwardly direction to the chestnut oak at the point A on the official map. I further find that the northeast corner of the survey of the T. D. Bryson line is at the sugar maple at the head of Big Chestnut ridge at the point marked 'D' on the official map."

There are many findings of fact bearing upon the general question as to the location of the Bryson line and the first line of the tract described in grant No. 3290 to W. L. Love, under which the plaintiff claims; but it is not necessary to set them out, as those stated will be sufficient for a clear understanding of the contentions of the parties and the question presented in this appeal.

The referee found with the defendants in the appeal that the first line of plaintiff's grant No. 3290 was the one from A to D, and not from A to B, as contended by the plaintiff, and that the plaintiffs are not the owners of the land covered by said grant or of any land west of the said line from A to D, except as stated and decided in the defendant's appeal, but that the defendant Montvale Lumber Company is the owner of the land covered by said grant No. 3290, with the exception aforesaid; it being also a part of the land covered by grant No. 138, issued to George S. Walker, and described by metes and bounds in the judgment. The judgment may be referred to for greater certainty.

Both parties appealed from the judgment. We will proceed now to the consideration of the plaintiff's appeal.

Theodore F. Davidson and James H. Merimon, both of Asheville, Fred S. Johnston, of Franklin, and Landon C. Bell, of Columbus, Ohio, for plaintiffs. F. A. Sondley and A. S. Barnard, both of Asheville, A. M. Fry, of Bryson City, and W. L. Taylor, of Baltimore, Md., for defendants.

Plaintiffs' Appeal.

WALKER, J. (after stating the facts as above). [1] The right of the plaintiffs to recover depends upon the true location of the first line of grant No. 3290; that is, as to land described in the grant which is not covered by any of the inside patents. The question as to the effect of the latter upon the rights and interests of the parties is present-

ed by the defendants' appeal, and need not be considered here. The contention of the plaintiffs is that the first line of that grant should be from A to B, as shown on the court map, while the defendants say that it should be from A to D. We are satisfied that we cannot adopt the plaintiffs' view, unless we hold that what was done by Sawyer and Kelly, when they made the survey in 1871, amounted to a practical location of the first line within the rule laid down in *Cherry v. Slade*, 7 N. C. 82, that where it can be proved that there was a line actually run by the surveyor, which was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed. But the insuperable obstacle to the application of this rule is that the line must have been "marked and a corner made"; and it must also appear that this was done for the purpose of making it a line of the tract of land or a call in the deed, for it is said in *Safret v. Hartman*, 50 N. C. 186, after quoting from *Cherry v. Slade*, as above:

"This rule presupposes that the patent or deed is made in pursuance of the survey, and that the line was marked, and the corner that was made in making the survey was adopted and acted upon in making the patent or deed, and therefore permits such line and corner to control the patent or deed, although they are not called for, and do not make a part of it. Parol evidence being thus let in for the purpose of controlling the patent or deed, by establishing a line and corner not called for, as a matter of course, it is also let in for the purpose of showing that such line and corner was not adopted and acted on in making the patent or deed, because the rule presupposes this to be the fact."

It may also be added at this place that the rule was adopted, against the strong but ineffectual protest of the Judges long since expressed, for the sole purpose of executing the intention of the parties to the grant, and not to defeat it, and it was under the stress of some "hard case," where a sense of justice prevailed over the long-established and safe rule, forbidding a written instrument to be contradicted or varied by parol evidence that the rule was brought into being. But conceding fully its existence, and that it is too firmly imbedded in the law of boundary to be now disturbed, we are admonished that it should be administered with caution and not carried beyond its well-defined limits. Judge Pearson once said that the rule was "a violation of principle" and should not be extended. *Safret v. Hartman*, *supra*. We may well say in this case what was so well said in *Elliott v. Jefferson*, 133 N. C. 207, 45 S. E. 558, 64 L. R. A. 135, that the error of the plaintiff lies in a misapprehension of the application of the rule that, in case of a discrepancy, a marked line controls the calls in the deed as to course and distance. This rule never applies, unless the marked line is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption as to the

intent of the grantor. The mere running and marking of a line can never convey the title to land, nor can it take the place of a deed. At best, it can only serve to locate the land conveyed in the deed, and can operate only in aid of the deed. Admitting that a line is run in contemplation of a deed, it does not bind the grantor, as a different contract may be made or the line subsequently changed. As no title can vest, except by the execution of a deed, the vital question is the intent of the grantor at the time of such execution. It was also stated in that case that:

"Wherever a marked line or other natural object is permitted to vary the description called for in the deed, it is always in presumed furtherance of the intent of the grantor in the execution of the deed. In other words, it is to carry out the true intent of the deed, and never in derogation thereof. This principle is clearly recognized in the authorities cited by the plaintiff himself, as will appear from the following extracts: * * * The doctrine thus laid down is in full accord with the principles enunciated and the cases cited in *Bowen v. Gaylord*, 122 N. C. 816 [29 S. E. 340], and is sustained by the general current of authority here and elsewhere. In the construction of all deeds and grants, there is one essential object to be kept in view, and that is to ascertain the true intent of the grantor and to give full effect to that intention, when not contrary to law. All rules of construction adopted by the courts are simply means to a given end, being those methods of reasoning which experience has taught are best calculated to lead to that intention. Hence all authorities unite in saying that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. This doctrine is of such universal acceptance as to require but few citations, more to illustrate its extent than to prove its existence."

So we see that the very foundation of the rule is the presumed intention of the parties to the grant, and the only excuse for it, as it is opposed to the general principle, is that it enables us to ascertain what the intention was in respect of the boundary. It may be well here to reproduce some of the comments of this court upon the rule and its application, as what has been thus said is most pertinent to the facts of this case, as found by the able and learned referee and judge. The question as to the extent of the rule and the manner of its application was presented in the oft-cited case of *Reed v. Shenck*, 13 N. C. 415, where Chief Justice Henderson, with his usual clearness and acumen, thus refers to the rule:

"For many years, we have in all cases, I believe, except one, adhered to the description contained in the deed; and it is much to be lamented that we do not altogether. The case to which I allude is where the deed describes the land by course and distance only, and old marks are found, corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the courses and distances that they may well be supposed to have been made for its boundaries, the marks shall be taken as the termini of the land. This is going as far as prudence permits, for what passes the land not included by the description in the deed, but included by the marked termini? Not the deed, for the description contained in the deed does not comprehend it. It

passes, therefore, either by parol or by a mere presumption. As far as we know, there has been no series of decisions, by which the description in the deed is varied by marks, unless they were made for the termini of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or to which it was supposed the deed did refer, or rather supposed that the courses and distances corresponded with the marks, and that the same land was described, whether by course and distance in the deed or by the marked termini."

And in *Baxter v. Wilson*, 95 N. C. 138, Justice Ashe, with equal force and clearness, states the object and defines the limit of the rule. He said:

"For instance, when there has been a practical location of the land, as when it can be proved that there was a line actually run and marked, and a corner made, such a boundary will be upheld, notwithstanding a mistaken description in the deed. *Cherry v. Slade*, 7 N. C. 82. The construction has been adopted by our court to carry out the intention of the parties, when it is clearly made to appear; and, to effect that object, course and distance will be disregarded, if the means of correcting the mistake be furnished by a more certain description in the same deed, and especially will it be so when some monument is erected contemporaneously with the execution of the deed"—citing *Campbell v. McArthur*, 9 N. C. 33, 11 Am. Dec. 738; *Cooper v. White*, 46 N. C. 389; *Spruill v. Davenport*, 44 N. C. 134; *Reed v. Schenck*, *supra*.

The rule has received consideration, and its precise limits fixed, in the following cases: *Shaffer v. Gaynor*, 117 N. C. 16, 23 S. E. 154; *Fincannon v. Sudderth*, 140 N. C. 246, 52 S. E. 579; *Mitchell v. Welborn*, 149 N. C. 347, 63 S. E. 113; *Lance v. Rumbough*, 150 N. C. 19, 63 S. E. 357; *Land Co. v. Erwin*, 150 N. C. 41, 68 S. E. 356—and more recently it has been discussed very fully by Justice Hoke in *Clarke v. Aldridge*, 162 N. C. 326, 78 S. E. 216, citing the principal cases, which had been decided up to that time, and by Justice Brown in *Allison v. Kenion*, 163 N. C. 582, 79 S. E. 1110, and they all tend to this general result and agree upon this proposition, that the line thus run and marked before the deed was executed or contemporaneously with the deed must have been clearly intended by the parties as one of the lines of the land to be conveyed; and, without this intention, the mere fact that a line was surveyed or even marked will not bring the case within the operation of the rule, unless the said intention can be clearly inferred from the conduct of the parties in regard thereto, the intention being as essential as the fact that the line was surveyed and a corner made.

[2] It has grown into one of the maxims of the law that such construction should be made of the language of a deed or other written instrument as is most agreeable to the intention of the parties. The words are not the principal things to be considered, but the intent and design, which is the chief object to be attained. We cannot alter words or insert others, which are not in the instrument, but those that are there should be con-

strued in the way most likely to accord with the intent or meaning of the parties, and we may reject words that are merely insensible. In *Smith v. Parkhurst*, 2 Atk. 125, Lord Chief Justice Willes, referring to these principles of construction, said:

"Those maxims, my Lords, are founded upon the greatest authority (Coke, Plowden, and Lord Chief Justice Hale); and the law commands the astutia (the cunning) of judges in construing words in such a manner as shall best answer the intent. The art of construing words in such a manner as shall destroy the intent may show the ingenuity of, but is very ill becoming, a judge."

This idea was never better expressed than in the case of *Walsh v. Hill*, 38 Cal. 481, 487, by Justice Sanderson:

"In the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value * * * is to place ourselves as near as possible in the seats which were occupied by the parties at the time the written instrument was executed; then, taking it by its four corners, read it."

This is the main object of all constructions. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention. The same rule has frequently been stated by this court, and applied in the construction of various kinds of written instruments, grants, deeds, wills, and contracts. *Gudger v. White*, 141 N. C. 507, 54 S. E. 386; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514.

When we look at this case in the light of the foregoing authorities, it is manifest that the findings of the referee and judge withdraw the case from the operation of the rule as to the effect of a line being run and marked at the time the grant was made, as they distinctly find, and as clearly and emphatically as language can express such a finding, that B. L. Sawyer and his surveyor, M. L. Kelly, when they made the survey in 1871 and ran along Deep Gap or Forester ridge, had no intention of marking the line A B as a line of the tract of land to be thereafter described in the grant No. 3290. To use the language of the judge:

"In respect of the survey made in 1871, for grant No. 3290, on the B. L. Sawyer entries, the court finds that said survey began at the chestnut oak at A and was carried to the point B at Thunderhead; the same being the head of Defeat ridge, retracing the survey theretofore made in 1867, for the purposes heretofore stated. * * * The court finds that B. L. Sawyer was present upon this survey, and that the intention of Sawyer and the surveyor, upon said survey, was to establish the chestnut oak at A, a corner in the Bryson survey, as the beginning point in said survey, and that the western line of said survey should coincide with the eastern line of the survey of 1867, and that the northwest corner of said last (first) mentioned survey should be identical with the northeast corner of the Bryson survey of 1867."

It is then found as a fact that the line from A to B was not actually measured "along said straight line," but along the corner of Deep Gap or Forester ridge; a corner being marked at the point where the first

and second lines of the triangle made upon the Bryson survey of 1817 intersected on the state line at Thunderhead. There are further findings that B. L. Sawyer knew in 1871, when he and Kelly made their survey, that there was "no Bryson line along and up said Deep Gap or Forester ridge"; and he further knew, at said time, that the line of T. D. Bryson ran from a sugar maple at the head of Big Chestnut ridge, at the point marked D on the official map to the chestnut oak, at the point marked A thereon, and he consequently knew that this was the eastern line of T. D. Bryson's land; that is, from the sugar maple at D, in a southwesterly direction, to the chestnut oak at A, as the one fact is necessarily to be inferred from the other. It appears also that it was Sawyer who set the compass in 1867 on the Bryson survey and sighted to the sugar maple, which he told the surveying party was at the head of Big Chestnut ridge. He was the marker, and he marked the chestnut oak, so as to indicate the direction from which they had come in reaching it and the direction they would go in leaving; the latter being towards the sugar maple on Big Chestnut ridge. The marks were three hacks on each side of the tree. Sawyer inquired of T. S. Siler how he could measure the line to the sugar maple without running it, and he was shown how it could be done by a diagram. It is also found that it was the intention that the western line of the Kelly survey of 1871 should coincide with the eastern line of the Bryson survey of 1867, and that the northwest corner of the Kelly survey should be identical with the northeast corner of the Bryson survey. The Bryson northeast corner is at the sugar maple, the point marked D on the map. So it is clear that the line up the Big Gap or Forester ridge was not run and marked for the purpose of making it a line of the grant to be thereafter issued (No. 3290); but, on the contrary, the intention of the parties was in strict accordance with the express words of the grant, that the line A D should be one of its lines.

[3] We are bound by the findings of fact as made by the referee and judge, as it is not our custom to review them under such circumstances. *Usry v. Sult*, 91 N. C. 406; *Wiley v. Logan*, 95 N. C. 358; *Dunavant v. Railroad Co.*, 122 N. C. 999, 29 S. E. 837; *Collins v. Young*, 118 N. C. 265, 23 S. E. 1005; *Harris v. Smith*, 144 N. C. 439, 57 S. E. 122. The findings of fact are conclusive upon us, unless it appears that they were not based upon any evidence, or rested upon improper evidence. *Usry v. Sult*, supra. There was evidence to sustain the findings in this case.

[4] But plaintiffs contend that, while the call is for the Bryson line, it also extends from A "1,800 poles north to the Tennessee line at the head of Defeat ridge, and they insist that the line should go to that place, notwithstanding it is also said that it must

begin and run with Bryson's line and corner with Bryson's northeast corner, but we do not think that this is the proper meaning of the call. The leading purpose and dominant idea is that this line shall coincide with the Bryson line, and if this part of the call is ignored, and the line is extended north to the intersection of the head of Defeat ridge with the Tennessee line, it would violate the evident intention of the parties, as gathered from the deed, that it should corner at D, where the maple stood, and of course stop there, for it could not corner there very well if that was not to be the end of the line. The clear intention of the parties must prevail, and the line must run with that of Bryson's and stop at D, as a corner of the land. It is plain that the parties mistakenly thought, when they inserted the call for Defeat ridge in the grant, that the northeast corner of the Bryson land was on the Tennessee line at the head of that ridge, but their purpose was to stop at the corner, wherever it should be; the call for Defeat ridge being descriptive and not locative. The call is to be construed as if it read, "Cornering at Bryson's northeast corner, supposed to be on the Tennessee line, at the head of Defeat ridge." This is a much more reasonable interpretation of the grant than if we should defeat the intention to make "Bryson's line" one of the lines by running the line along Deep Gap or Forester ridge to Defeat ridge, eliminating the primary and principal call, and the law does not require that we should do so.

Referring to the "third" of the four rules for locating boundaries which are stated in *Cherry v. Slade*, 7 N. C. 82, Chief Justice Taylor said:

"This rule is founded upon the same reasons with the preceding ones, the design of all being to ascertain the location originally made, and, calling for a well-known line of another tract, denotes the intention of the party, with equal strength to calling for a natural boundary, so long as that line can be proved."

The case of *Bonaparte v. Carter*, 106 N. C. 534, 11 S. E. 262, is pertinent, for there the call was for a small oak, John Edwards' corner, on the side of the creek. It turned out that the Edwards corner was 300 yards from the creek, and the court, by Justice Clark, said:

"The side of the creek is not called for as a boundary, but merely as a description of the locality of the beginning point, which is 'a small oak, John Edwards' corner.' If that can be identified, an inaccuracy in the description of the locality will be disregarded. What is the beginning point is a matter of law for the court to declare. This it did correctly. Where it is is for the jury to say, and the court so held. The objection is, in effect, that the court did not hold that, though 'a small oak, John Edwards' corner,' might be identified, it could not be held to be the beginning corner, unless it stood on the bank of the creek. This is not the case where two natural objects, a creek and a marked tree, are both called for, and the question arises which shall govern. The case now presented is where a marked tree is described as located on the side of a creek. Inquiry is:

Which shall govern, the tree as it is actually located, or as described to be located? The failure of the description may make it difficult to satisfy the jury that the tree claimed to be the 'small oak, John Edwards' corner,' is such. But, if the evidence is sufficient to identify it, the inaccuracy in describing the locality as 'on the side of the creek,' when it is 300 yards off, cannot be allowed to vitiate the grant. The exact point has never been decided in this state, but in *Murray v. Spencer*, 88 N. C. 357, the court intimates that when a marked tree in the line of another tract is called for, and the marked tree * * * is identified, but is not in the line of the other tract, the tree will be held the true corner, and the misdescription of it, as being in such other line, will be disregarded. And the point is expressly so held by Judge Story in *Cleveland v. Smith*, 2 Story, 278."

And the same rule was followed in *Fincannon v. Sudderth*, 140 N. C. 246, 52 S. E. 579.

In *Murray v. Spencer*, 88 N. C. 357, where the conflict was between a tree and the line of another tract, both being called for, it was held to be a question for the jury to determine as to which one was actually adopted. In our case the referee and judge have decided in favor of the line, and it is intimated by Justice Ruffin that, if the line was well known and its location certain, the preference should be awarded to it, as between the two objects in the call. Physical monuments are generally preferred to other objects in the call, because they are more durable, and in some respects more reliable, but even they will give way to a more certain and definite call, in the grant or deed, especially if the intention is clearly manifested that they should not govern or control in ascertaining the location of the land.

It was held in *Jamison v. Fopiano*, 48 Mo. 194:

"Although monuments will generally prevail over other calls in a deed, yet if, taking the whole deed together, they are apparently erroneous, they will be disregarded. And a boundary may be rejected when it is clear that it was inadvertently inserted, and that a tract with different boundaries was intended to be conveyed. * * * In the construction of deeds, words are not the principal thing, but the intent and design of the parties; and therefore when there are any words in a deed that appear repugnant to the other parts of it, and to the general intention of the parties, they will be rejected. * * * The evident intention here was to convey the whole Lami tract, and the error of the parties in designating a boundary line ought not to defeat that intention"—citing *Grison v. Bogy*, 28 Mo. 478; 4 *Greenleaf's Cruise*, 307, 338, and note; *Thatcher v. Howland*, 2 Metc. (Mass.) 41; *Bosworth v. Sturtevant*, 2 Cush. (Mass.) 392.

"While natural objects and artificial boundaries will generally prevail over course and distance, yet the former will often, from the nature of the case, be compelled to yield to the most inferior call. Everything being equal, the call for natural objects would have precedence, because most enduring and less liable to change, and are supposed to be selected as landmarks because of their immutability. This is only true when they are selected as locative calls, and are then not always absolute; when they are noted in the field notes as mere incidental calls in passing, their reliability is weakened and sometimes rendered wholly worthless. Distances called for between corners to creeks or

roads, unless specially designated in such manner as to show the intention to make them locative, are not such, and will not ordinarily have precedence over a call for course and distance. The calls in the Hunt deed for the creek and road are incidental, and, unless shown to be intended as locative, should not be so regarded if inconsistent with other locative calls." *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170.

See, also, *Lutcher v. Hart* (Tex. Civ. App.) 26 S. W. 94; *Page v. Scheibel*, 11 Mo. 167, 187.

It was held in *White v. Luning*, 93 U. S. 514, 23 L. Ed. 938:

"(2) As a general rule monuments, natural or artificial, referred to in a deed, control its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. (3) If monuments are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed, that they were inadvertently inserted, they will be rejected. (4) Other things being equal, boundaries prevail over courses; but, where the courses and distances inclose the identical land in dispute, it would be wrong to let two false boundaries stand, in order to defeat a conveyance."

See, also, 1 *Jones on R. P.* §§ 382, 383, 384; 2 *Devlin on Deeds*, 1405, 1406; *Noonan v. Lee*, 2 Black (U. S.) 504, 17 L. Ed. 279; *Shipp v. Miller*, 2 Wheat. 316, 4 L. Ed. 248; *Davis v. Rainsford*, 17 Mass. 207; *Thatcher v. Howland*, 2 Metc. (Mass.) 41; *Parks v. Loomis*, 6 Gray (Mass.) 472; *Hamilton v. Foster*, 45 Me. 40; *Evans v. Greene*, 21 Mo. 170; *Bass v. Mitchell*, 22 Tex. 285; *Bagley v. Morrill*, 46 Vt. 99; *Atkinson v. Cummins*, 9 How. (U. S.) 485, 13 L. Ed. 223; *Browning v. Atkinson*, 37 Tex. 633; *Barclay v. Howell*, 6 Pet. (U. S.) 511, 8 L. Ed. 477.

In *Mayo v. Blount*, 23 N. C. 283, it was said to be "a sound rule of construction that a perfect description, which fully ascertains the corpus, is not to be defeated by the addition of a farther and false description." *Cherry v. Slade*, 7 N. C. at page 96; *Henderson, J.*; *Proctor v. Pool*, 15 N. C. 370; *Shaffer v. Hahn*, 111 N. C. 1, at page 11, 15 S. E. 1033; *Shultz v. Young*, 25 N. C. 385, 40 Am. Dec. 413.

We find it stated in plaintiff's brief that: "When a deed sufficiently identifies a thing by its known or other means, and then superadds, unnecessarily, to the description, such further description, though inaccurate, will not vitiate the previous and perfect description"—citing *Simpson v. King*, 36 N. C. 11; *Mortgage Co. v. Long*, 113 N. C. 126, 18 S. E. 166.

This is because of the maxim, "Falsa demonstratio non nocet." If the line should be run from A to D and then extended to the head of Defeat ridge on the Tennessee line, so as to satisfy both calls (*Clarke v. Wagner*, 76 N. C. 463), it would be of no benefit to the plaintiffs, as we understand. But the mention of Defeat ridge was evidently incidental, and not intended to be locative. It was merely a mistake of the parties as to where the Bryson corner was. As we have seen:

"All authorities unite in saying that no rule can be invoked, no matter how correct in its

general application, that tends to defeat the intention of the grantor." *Elliott v. Jefferson*, supra.

In this case, the mistake in the call for Defeat ridge is corrected by other more certain descriptions in the grant, which is one of the permissible methods of ascertaining what was meant. *Campbell v. McArthur*, 9 N. C. 33, 11 Am. Dec. 738; *Ritter v. Barrett*, 20 N. C. (4 Dev. & B.) 266; *Cooper v. White*, 48 N. C. 389; *Kissam v. Gaylord*, 44 N. C. 116. There are several facts which tend to show clearly what property was intended to be described: (1) There is no reference in the grant to the Deep Gap or Forester ridge, but the call is for a course due north to the Tennessee line, and this course is deflected, not to coincide with Deep Gap or Forester ridge, but with the Bryson line, beginning with it, running with it, and "cornering" with it at its northeast corner, where the maple is. We must therefore adopt it as the line, or at least as a part of the line. *Mizell v. Simmons*, 79 N. C. 187; *Cansler v. Fite*, 50 N. C. 424. (2) If the call is run with the Bryson line, and stopped at the Bryson northeast corner, the other calls of the grant fit in with it, whereas, if run as plaintiffs contend it should be, there are marked discrepancies. (3) The Bryson line was marked, when the first or Siler survey was made, at both of its ends, and has for its northeast corner a maple, which identifies it with certainty. (4) There are subsequent calls in the Bryson survey for physical monuments just as certain and as reliable as Defeat ridge, and they would not be reached without greatly lengthening lines, if the line is carried to Defeat ridge. One of them is "700 poles to a beech, where the Locust ridge reaches the Tennessee line."

It will be conceded, we presume, that the mere understanding of the parties, without more, as to the location of Bryson's line and northeast corner, cannot control the call. *Hough v. Martin*, 22 N. C. 379, 34 Am. Dec. 403; *Johnson v. Farlow*, 33 N. C. 199; *Literary Fund v. Clark*, 31 N. C. 63; *Wynne v. Alexander*, 29 N. C. 237, 47 Am. Dec. 326; *Sasser v. Herring*, 14 N. C. 340; *Land Co. v. Erwin*, 150 N. C. 41, 63 S. E. 356; *Miller v. Bryan*, 86 N. C. 167; *Ingram v. Colson*, 14 N. C. 520; *Patton v. Alexander*, 52 N. C. 603. The call is not from the chestnut oak (at A) to Defeat ridge (at B), but a very different one, and, if you go to Defeat ridge at all, it must be by way of the Bryson line, and importance must be attached to the fact that it also calls for Bryson's corner as the end of the line. The Bryson line, at the time, had been well established, having one corner at the chestnut oak (at A) and the other at the maple (at B), with marks on the trees indicating its course. It could easily be identified, and was certainly identified.

There are many exceptions to evidence in the case, but we think they can be so classified as to present but few questions for our consideration.

[5, 6] First. The testimony of the witnesses M. L. Kelly, P. C. Sawyer, and Joseph M. Greer, and any other of the same kind, as to the declarations of B. L. Sawyer concerning the Bryson line, was properly limited by the court to what was actually done on the Kelly survey. The declarations of B. L. Sawyer as to the location of the Bryson line were incompetent, because he was not shown to be disinterested at the time they were made, and, on the contrary, it appears that he was interested at the time of the alleged declarations. *Morgan v. Purnell*, 11 N. C. 97; *Sasser v. Herring*, 14 N. C. 340; *Hedrick v. Goble*, 63 N. C. 48; *Caldwell v. Neely*, 81 N. C. 114; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782; *Hemphill v. Hemphill*, 138 N. C. 504, 51 S. E. 42; *Hill v. Dalton*, 140 N. C. 9, 52 S. E. 273; *Lumber Co. v. Branch*, 150 N. C. 240, 63 S. E. 948. The declarations of a grantor are not competent in favor of one claiming under him. *Sasser v. Herring*, supra. We need not say whether the evidence is sufficient to show the declarations were ante litem motam. It may be said that, where the declarant has parted with his interest, what he has afterwards said about lines and boundaries cannot be used against those claiming under him to disparage their title. The same principle applies to the testimony of the witness A. C. Hoffman.

[7, 8] Second. The testimony as to the contents of the deposition of Bent Cook was properly excluded, as the witnesses were not able to give the substance thereof (*Wright v. Stowe*, 49 N. C. 516; *Whitmire v. Heath*, 155 N. C. 304, 71 S. E. 313); and besides, the deposition itself was not competent, as it had not been opened and passed upon, when it was destroyed, and never has been restored for that purpose. *Revisal*, § 1652. It may be added that the testimony of Bent Cook as to declarations of Bryson was incompetent, as they were made after Bryson had disposed of his interest, and would disparage the title of those claiming under him. 16 Cyc. 979. The testimony of T. T. Jenkins and T. J. Calhoun was properly excluded, and is governed by what we have already said in regard to the other excluded evidence. Besides, it does not clearly appear when the alleged declarations were made.

[9, 10] Third. The testimony of William Walker as to line trees was not sufficiently definite as to kind of marks or their age, and in other respects was very indefinite. Even if there was any error, it was not sufficiently harmful for a reversal.

[11] Fourth. Testimony as to the acts and declarations of Kope Elias was properly rejected. The relation between George W. Swepson and Elias, as client and attorney, appears to have been severed at the time of the alleged acts and declarations by the death of Swepson, and we can see no authority in Elias to bind Swepson by his acts or decla-

rations. It surely did not arise out of their relations as attorney and client.

[12] Fifth. The copy of the grant to Geo. S. Walker, No. 138, taken from the registry, was properly admitted in evidence. By Revisal, § 988, it is provided that the registry of a deed, or duly certified copy thereof, shall be evidence in any court of the state, without accounting for the nonproduction of the original, and by sections 1598 and 1599 it is further provided that the court may "upon affidavit suggesting some material variance from the original in such registry or upon other sufficient grounds," by rule or order, require the production of the original of such deed, in which case the same shall be produced, or its absence duly accounted for according to the course and practice of the court. In this case, upon affidavit, Judge Peebles ordered that defendants allow plaintiffs to inspect the original grant, No. 138, and the plat and certificate of survey thereto attached, or show to the satisfaction of the court that they had made diligent effort to find them and failed, and, on failure to produce the original grant, that they procure and use a certified copy of the same from the office of the Secretary of State. The latter was offered in evidence, and the court found that defendants had never had the originals in their possession or under their control, and that they had made a bona fide effort to produce the original papers by doing the things and making the inquiries and search detailed in the finding. Thereupon the court overruled the exception to the admission of the copies. We concur with his honor that reasonable search had been made for the missing papers, and that the order of Judge Peebles had at least been substantially complied with. It was fairly exhaustive as to sources of information, and probable places of deposit, and to have required more would have rendered it practically almost impossible to have complied with the order. There is really no tangible or reliable proof that there is any variance between the originals and the copies; none upon which a finding to that effect should legally be made. It is merely suggestion, conjecture, or supposition; but, even if there had been some proof to that effect, the defendants satisfied the court that they had made a diligent effort to comply with the order, as they were required by its terms to do. Justice Ruffin said in *Love v. Harbin*, 87 N. C. at page 254:

"A main purpose intended to be accomplished by registration is the perpetuation of the instrument, and of the memorial of its probate and order of registration, and it will not do to hold that this intention of the statute may in every case be defeated by a notice to produce the original. Under the operation of such a rule, it would be next to impossible to establish any title depending upon very ancient deeds, as they are rarely preserved so as to pass with the land; and this partly because it is universally understood that, when once registered, the proofs of their execution and probate are perpetuated."

[13] Sixth. As to the testimony of Mr. Davidson in regard to proceedings in *Wyman v. Taylor*, we do not see how it could be competent, if relevant to the issue in this case, to show that the court refused certain instructions in that case. It was *res inter alios acta*. The court submitted the evidence for the purpose for showing the *litem motam*, as the record states.

[14] Seventh. The description in a junior grant may not be evidence of the location of lines or boundaries of a senior grant (*Sasser v. Herring*, supra; *Hill v. Dalton*, 136 N. C. 339, 48 S. E. 784), but it was the survey of Siler that fixed the Bryson line, and this was made prior to the date of the senior grant, No. 3290. This is quite a different question from the one decided in the cases cited. The court properly admitted the map and certificate of survey to corroborate Siler.

[15] Eighth. If there is any defect in the defendant's chain of title, it does not concern the plaintiffs in this appeal, as they must recover upon the strength of their own title, and not upon the weakness of their adversary's. They cannot recover by showing merely that defendants had no title, even if this be true.

[16] Ninth. The referee was not bound to find a fact simply because there may have been some evidence of it, as he had the right to weigh the same, and therefore he could consider the evidence of reputation as to the Bryson line in connection with the other evidence in the case, and was not compelled to find in accordance with the reputation. He considers the whole evidence, and not merely a part of it, and this applies to other exceptions based upon his failure to find certain facts.

[17] Tenth. The testimony of Jos. M. Greer, as to certain facts told him about the Bryson northeast corner at Defeat ridge, was properly excluded, as he said, "It seemed to be agreed by all of said persons," but just who it was that called his attention to it, he would not say positively, because he did not recollect every person present. This was entirely too indefinite. He did not and could not say who it was, nor did he state what was said, so that the court could judge of the quality of the testimony, but he was only able to state that "it seemed to be agreed by them." The witness must be able to give the substance of what was said and by whom, and the impression made on him will not answer the purpose. This was held in *Grant v. Mitchell*, 156 N. C. 15, at page 18, 71 S. E. 1087, at page 1089, Ann. Cas. 1912D, 1119, where it is said:

"The secondary witness may * * * give the substance, but not the mere effect, of the former testimony. To allow him to state the latter only would be to permit him to decide upon the effect of the testimony, instead of submitting it to the jury, to whom it properly belongs"—quoting from *Jones v. Ward*, 48 N. C.

26, 64 Am. Dec. 590, and citing *King v. Joliffe*, 4 Term. R. 290.

There are a few more exceptions, but they are fully covered, we think, by what we have said in regard to the others, and require no further discussion. It may be said generally, and in conclusion, that no reference is made in grant No. 3290 to Deep Gap or Forester ridge as a line of the grant, and this is made more significant by the fact that it is referred to only for the purpose of describing the beginning corner at the chestnut oak (A on map), and the next call is "north with Col. T. D. Bryson's line," and so forth, and not "north with the Deep Gap or Forester ridge, Col. Bryson's line," as we would expect if the ridge controlled the call. The referee and judge find that it was not the intention to make the ridge one of the lines, or Defeat ridge one of the corners, but the sole intention was to start at the chestnut oak and go to the sugar tree or maple at the head of Big Chestnut ridge. It is found as a fact that in the survey of 1871, for grant No. 3290, the line was measured along Deep Gap or Forester ridge and carried to Thunderhead, it being the head of Defeat ridge, in order to retrace the survey of 1867, for the purpose heretofore stated, which was triangulation; the object being to locate the line from A to D, or from the first corner to the sugar maple, and to establish, at the latter place, the Bryson northeast corner. If a line had been run along Deep Gap, it could not be adopted as a line of the survey, unless it was so intended to be, and it is found by both referee and judge that there was no such intention. The line from A to D was marked for some distance at either end, and cuts or hacks made on the chestnut tree at the place of beginning, and, at the time, indicating its direction. Besides, to fix the line at A D will harmonize with the other calls of the Bryson tract of land. All these things being considered, and others could be added, make it safer and more certain, as a guide to the intention of the parties, that the call should be controlled by the Bryson line as thus located, from A to D, than by the line A B, which is not even north, and has no such indicia of a line as we find on the other. Again we say physical monuments will have the preference in the calls, unless there is some more definite and certain call that clearly indicates the intention of the parties. There is no hard and fast rule of the law that is permitted to have the effect of defeating the clearly expressed will of the parties.

It must be borne in mind that we are dealing with a referee's report, in which the facts were found and the findings afterwards confirmed by the judge, and this renders many of the cases cited by the plaintiff inapplicable. It is found, for instance, that the line from A to B was not run and marked, nor was it intended to be the first line of

the Kelly survey, but the line A D was intended to be the first line, and further that the line A B, by Forester's Deep Gap ridge, was run, though not marked, for the purpose solely of locating the line A D, as the first line of the tract; the Kelly survey having been made just as was the Siler survey and for the same purpose. The rule, therefore, which classifies locative calls into natural objects, mountains, rivers, lakes, and creeks, artificial objects, as marked trees lines, and course and distance, giving them rank in the order named, does not require, in this case, that the first line should run from A to B, without any regard to the call for Bryson's line, as the line A D was actually run and marked for the first line, and besides there are other calls in the survey of equal importance with the one for Defeat ridge, which would have to be disregarded, if that is adopted as the end of the first line. If the line is run from A to D, we are following the footsteps of the surveyor, and rejecting a false description for that which is not only certain, but which the referee and judge say was the one actually adopted by the parties at the time of making the surveys. This is not a case where there is a call by course merely to a certain object, for here the course is controlled by an additional call for a well-established line of another tract, which was actually run and marked when the Bryson line was surveyed, and the question is whether the course should be along said line. The well-settled rule, and the true construction of the grant, require this departure from the course. *Lumber Co. v. Hutton*, 159 N. C. 445, 74 S. E. 1056; *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581; *Bowen v. Lumber Co*, 153 N. C. 366, 69 S. E. 258. Abstract rules of law should not be so applied as to disappoint the clear intention of the parties (*Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. [N. S.] 514; *Gudger v. White*, 141 N. C. 507, 54 S. E. 386). and the rules of law in respect to boundary were adopted to prevent such a result. It may be added that Forester or Deep Gap ridge, along which the Kelly survey is claimed to have been made, appears to be quite as prominent and as well known as Defeat ridge, and yet there is no mention of it in the surveys, or the grants, as a line. It is argued by plaintiffs that it would be far more certain, if called for, than the line of another tract, and, if this is so, why did not the surveyor call for it?

The record and the briefs are voluminous, the record containing 805 and the briefs 342 printed pages, and there were a large number of exceptions, running into the hundreds. Some of the questions are highly important and very delicate in certain of their phases. The case has been strenuously contested, with great ability and research, and the court has bestowed upon it most careful study and reflection. We have concluded

that we but decide it upon its true legal merits, when we hold that no error was committed at the hearing in this the plaintiff's appeal.

No error.

Defendants' Appeal.

PER CURIAM. In the defendants' appeal it is found, and so adjudged by the court, that there is no error in the proceedings or judgment.

No error.

Plaintiffs' Appeal.

BROWN, J. (dissenting). I feel compelled to differ from the conclusions reached by the majority of the court in this case, and I will state my reasons as briefly as possible.

This is an action brought to recover a triangular tract of land, delineated on the map as beginning at A, running to B, thence to D, and back to A. The plaintiff's appeal involves the proper location of the first line of grant No. 3290. The beginning corner of this grant is admitted by all parties to this action to be correctly located, and is shown on the court map at the letter A. The description of grant 3290 may be analyzed as follows: (1) A tract of land containing 10,000 acres. (2) Lying in Macon county, section No. —, District No. —. (3) Being part of the lands lately acquired, etc. (4) Bounded as follows, viz. (5) On the waters of Hazlenut creek. (6) Beginning at a chestnut oak on a trail leading from the mouth of Sugar Fork creek to the Deep Gap. (7) Beginning and running with Col. T. D. Bryson's line. (8) Eighteen hundred poles north to the Tennessee line at the head of Defeat ridge. (9) Cornering with Bryson's northeast corner. (10) Thence east 700 poles to a beech where the Locust ridge reached the Tennessee line, etc.

It is admitted that the chestnut oak at A is the beginning corner of this grant. I am of opinion: (1) That the first line of grant 3290 begins at A and runs to B on the map as a conclusion of law wholly irrespective of whether there ever has been or is now a "Bryson's line," and regardless of where it was located or alleged to have been located. In other words, the existence and location of this line is entirely immaterial for the purpose of establishing the first line of grant 3290. The admitted facts show that this grant was located by starting at A and running to B; this being the identical line actually run and marked at the time the entries were made. (2) Assuming that the Bryson line is material, it appears to be undisputed that, at the time of the survey in 1871 and the issuance of grant 3290 thereon in 1872, the line from A to B was reputed to be the Bryson line, even though that reputed was incorrect, and the surveyor located the first line of grant 3290 under the belief that he was running with the true Bryson line. and

he acted upon that belief, although it may have been erroneous.

The referee finds:

"That Defeat ridge is located, as plaintiff claims, being the ridge going up between the prongs of Little river, in Tennessee, and the head of Defeat ridge culminates at and with other converging ridges and forms the easternmost knob of the group of knobs known as Thunderhead, on the state line between North Carolina and Tennessee; the said head of Defeat ridge being at the point marked 'B' on the official map."

The court finds that in making the survey in 1871 of the B. L. Sawyer entries, upon which grant No. 3290 issued, in 1872 M. L. Kelly, the county surveyor, with his crew, surveyed from the said point A up the Deep Gap or Forester ridge to the top of the Smoky Mountains at B at the head of Defeat ridge, and at the said point B made and marked a corner on a tree of the survey he was then making and upon which grant No. 3290 issued. The said tree was marked as a corner by M. L. Kelly in 1871, having been previously marked as a corner of the Bryson survey in 1867.

The call for 1,800 poles north to the Tennessee state line at the head of Defeat ridge is, in my opinion, controlling. There are two well-defined objects that are unmistakable; one is the state line that divides North Carolina and Tennessee, and the other is Defeat ridge. This ridge, as shown by the evidence, and not controverted, is one of the most prominent natural objects in the whole of that great range of the Smoky Mountains, and because of its prominence has been long and well known to the citizens and inhabitants of both states of Tennessee and North Carolina, as well as to the United States surveys and to geographers. It would be difficult to find a better defined and located natural object, or one better known in all that country. The location of this ridge, where it joins the Smoky Mountains, and its relation to the state line, was overwhelmingly established by the evidence, and the court found the fact to be that it was located at B.

It was also admitted that the dividing line between the states of Tennessee and North Carolina passed along the crest of the Smoky Mountains. So that we have here a remarkable conjunction, in fact, of both the descriptions mentioned in the surveyor's certificate of his survey, and the grant issued thereon, viz., "the Tennessee line and Defeat ridge."

These facts being practically admitted or indisputably ascertained, under the repeated and well-settled decisions of this court, it follows, as the legal result, that the first line of grant 3290 begins at A and runs to B. As I read the cases, this rule of law may be regarded as an ancient one in this state, and so well settled that it can hardly be seriously questioned.

Among the many cases cited in the elaborate and learned brief of the plaintiff's counsel, we find the following to be especially in

point, where the rule is most instructively applied to facts very similar to those in the case under consideration: *Miller v. Cherry*, 56 N. C. 29; *Jones v. Robinson*, 78 N. C. 398; *Flannigan v. Lee*, 19 N. C. 430; *Carson v. Burnett*, 18 N. C. 558, 30 Am. Dec. 143; *Jones v. Bunker*, 83 N. C. 327; *Reed v. Shenck*, 14 N. C. 65; *Graybeal v. Powers*, 76 N. C. 71; *Waters v. Simmons*, 52 N. C. 543.

When a deed sufficiently identifies a thing by its known name, or other means, and then superadds, unnecessarily, to the description, such further description, though inaccurate, will not vitiate the previous and perfect description. *Simpson v. King*, 36 N. C. 11; *Mortgage Co. v. Long*, 113 N. C. 126, 18 S. E. 165; *Proctor v. Pool*, 15 N. C. 373.

The head of Defeat ridge is a natural object so commanding in its character that it answers the description fully, and is sufficient of itself to locate the second corner, regardless of whether the line runs with Bryson's line or not. The unnecessary and false description will be disregarded and the line run to this controlling natural monument.

In *Ehringhaus v. Cartwright*, 30 N. C. 42, it is said:

"Many of the rules respecting boundaries are examples of preferring one part of the description, turning out to be true, to another part, turning out to be untrue. The case of *Proctor v. Pool*, 15 N. C. (4 Dev.) 370, is an instance of the application of the rule to a general description of the thing devised; the court holding that the effect of the true description was not to be weakened by a further and unnecessary false description." *Smith v. Low*, 24 N. C. 460.

In *Miller v. Cherry*, 56 N. C. 29, it is said:

"Our decision is made under the rule that where more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake would be committed, and that be rejected in regard to which mistakes are more apt to be made. This is a rule of frequent application. If a tract of land be described by natural objects, or corner trees, and also by course and distance, and there turns out to be a discrepancy, the latter description is rejected."

In *Addington v. Jones*, 52 N. C. 584, the court said:

"This rule, in respect to questions of boundary, presupposes that the description which is to control, and be put in the place of course and distance, has of itself sufficient certainty to locate the land, supposing the 'course and distance,' which it controls and contradicts, to be stricken out of the grant."

In *Stafford v. King*, 30 Tex. 257, 94 Am. Dec. 308, it is laid down that the general rules in respect to locating land are: (1) By natural objects, such as rivers, mountains, lakes, creeks; (2) artificial marks, such as marked trees and lines; (3) course and distance. In this case Chief Justice Marshall is quoted as having said:

"That the most material and most certain call shall control those which are less material and less certain."

In this case it is laid down as a prime rule that:

The "footsteps of the surveyor must be followed, and the above rules are found to afford the best and most unerring guides to enable one to do so."

In *Doe v. Paine*, 11 N. C. 71, 15 Am. Dec. 507, it is said that:

"When the natural boundary is unique, it has properties peculiar to itself."

A more distinctive, commanding, and controlling object could scarcely be thought of than the well-known head of a great mountain ridge.

In *Carson v. Burnett*, 18 N. C. 558, 30 Am. Dec. 143, it is said:

"The object in all boundary questions is to find some certain evidence of what particular land was surveyed, or was intended to be conveyed. * * * When the call is for the line of another, it has also been held that course and distance may yield to it. But it is obviously not so decisive as the call for a natural boundary."

In *Waters v. Simmons*, 52 N. C. 543, the court stated:

"One of the calls of the grant * * * is 'the head of Spellar's creek,' which is certainly * * * a natural object," etc. "It was the duty of the court then to instruct the jury that, as a construction of law, 'the head of Spellar's creek' was one of the corners of the defendant's tract of land," etc.

This is precisely in point in the case at bar. The call is to the state line at the head of Defeat ridge. Defeat ridge is a "natural object." Its head is at the Tennessee line, and it was the duty of the judge to declare that it was one of the corners of the grant, No. 3290, to W. L. Love.

The defendants insist that the way to go to B from the admitted beginning at A is to run from A to D, the head of Big Chesnut ridge, and the defendants alleged northeast corner; thence westerly along the top of the mountain to B, a distance of three or four miles; and then run back in an easterly direction over precisely the same line and same distance to D; and then resume the survey of the lines of grant 3290 along the mountain until they turn southwardly to the beginning. The referee so concluded, and his judgment was affirmed by the court below. In view of the well-settled principles of law set forth in the cases that we have cited, I see neither reason in nor authority for such ruling.

The defendant, admitting that the Bryson line was actually run, as claimed by the plaintiff, undertakes to explain it by saying that the straight line from A to D, intended as a Bryson line, was not actually run and marked from A to D because the line would run through a country badly infested with rattlesnakes, and therefore they ran from A to B and by triangulation platted the true Bryson line from A to D. This explanation may or may not be true, but it cannot have the effect of changing the controlling call for Defeat ridge. It is but added proof that the Bryson line was actually run where the plaintiff claims it was, and that is consistent with the call from the chestnut oak to Defeat ridge.

There are several exceptions to the evidence, which are set out in the assignments of error and commented on in the plaintiff's brief, some of which, in my opinion, are well taken and entitle the plaintiff to a new trial; but, in the view I take of the case, it is not necessary to prolong this opinion by commenting upon them.

I am of opinion that, upon the admitted facts, the plaintiff is entitled to judgment for the tract of land bounded and described in grant 3290, beginning at chestnut oak A and running to B at Defeat ridge.

The CHIEF JUSTICE concurs in this opinion.

(16 Ga. App. 408)

WALDEN v. MORRIS, Sheriff. (No. 6436.)
(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

1. PAYMENT OF FINE—EXTENSION OF CREDIT.

There is in the record no evidence that the plaintiff in error was ever extended credit by the sheriff, or the deputy sheriff, for the payment of the fine imposed upon him; hence the cases cited by counsel for the plaintiff in error are not applicable to this case.

2. WITNESSES —245—EXAMINATION.

Error is assigned upon the ruling that the sheriff, when being examined as a witness, need not answer the following question: "By what authority did you permit him [the plaintiff in error] to leave without bond, when you knew that his fine had not been paid?" In our opinion this question was irrelevant and immaterial, and the court did not err in this ruling. The sheriff had already testified that he did not turn the plaintiff in error out of jail, that he did not extend to him any credit upon his fine, and did not extend credit to any one else for this fine, and that Shaw (the man who the plaintiff in error testified had promised him immunity if he would swear against some other parties under arrest) was not his deputy, and had no authority to act for him in any way as an officer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. —245.]

3. HABEAS CORPUS —113—APPEAL—DISCRETION.

Large discretion is vested in the trial judge in habeas corpus cases, and this court will not interfere with his judgment on the law and the facts, unless his discretion is manifestly abused. Unless the finding is so manifestly contrary to the evidence as to indicate passion or prejudice, it will not be disturbed. *Evans v. Lane*, 8 Ga. App. 826, 70 S. E. 603.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. —113.]

Russell, C. J., dissenting.

Error from City Court of Nashville; C. A. Christian, Judge.

Habeas corpus by Richard Walden against W. E. Morris, sheriff. Judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Smith and Wm. Story, both of Nashville, for plaintiff in error. J. H. Gary, Sol., of Nashville, for defendant in error.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J. (dissenting). I deem the right of a rigid and sifting cross-examination, provided for by the Code, so important, and it is so clear to my mind that an answer of a certain kind on the part of the witness who was the respondent to the petition for habeas corpus might have corroborated the testimony for the petitioner, that I feel compelled to dissent from the judgment of the majority. I agree with the general proposition that the trial judge was clothed with almost plenary discretion; but, to my mind, the fact that the witness had already testified to certain pertinent facts sufficient to sustain his answer to the writ of habeas corpus affords no sufficient reason for denying to the opposite party the right of discrediting those statements. Usually a cross-examination is necessary, for the very reason that the testimony of the witness sought to be cross-examined has been damaged by the opposite party.

(16 Ga. App. 339)

PRAY v. PACE. (No. 5902.)
(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

TRIAL —170— DIRECTION OF VERDICT — INSUFFICIENCY OF ANSWER.

The answer to the petition alleged facts which, if proved, would have authorized a verdict for the defendant; and the demurrer, of course, admits the truth of all facts alleged in the pleadings which it attacks. The answer was not subject to general demurrer; and, in the absence of a special demurrer, the court erred in striking the answer and in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390-394; Dec. Dig. —170.]

Error from City Court of Albany; Clayton Jones, Judge.

Action by one Pace against J. K. Pray. Judgment for plaintiff, and defendant brings error. Reversed.

Pope & Bennet, of Albany, for plaintiff in error. Pottle & Hofmayer, of Albany, for defendant in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 411)

HINES v. STATE. (No. 6519.)
(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

1. ROBBERY —24— SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to warrant the verdict.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. —24.]

2. CRIMINAL LAW —385— EVIDENCE—COMPETENCY—AFFIDAVIT.

The court did not err in ruling out as immaterial and irrelevant what purported to be an affidavit of the prosecutor and principal witness for the state; the transaction to which it referred not being identified therein as the transaction involved in the trial then in progress, and there being no testimony establishing

any relation between the facts recited in it and the charge against the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 865-868, 870, 878; Dec. Dig. § 385.]

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Carl Hines was convicted of robbery, and brings error. Affirmed.

A. E. Wilson and Albert Kemper, both of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

WADE, J. Carl Hines was convicted under an indictment charging him and Ned Ellerby jointly with robbery, for that they did "wrongfully and violently, by force and intimidation, take from the person of Will Jennings, without his consent and with intent to steal the same, three and $\frac{75}{100}$ (\$3.75) dollars in money, of the value of three and $\frac{75}{100}$ (\$3.75) dollars and the property of said Will Jennings," etc. His motion for a new trial was overruled, and he excepted.

The evidence introduced in behalf of the state was in substance as follows:

Will Jennings testified that on or about June 13, 1914, Carl Hines and Ned Ellerby approached him, while he was walking down Pratt street in the city of Atlanta, and, after engaging him in conversation, asked him if he would not like to gamble, suggesting that they play "skin" or "pool"; that to this inquiry he replied that he did not gamble; that they then invited him to join them in visiting some "woman," and again he refused to favor them with his much-desired company. He said: "They both asked me about gambling, * * * and about going with them to see some women * * * and about betting on a belt." He further testified that he had \$3.75 in his pocket; that Ned Ellerby ran a hand in his pocket, and that he "grabbed" Ellerby's hand in an effort to save his money; that, while he had hold of Ellerby's hand, "that man there [referring to Hines] hit me under the ear and then struck me on the shoulder, and I hollered for the officers, and they run off as far as to the back side of the house, and I run after them;" that Hines "had a knife; that was all the weapon I seen; he drew it on me; they took \$3.75 from me, out of my pocket, and then run off together;" that when he called for the police Hines and Ellerby became frightened and ran; that he followed in an effort to regain his stolen money, and, when he was within a short distance of Ellerby, who had his money, Hines gave Ellerby a knife, and thereupon Ellerby "made at me with the knife, and I ran myself." On cross-examination the witness apparently became confused and contradicted himself somewhat in his testimony as to exactly how the robbery occurred, and said that "the other man [meaning Ellerby] hit me and took

the money out of my pocket," while on direct examination he said that Ellerby "ran his hand in my pocket, and I grabbed his hand, and that man [Hines] hit me under the ear and then struck me on the shoulder."

Mollie Cochran testified that she lived on Pratt street, where the robbery occurred, and that she saw Hines and Ellerby hold up Will Jennings; that Carl Hines gave Ned Ellerby a knife when Jennings ran after him; that he ran "about a block on Armstrong between Pratt and Butler streets, and then Carl took the money and ran off with it, and Ned turned on this man [Jennings] with a knife"; that "they scuffled there on the street, both of them were holding Will Jennings." She testified that she had known the defendant Carl Hines for a long time; that she had never had him arrested, and had nothing against him.

The defendant made a short statement of only a few lines, in which he seemed to think it more important to impress the jury with the idea that the witness Mollie Cochran was an enemy of his, who cherished many grievances against him, than to assert his innocence.

[1] 1. In the motion for a new trial it is contended, first, that the evidence adduced at the trial of this case did not prove beyond a reasonable doubt that the crime of robbery was committed as charged in the bill of indictment; that there was no evidence which proved that Ned Ellerby, the defendant's confederate, used force in abstracting the money from Will Jennings, or that Jennings in any wise resisted the effort by Ellerby to take his money, and therefore the crime committed was not robbery, but larceny from the person. We cannot agree with counsel in the above contention, since it appears from the evidence (without contradiction, except by the defendant's statement) that Ellerby ran his hand in Jennings' pocket, and that Jennings "grabbed" his hand in an effort to save his money. If this be true (and the jury certainly had the right to accept this testimony if they saw fit to do so), it necessarily follows that, since the prosecutor, Jennings, "grabbed" Ellerby's hand, Ellerby was obliged to use force in abstracting the money so taken. Not only was this sufficient to authorize the jury to infer that force was used in taking the money, but the evidence that Jennings was beaten and bruised was of itself a sufficient circumstance to show that actual force was used. As to whether Jennings resisted the efforts of Ellerby to take his money, it is enough to say that the Supreme Court and this court have time and again held that, if force be used, it avails the accused nothing if the person robbed makes no resistance, or is even unconscious at the time that a robbery is being perpetrated. *Moran v. State*, 125 Ga. 33, 53 S. E. 806, and cases there cited.

It will be noted that what is said above

concerns Ellerby, the defendant's partner in crime; and since it appears to us that the evidence was sufficient to make out a plain case of robbery against him, the next question which presents itself for our consideration is the second one raised in the motion for a new trial, to wit:

"If Ned Ellerby was proven guilty of the crime of robbery, was Carl Hines a principal in the second degree?"

We think the evidence introduced in behalf of the state was sufficient to authorize the jury to find that Hines and Ellerby were acting in concert, under an arrangement or agreement and with a common intent to rob Jennings, and that the act of one in the furtherance of this agreement was therefore the act of the other. Section 42 of the Penal Code, defining principals in the first and second degrees, is as follows:

"A person may be principal in an offense in two degrees. A principal in the first degree is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the act to be done," etc.

In 12 Cyc. 187 (note), it is said that:

"In a statute providing that one who aids, abets, or procures another to commit a crime may be prosecuted the same as the principal [see section 43 of the Penal Code], the word 'aid' means to help, assist, or strengthen; the word 'abet' to encourage, counsel, induce, or assist; and the word 'procure' means to persuade, induce, prevail upon, or cause."

See, also, *State v. Snell*, 5 Ohio S. & C. P. Dec. 670.

The evidence as to the precise part Hines played in committing the offense charged in the indictment is, as said above, somewhat conflicting, and of such a character that it is very difficult to determine what is the exact truth of the case. There was evidence, however, sufficient to support the verdict returned, conceding, for the sake of the argument, that the testimony of the prosecutor that Hines "didn't put his hands on me, he didn't touch me," be true (though he testified differently on direct examination), the evidence amply shows that the defendant aided and abetted in the crime charged and was actuated by the same criminal intent as Ellerby. The uncontradicted evidence of the prosecutor shows that both the defendant and Ellerby, his associate, approached him, and that both invited him to engage in certain named games of chance, and also suggested that they visit a certain woman, or certain women, from which the jury might have been authorized to infer that the accused was then acting in concert with Ellerby, as these joint invitations certainly furnished very strong ground for the conclusion that he and his companion, Ellerby, were actuated by a common intent, and that he was therefore equally responsible with Ellerby for what thereafter followed. In 2 Am. & Eng. Enc. L. 33, it is said that the presence, companionship, and conduct before and after the offense are all circumstances from which one's participation in the crim-

inal act may be inferred. As said above, we think this evidence, coupled with the undisputed proof as to the taking of the money from Jennings by Ellerby, might have been sufficient to warrant the verdict; but, in addition thereto, Mollie Cochran, an eyewitness of the robbery, testified that she saw the men when they robbed Jennings; that Hines gave Ellerby a knife, and Ellerby gave Hines the money taken from Jennings; that "they scuffled there on the street; both of them were holding Will Jennings." She testified, further, that she did not see Hines strike Jennings, but that Ellerby struck him on the head, while Hines held him. We think, therefore, that the grounds of the motion for a new trial, that the verdict is contrary to evidence and without evidence to support it, etc., are without merit.

[2] The amendment to the motion for a new trial presents one question for determination: Did the court err in excluding the following documentary evidence from the jury?

"Georgia, Fulton County.

"Before me, the undersigned authority, this day personally came Will Jennings, who, after being duly sworn, on oath says with reference to a certain criminal case pending against Carl Hines and Ned Elven, wherein said parties are charged with stealing \$3.75 from this defendant, that the said Carl Hines did not take the money from him, nor did he assist the said Ned Elven in taking said money, but that the money was taken and stolen by the said Ned Elven, and that he is the party that should be punished therefore, and not Carl Hines.

"[Signed] Will Jennings.

"Sworn to and subscribed before me this 5th day of January, 1915.

"A. E. Wilson,

"Notary Public, Fulton County, Georgia."

Without referring to any other possible objection to this affidavit, which was tendered in evidence for the purpose of impeaching the prosecutor by proof of contradictory statements, it is enough to say it was clearly irrelevant and immaterial. It will be readily observed that the affidavit purports to refer to "a certain criminal case pending against Carl Hines and Ned Elven, wherein said parties are charged with stealing \$3.75 from this defendant," and that nothing more is set out therein from which it may be determined that the affidavit is intended to relate to the specific case on trial against Hines in the superior court of Fulton county, under an indictment charging Carl Hines and "Ned Ellerby" jointly with the offense of robbery by force and intimidation. The affidavit does not disclose whether the "case pending" against Hines and "Elven," charged with stealing \$3.75 from Will Jennings, was pending in Fulton county, or in some other county of the state of Georgia, or even whether the case referred to was pending in Georgia at all; nor does it set out whether the two persons named therein were charged with simple larceny, robbery by force and intimidation, robbery by snatching, or larceny from the person, or that "Carl Hines"

and "Ned Elven" mentioned therein were the same persons named in the indictment as Carl Hines and Ned Ellerby; and therefore the affidavit does not necessarily relate or refer to the charge of robbery under investigation in this case. An affidavit purporting to have been made by the prosecutor in the case on trial, who had just testified to the guilt of the accused under a charge of robbery, which recited simply that the defendant was not guilty under a charge of stealing \$3.75 from him, and did not identify the charge referred to in the affidavit itself as the same charge under which the accused was then being tried, was clearly inadmissible, where there was no testimony going to show that the affidavit was intended to refer to the transaction then being investigated, or to the particular charge against the defendant who was then on trial, and where, on the contrary, the prosecutor, who was alone interrogated in regard thereto, and whose name purported to be signed to the affidavit, declined even to admit that he had subscribed to the same, and the affidavit itself did not by its terms and recitals apparently or necessarily relate to the case on trial. Had the attesting witness, who it appears was of counsel for the accused, and who was then and there present, testified, not only to the fact that the prosecutor had signed the paper, but also to the effect that the paper as signed was intended to relate to the particular charge of robbery preferred against Hines and Ellerby [not Elven] which was then on trial in the superior court of Fulton county, the affidavit might have been admissible for the purpose of impeachment.

Judgment affirmed.

(16 Ga. App. 393)

JORDAN v. STATE. (No. 6287.)

(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

1. HOMICIDE \S 309 — VOLUNTARY MANSLAUGHTER—INSTRUCTIONS—EVIDENCE.

The evidence authorized the instruction given to the jury as to the law of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. \S 309.]

2. HOMICIDE \S 340 — INSTRUCTIONS — EVIDENCE.

There is no merit in the one special assignment of error that the court erred in charging as to provocation by words, threats, menaces, or contemptuous gestures, without sufficient explanation that the fears of a reasonable man might be aroused thereby, for neither the testimony nor the statement of the accused suggests or intimates that any words, threats, or menaces, etc., had been used at the time the homicide occurred, or at any other time by the deceased to or towards the defendant. There is no reversible error where no possible injury could have resulted to the accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. \S 340.]

3. HOMICIDE \S 255 — VOLUNTARY MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

The evidence and the statement of the accused authorized the verdict of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541; Dec. Dig. \S 255.]

Error from Superior Court, Laurens County; W. W. Larsen, Judge.

Will Jordan was convicted of voluntary manslaughter, and brings error. Affirmed.

R. Earl Camp, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

WADE, J. [1, 3] Will Jordan was tried under an indictment for murder and was found guilty of voluntary manslaughter; his motion for a new trial was overruled, and he brought the case to this court for review. The brief of evidence discloses that one Luvenia Johns was the only witness who testified that she saw the fatal encounter between the defendant and the deceased, and her further statement that she herself, Lewis West (the deceased), Will Jordan (the accused), and the wife of the accused were the only persons present at the time of the tragedy is uncontradicted, except that the defendant, in his statement at the trial, denied her presence at the precise time the homicide occurred. According to the testimony of Luvenia Johns, West was standing on the back porch of her house when he was shot, with one foot on the ground and with one on the steps, and Will Jordan was standing "on the porch in the hallway," and Jordan's wife was standing behind Jordan; West had been at the house of the witness about a half an hour or more when he was shot, but had not been in the house; Jordan said nothing to Lewis when he shot him, nor did Lewis say anything to Jordan; the witness was standing there talking when Jordan came in the house, and Jordan's wife said he was drunk; Jordan heard his wife say that he was drunk; the witness turned around and caught Jordan in the collar, and said, "You must not come in here drunk," whereupon Jordan turned around and commenced shooting, and it appeared to the witness that he shot three times; she was holding, or tried to hold, Jordan, as she thought he was drunk, and he shot across her shoulders at Lewis, who was standing behind her, "sorter down on the ground." Jordan "snatched aloose" as soon as he finished shooting, and went back in the house, and the witness never saw him afterwards until the day of the trial in 1914. The shooting occurred in 1907. She further testified that the deceased had been painting at her house and was not yet through, as he was painting the inside and putting up wall paper; that he would have been back before the day he was killed, to finish the painting, but she "had to move out of the room to give him time, and he

came back to see about it, and that's the reason he was at my house"; that she did not hear the deceased say a word after he was shot, but when he was shot she heard a slight noise, and turned around and saw him fall backwards, and at that time Jordan ran "around her house and she never saw him again"; that Jordan lived just above her place, on the same street, with a vacant lot belonging to her between his house and hers, and that Jordan's wife had been at her house all the morning, until just before 9 o'clock, and West came there about 3 or 4 o'clock in the afternoon, and had been there about half an hour before the shooting took place; that West lived back of the witness' place about 100 or 150 yards, and did not come to her house except when he was working there, and that he had not been there at work in two weeks; that she "did not see any cause in the world for Will Jordan to shoot; he just shot him offhand," that when Jordan came to her house and his wife said he was drunk, he "acted like he was falling, and she said, 'Will, you are drunk and just can walk,' she had hold of him at that time and he was pushing and shoving her; they were pushing and shoving one another, and I grabbed him"; that up to the time that Lewis was shot he had not spoken a word to Jordan's wife, and the witness did not know whether the deceased was aware that Jordan's wife was even in the house or not, as Jordan's wife was in the kitchen, cooking preserves. This testimony would perhaps tend to support a verdict for murder.

There was testimony as to the nature of the wounds, which showed that one bullet entered the body of the deceased from the front and one from the back, and there was also testimony that the death of the deceased was caused by the bullet wounds inflicted by the accused. The testimony further showed that the defendant left the county and disappeared, and that when arrested in another county, three or four years later, and while he was returning in the custody of the officer to the place where the alleged crime was committed, he threw himself out of the window of a moving train and escaped, and he was not again arrested until some years later, and that his wife disappeared about the time he did, and had not been seen in the county where the alleged crime was committed until his trial. There was evidence introduced to show the good character of the accused, and there was also evidence to the effect that the accused had, on more than one occasion and by different persons, sent messages to the deceased that he objected to visits of the deceased to his wife at his house, and there was evidence that the deceased nevertheless was seen on several occasions thereafter at the house when the accused was absent, and when no one was at home but his wife, but there was no evidence that any improper relations ex-

isted between the deceased and the wife of the accused, or that they had ever been seen in any improper or compromising situation, or in fact that she had ever been guilty of anything immoral or improper with any one. There was also evidence that the deceased was not the only man who visited the house of the accused. The statement of the accused (omitting only his tribute to himself as a law-abiding citizen of industrious habits, and his statement that he had himself told the deceased to stay away from his house, and a further statement that a deceased wife of the man whose present wife, Luvenia Johns, testified for the state, had accused West of being his wife's "sweetheart," and was the first one to arouse his suspicion) was as follows:

"I had gone to my house that day, when this occurrence happened, and I had gone there for the purpose of having my potatoes bedded or banked. I asked the old gentlemen that pulled them up the day before to come and pull them up that day, and I had gone home and gone to my door to open it, and both doors were fastened, so I goes to Mary Gallemore's, next door to my house, and asked her could she tell me where my wife was, and she said, 'Yea, she was down to Mrs. Johns,' and so I goes down there and walks to the door, and I felt that there was something wrong, after not finding her at home, and I didn't knock on the door; I opened the door and entered in, and when I entered the room door I saw something drop down near in the corner with the scarf that covered the lounge, and I walked there and snatched it up, and it was my wife, and I said, 'What are you hid for?' and about this time this woman [the Johns woman] came running in from the kitchen (her kitchen is on a little veranda that extends to the kitchen), and she ran in, and they grabbed me, both of them, one on each side of me, and she said she had my wife cook fig preserves; and I said, 'What are you trying to scramble with me?' I said, 'She ain't cooking no fig preserves in here,' and she said, 'Come back and see,' and I heard some scrambling behind me, and this fellow Lewis West was coming out of the door. They had got me out of the room door and was making towards me, and he had a fine chance to get out of the front door. I left the door open when I came in the house, and I saw that they had me devoured, and he came right on to me and didn't turn until I shot him twice. I don't know whether I hit all the times or not, but he still kept on and run over me and the women both. Mrs. Johns, she claims she was in there, but she was not in there. That man was in the room, and I heard scrambling, and as I entered the door she just got up in time to throw the scarf over her head, and when I did this shooting, the first shot I had to make, I had to do it to make these women turn me loose to keep this man from killing me; he had plenty of chance to get out, the front door was in four or five feet, and they had me, trying to carry me to the kitchen; the kitchen was on the outside at the back veranda."

It will be observed, from an examination of the statement of the accused, that he nowhere charges that he discovered his wife and the deceased either in the act of adultery or about to engage in the commission of that crime, nor does he himself assert that they were even in a compromising position at the time when he entered the house of the Johns woman and discovered their presence. It

will also be noted that under his own statement it does not appear that at the time he shot West the latter was attempting to commit a felony upon his person, or was even armed with a deadly weapon; but, on the other hand, West was apparently endeavoring to leave the premises, though he says West was "making towards me." Some of the testimony discloses that the best and shortest way for the deceased to leave the house from the room where the statement of the accused placed him was through the front door, and the accused himself says:

"West was coming out the door [presumably the door of room where he claims to have discovered him]. They had got me out of the room door [in the hall] and was making towards me, and he had a fine chance to get out of the front door. I left the door open when I came in the house, and I saw that they [his wife and the Johns woman] had me devoured, and he came right on to me and didn't turn until I shot him twice. I don't know whether I hit all the times or not, but he still kept on and run over me and the womans both."

There is no hint or suggestion that West made any threats, menaces, or contemptuous gestures; that he approached the accused with any weapon, or even with the apparent purpose and intention of committing an assault less than a felony upon him; nor is there any specific claim on the part of the accused that he was acting under the fears of a reasonable man at the time he fired the two shots into the body of the deceased, notwithstanding his assertion, "I had to do it to make those women turn me aloose to keep this man from killing me," but according to his own statement, it would seem that West was seeking to escape from the room where the accused says he discovered him, by going down the hall and out of the front door, which he says was wide open and offered an apparent means of exit. Under the statement made by the accused himself, in connection with all the evidence in the case, it is only possible to explain his conduct at the time of the homicide on the natural assumption that, conceding the truth of his own statement that he seriously objected to the attentions he believed West had been paying to his wife, when he reached his home on the day of the tragedy and was told by the Gallemore woman that his wife was at the house of Luvenia Johns, and, following her there, discovered her (as he says in the same room with his real or imagined rival, West), and being at the time partially intoxicated, he became inflamed with rage and carried away by fury provoked by his finding West in the presence of his wife, notwithstanding his positive prohibition; that when West approached him with bare hands (so far as the evidence shows), either with the purpose of making an assault upon him less than a felony, or intending to pass by him and out of the front door, he was carried away by irresistible passion and fired the fatal shots.

Granting that the accused was intensely jealous, and granting that he had cause to

suspect the fidelity of his wife, it is easy to understand how he could have been carried away by an irresistible tide of passion, especially if he himself was at the time inflamed with alcohol when he discovered his wife with West, even though nothing actually improper appeared to be in progress at the time or about to occur. Of course, if, after witnessing the act, he had shot in a spirit of revenge, he would have been guilty of murder, but under the circumstances detailed by the defendant himself, it was possible for the jury to conclude that there was no admixture of deliberation whatever in the commission of the homicide, but that it was brought about by causes which, though insufficient to justify the defendant, would warrant a verdict of manslaughter rather than of murder, upon the idea that the killing was the result of sudden and uncontrollable passion. We think therefore that the evidence warranted a charge as to the law of manslaughter.

[2] The plaintiff excepts, in his motion for a new trial, to the charge of the court that:

"Provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." Penal Code, § 65.

The plaintiff in error contends that this charge, without further explanation, tended to confuse the jury, and also that the court should have explained, in connection therewith that words, threats, menaces, or contemptuous gestures might, under some circumstances, be sufficient to arouse a reasonable fear in the mind of the slayer, and thereby afford a complete justification for the killing. It is well settled by repeated adjudications that where an alleged error cannot result in injury to the party complaining, it will not afford a sufficient ground for reversal. "Error must be accompanied by injury." *Jackson v. State*, 16 Ga. App. —, 84 S. E. 974, and numerous other cases. From what has been said already, and from an examination of the statement of the accused himself, it will be seen that it was not stated or even suggested, that the deceased made any threats, menaces, or contemptuous gestures directed towards the accused, nor does it appear, even from the statement of the defendant, that he uttered one single word from the time the accused encountered him, either immediately in front of the house of the Johns woman (as she testified), or in a room of that house, as the defendant alleged in his statement to the jury. This instruction must therefore be treated as mere surplusage, which could in no wise have affected the rights of the accused. Nor can it be said that the court, in giving these words in charge to the jury, withdrew from their consideration the real defense which the accused sought to set up, to wit, that the deceased at the time was either engaging in or about to engage in adulterous intercourse with the

wife of the accused. The court charged the jury that if they believed—

"that the defendant came upon his wife and the deceased at the time when they were preparing to commit an act of adultery, or to have sexual intercourse, or under such circumstances as to evidence to a reasonable man that such act was intended or about to be committed, and that the defendant shot the deceased to prevent such adulterous act or intercourse, he would be justified in said act of shooting; but if, on the other hand, you do not believe the killing was done to prevent the deceased from attempting or consummating the impending adultery or intercourse, but was done in a spirit of revenge, to revenge a past adultery or intercourse, such an act would not be justified in the eyes of the law."

The court further charged them, if they believed "that the defendant came upon his wife and the deceased together in such a position as to indicate, with reasonable certainty to a rational mind, that they had just committed an adulterous act of intercourse, and he then fired this fatal shot, he would not be justified, but the shooting, under such circumstances, would justify you in finding the defendant guilty of manslaughter," if he acted, immediately after the crime had been committed, promptly and in the burst of passionate indignation which overwhelmed him upon discovering the outrage which had been done him. It appears to us that under this excerpt from the charge, and under the charge as a whole, the defense set up by the accused was placed before the jury in such a manner as to leave the defendant no ground for complaint on this score.

There is no other special assignment of error, and, in the absence of a proper assignment of error thereon, we cannot consider the excerpt from the charge of the court which is complained of in the brief of counsel for the plaintiff in error as being insufficient to properly instruct the jury on one of the main contentions of the defense. For the same reason we are not required to consider the contention, argued in the brief of counsel for the plaintiff in error, that the court erred in failing to define a "felony," or to define a "reasonable doubt." It may be said in passing, however, that it has been time and again held by this court that the court need not attempt to define reasonable doubt (*Barker v. State*, 1 Ga. App. 286-288, 57 S. E. 989; *James v. State*, 1 Ga. App. 779, 780, 57 S. E. 959; *Middleton v. State*, 7 Ga. App. 1, 66 S. E. 22; *Norman v. State*, 10 Ga. App. 802, 74 S. E. 428; *Rice v. State*, 16 Ga. App. —, 84 S. E. 609); and also that, while the Supreme Court in *Roberts v. State*, 114 Ga. 450, 40 S. E. 297, said that "in all cases where the term 'felony,' or other technical term of the law, is contained in a section of the Code which is given in charge, the meaning of such term should be explained to the jury," that expression was a mere obiter, since the court expressly said it was not necessary to determine in that case whether the failure to ex-

plain the meaning of the term "felony," in the absence of an appropriate written request so to do, would be such error as would require the granting of a new trial. It is true that in *Holland v. State*, 3 Ga. App. 465-469, 60 S. E. 205, Judge Powell, speaking for this court, said that:

"In charging section 70 of the Penal Code, the judge should explain to the jury the meaning of the technical word 'felony,' used therein"

—and cited the *Roberts Case* as authority for the statement. However, the definite rulings of the Supreme Court constitute the controlling authority in this state, and it was distinctly held in *Pickens v. State*, 132 Ga. 46 (1), 63 S. E. 783, that:

"The failure of the court to give in charge the legal definition of the term 'felony' appearing in Penal Code, § 70, which section was given in charge, was not such error as requires a new trial."

Again, in *Pressley v. State*, 132 Ga. 64 (3), 63 S. E. 784, it was held that:

"In charging section 70 of the Penal Code, failure to explain to the jury the meaning of the word 'felony,' used therein, is not cause for a new trial, in the absence of an appropriate and timely request so to do."

See also the holding to the same effect in *Hall v. State*, 133 Ga. 177 (8), 65 S. E. 400; *Helms v. State*, 138 Ga. 826, 76 S. E. 353; *Faison v. State*, 13 Ga. App. 180, 79 S. E. 39; *Carver v. State*, 14 Ga. App. 267 (3), 80 S. E. 508; *Franklin v. State*, 15 Ga. App. 350 (3), 83 S. E. 196. And see *Pye v. Pye*, 133 Ga. 246 (3), 65 S. E. 424, in which it was held that the judge did not err in failing to explain to the jury the words "fraud" and "undue influence," as used by him in his charge, where there was no proper request for such explanation.

Judgment affirmed.

(117 Va. 542)

NORFOLK SOUTHERN R. CO. v. WHITE-HURST.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

CARRIERS §32 — INTERSTATE COMMERCE — PREFERENCES—RIGHT OF SHIPPERS.

The rules of the Interstate Commerce Commission, formulated pursuant to U. S. Comp. St. Supp. 1911, c. 1 (U. S. Comp. St. 1913, §§ 8563-8604), declare that the privilege of diverting cars is of value to the shipper, and in order to avoid discrimination it is necessary for the carrier that grants such privilege to publish in its tariff that fact, together with the conditions under which it may be used. Pursuant to that regulation a carrier adopted a tariff and conditions upon which diversions would be made, which provided that parties making request for change of destination must furnish satisfactory proof of ownership and acceptable form of bond. The carrier by an arrangement made over the telephone agreed to divert a shipment. Held, that the regulations were not imposed solely for the benefit of the carrier, but being intended to place all shippers upon the same plane and prevent unfair preferences among

them, the carrier could not waive the regulation and allow diversion in an unauthorized manner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. ☞32.]

Error to Circuit Court of City of Norfolk.

Action by W. L. Whitehurst against the Norfolk Southern Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Jas. G. Martin, of Norfolk, for plaintiff in error. S. M. Brandt, of Norfolk, for defendant in error.

WHITTLE, J. The plaintiff below, W. L. Whitehurst, brought an action in the circuit court of the city of Norfolk against the Norfolk Southern Railroad Company to recover damages for its alleged negligence in connection with the shipment of three car loads of cabbage, under separate bills of lading from a station in Princess Anne county, Va., to Boston, Mass.

The first two cars were shipped May 30, 1913, and the last on June 2d, following. There was a verdict and judgment in favor of the plaintiff.

The last shipment was made the subject of a separate count in the declaration, and the argument of counsel was mainly directed to rulings of the circuit court with respect to that shipment. The consignment was delivered, without change of cars to the consignee in Boston, but the complaint is that while in transit the railroad agreed to divert the shipment to another consignee in the city of New York, and failed to do so.

We shall pass by several minor assignments of error that cannot affect the result, and address ourselves to what we conceive to be the ruling question in the case, namely, the admission by the court over the objection of the defendant of evidence of a special agreement for the diversion of an interstate car, not made in conformity to its published tariff and conditions as prescribed by the rules of the Interstate Commerce Commission, and basing an instruction favorable to the plaintiff on that evidence. It will be observed that this assignment involves an important federal question.

The rules of the Interstate Commerce Commission, formulated in pursuance of United States Compiled Statutes 1901 (Supp. 1911) c. 1 (U. S. Comp. St. 1913, §§ 8563-8604) for Regulation of Common Carriers so far as pertinent to this inquiry, were put in evidence. They declare with respect to diverting cars:

"The privilege is of value to the shipper, and in order to avoid discrimination it is necessary for the carrier that grants such privilege to

publish in its tariff that fact, together with the conditions under which it may be used and the charge that will be made therefor. Such rules should be stated in terms that are not open to misconstruction."

In pursuance of that regulation the defendant adopted a tariff and conditions upon which diversions might be made, which state in part:

"Provided parties making request for change of destination or name of consignee, furnish satisfactory proof of ownership and acceptable form of release or indemnity bond."

The defendant had adopted a printed form of indemnity contract to be employed in diverting cars; but it is not pretended that the special agreement upon which the court's instruction was predicated complies in any particular with the foregoing requirements. On the contrary, the agreement between the parties for diverting the car was a special arrangement consummated over the telephone.

It is a fundamental error to suppose that these regulations are imposed for the benefit of the carrier alone and can be waived by him at pleasure. Obviously that construction would nullify the rule, the chief purpose of which is to put all shippers of the same class upon the same plane, and to prevent unfair preferences among them.

This case comes directly within the influence of the decision of this court in the analogous case of *C. & O. Ry. Co. v. Ruckman*, 115 Va. 493, 80 S. E. 496, where it was held that:

"A special contract with a particular shipper, whereby a carrier agrees for the published rate to expedite an interstate shipment of freight and deliver the same on a designated day, gives to the particular shipper an advantage over other shippers, and makes a discrimination in his favor which is prohibited by the Interstate Commerce Act, and hence such a contract is void."

So, also, the decision of the Supreme Court of the United States in *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, condemns special contracts with particular shippers, the effect of which is to discriminate against other shippers. Such contracts are declared to be violative of the Elkins Act of February 19, 1903, 32 Stat. 847, c. 708 (U. S. Comp. St. 1913, § 8597), and relief in that case was denied.

For the error of the circuit court in not holding the special contract for the diversion of the car in question invalid, and making it the ground for modifying the instruction requested by the defendant, the verdict of the jury must be set aside, the judgment reversed, and case remanded for a new trial not in conflict with this opinion.

Reversed.

(117 Va. 511)

JONES & CO., Inc., v. C. W. HANCOCK & SONS.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. CORPORATIONS ⚡517—ACTIONS—AFFIDAVIT WITH PLEA.

Under Code 1904, § 3286, providing that if in assumpsit plaintiff file with his declaration an affidavit made by himself or his agent that the amount is justly due, etc., no plea in bar shall be received unless defendant file with his plea the affidavit of himself or his agent, that the plaintiff is not entitled, etc., an affidavit of the president of defendant corporation was not sufficient in the absence of any averment therein of his agency, or any other evidence on the subject.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2047-2051; Dec. Dig. ⚡517.]

2. JUDGMENT ⚡176—JUDGMENT BY DEFAULT—LIMITATION OF TIME TO SET ASIDE.

Where, after an office judgment was entered in an action in assumpsit, defendant appeared and filed pleas of nonassumpsit and set-off, whereupon the office judgment was set aside, the effect of the court's ruling in striking out defendant's pleas reinstated the office judgment so that it became final by the passing of time under the provisions of Code, § 3287, after which the court was without power to admit evidence as a basis for amending the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 339; Dec. Dig. ⚡176.]

3. CORPORATIONS ⚡507—PROCESS—SERVICE ON AGENT.

Code 1904, § 3225, requires process against a corporation to be served on the president if he is in the county or corporation wherein the action is brought. By section 3227, the process is required to be served ten days before the return day when service is on an agent, or in a county or corporation other than that in which the action is brought. *Held* that, where service was not on an agent or in another county or corporation, service at any time before or on the return day was sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. ⚡507.]

Error to Law and Chancery Court of City of Norfolk.

Action by C. W. Hancock & Sons against Jones & Company, incorporated. Judgment for plaintiffs, and defendant brings error. Affirmed.

Kenneth S. Jones, of Norfolk, and W. H. Moreland, of Lexington, for plaintiff in error. Wingfield & Hoag, of Norfolk, for defendants in error.

WHITTLE, J. The defendants in error, partners, who were plaintiffs below, brought an action of assumpsit against the plaintiff in error, a corporation, to recover the price of goods alleged to have been sold, and delivered by the plaintiffs to the defendant at its request. The account was filed with the declaration, accompanied by the affidavit of one of the plaintiffs, made in accordance with section 3286 of the Code, and an office judgment duly entered thereon. At the succeeding term of the court on June 17, 1914, the defendant appeared and filed pleas of nonas-

sumpsit and set-off, whereupon the office judgment was set aside. These pleas were sworn to by the president of the corporation, but it does not appear that they were verified by any agent of the defendant as required by section 3286.

On July 13, 1914, the court, on motion of the plaintiff, struck out the pleas because they were not verified by such affidavits as the statute prescribed, and likewise sustained the plaintiffs' motion to annul its former order setting aside the office judgment.

[1] It is quite clear under the decisions of this court that the affidavit of the president of the corporation, in the absence of any averment therein of his agency, or any other evidence on the subject, is not a sufficient compliance with the statute which requires the affidavit of the plaintiff or his agent to the plea. In other words the fact that affiant is president does not per se import such agency. Reference to decisions of this court on the subject obviates the necessity for further discussion. *Merriman Co. v. Thomas*, 103 Va. 24, 48 S. E. 490; *Taylor v. Sutherland-Meade Tobacco Co.*, 107 Va. 787, 60 S. E. 132; *Clement v. Adams Bros.*, 113 Va. 547, 75 S. E. 294.

[2] The effect of the court's ruling in striking out the defendant's pleas was to reinstate the office judgment and by force of the statute, section 3287, it became final on July 1, 1914, which was the 15th day of the term. *Grigg v. Dalsheimer*, 88 Va. 508, 510, 13 S. E. 993; *Price v. Marks*, 103 Va. 18, 48 S. E. 499. After that time the court was without power to admit evidence as the basis for amending the pleadings, and rightly so held. *Enders' Ex'rs v. Burch*, 15 Grat. (56 Va.) 64.

Objection was made to the service and return of the original summons in the case, because it did not show that it was served on an agent and ten days before the return day. Code, §§ 3225, 3227.

[3] The record does show that the defendant is a corporation and that the writ was served on its president in the city of Norfolk where he resides. By section 3225, process against a corporation is required to be served on the president if he is in the county or corporation wherein the action is brought. And by section 3227, process is only required to be served ten days before the return day when service is on an agent, or in a county or corporation other than that in which the action is brought.

In this instance, as observed, the service was not on an agent or in another county or corporation. Hence, service at any time before or on the return day was sufficient.

The remaining assignments are without merit and do not call for special notice.

The judgment of the court of law and chancery of the city of Norfolk is plainly right, and must be affirmed.

Affirmed.

(117 Va. 260)

CHESAPEAKE & O. RY. CO. v. NEWTON'S ADM'R.

(Supreme Court of Appeals of Virginia. March 11, 1915. Rehearing Denied June 10, 1915.)

1. CONTINUANCE ⇨24—GROUNDS—ABSENCE OF WITNESSES.

Where three of the eyewitnesses to an accident were present at a trial and testified, and it was not probable that the evidence of a fourth eyewitness could have been more than cumulative, the denial of a continuance because of the absence of such witness was not error.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 72; Dec. Dig. ⇨24.]

2. CONTINUANCE ⇨7—DISCRETION OF COURT.

A motion for a continuance is always addressed to the sound discretion of the trial court under all the circumstances of the case.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. ⇨7.]

3. APPEAL AND ERROR ⇨966—REVIEW—DENIAL OF A CONTINUANCE.

An appellate court will not reverse the judgment of the trial court in the exercise of its discretion on a motion for a continuance unless plainly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⇨966.]

4. PLEADING ⇨64—COMPLAINT—DUPLICITY—INJURIES TO SERVANT.

In an action for the death of an employé painting a railroad trestle, and knocked therefrom by a staging which other employés were moving under the direction of the foreman, the declaration alleged that the foreman had the supervision of the men moving the scaffolding; that the employer and its foreman knew that it was dangerous to move it with only three men; that it was the employer's duty not to attempt to move it with only three men; but that the foreman negligently ordered the three men to move it, though he saw or by ordinary care could have seen decedent's danger, and that if the scaffolding was so moved decedent would be struck. *Held*, that the declaration did not allege separate and distinct causes of action, but concurrent causes co-operating to produce the injury complained of.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. ⇨64.]

5. MASTER AND SERVANT ⇨162—LIABILITY FOR INJURIES—NEGLIGENCE OF FOREMAN.

If plaintiff's intestate was engaged in painting a railroad trestle, and while so engaged the employer attempted to move a swinging scaffold with the aid of three employés, including its foreman, and this was not a sufficient number of men to do the work with reasonable safety to plaintiff's intestate, and thereby he was knocked from the trestle and killed, this was negligence for which the employer was liable, unless plaintiff's intestate was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 327; Dec. Dig. ⇨162.]

6. MASTER AND SERVANT ⇨294—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for the death of an employé, the court charged that, if such employé was painting a railroad trestle, and while so engaged the employer attempted to move a swinging scaffold, and if its agents began to move the scaffold towards such employé's back, and to do so was negligence on the part of such agents, including the foreman, and if such foreman had the supervision of the work, or was charged with the duty of directing the immediate work of such employé and the other men, and thereby

the accident resulted without negligence of such employé, the jury should find for plaintiff. It appeared that the foreman was a vice principal, and that those moving the scaffold were working under his immediate control, and the case proceeded on the theory that the deceased employé was thrown from the trestle as a result of the foreman's negligence in ordering the scaffold to be moved by an insufficient force to properly handle it. *Held*, that it was not at all probable that the jury could have been misled by the instruction into believing that there could be a recovery for the negligence of the decedent's fellow servants other than the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1157-1187; Dec. Dig. ⇨294.]

7. MASTER AND SERVANT ⇨201—LIABILITY FOR NEGLIGENCE—CONCURRING NEGLIGENCE OF VICE PRINCIPAL AND FELLOW SERVANTS.

If the misconduct of a vice principal enters into and constitutes a part only of the negligent act causing an injury to an employé, the employé's fellow servants also being negligent, the courts will not undertake to distribute the fault, but will hold the employer responsible, as though it alone were guilty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. ⇨201.]

8. MASTER AND SERVANT ⇨215—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

If, as claimed, a scaffolding used in painting a trestle could not be moved by three men without danger to an employé who was on the trestle, and an attempt to move it with three men had never before been made, and in so moving it the work was being done behind such employé and without his knowledge, it was not a risk incident to the manner in which he knew, or in the exercise of ordinary care ought to have known, that the employer conducted its business, and was not assumed by him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 566; Dec. Dig. ⇨215.]

9. MASTER AND SERVANT ⇨248—INJURIES AVOIDABLE NOTWITHSTANDING NEGLIGENCE.

Where a foreman who was having a scaffolding moved by an insufficient force of men was standing where he could see, or by the exercise of ordinary care could have seen, the danger to an employé knocked from the trestle on which he was working, and could have averted the accident by warning him of the danger, or by directing the men moving the scaffold to stop until such employé could get out of the way, if such employé was negligent, as contended, in being at the place where he was, there was a plain case for the application of the doctrine of last clear chance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. ⇨248.]

10. TRIAL ⇨252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction was properly refused where there was no evidence upon which it could be based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ⇨252.]

11. TRIAL ⇨252—INSTRUCTIONS—EVIDENCE.

Where, in an action for the death of an employé knocked from a trestle on which he was working, there was evidence tending to show that the accident resulted from the attempt of a foreman to move a scaffolding with three men, when four was the least number that could move it with safety, an instruction that there could be no recovery on the ground of

any alleged insufficiency in the number of men employed was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. §252.]

Error to Hustings Court of Richmond.

Action by William W. Newton, administrator, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

D. H. & Walter Leake and Henry Taylor, Jr., all of Richmond, for plaintiff in error. L. O. Wendenburg, of Richmond, for defendant in error.

HARRISON, J. This action was brought by the administrator of William W. Newton, deceased, to recover of the defendant company damages for its alleged negligence in causing the death of the plaintiff's intestate. The trial resulted in a verdict and judgment for \$10,000 against the defendant company, which this writ of error brings under review.

Considering the evidence, as must be done in this court, from the standpoint of a demurrer thereto, the following facts appear to be established: The decedent, a young man 22 years of age, was engaged, with others, as an employé of the defendant, in painting the iron trestle of the company which runs along the north side of James river in the city of Richmond. The scaffolding or staging used in doing this work consisted of long ladders which were suspended by ropes and pulleys with planks thereon, making a sort of platform for the men to stand on while at work. At the time of the accident the foreman in charge was having the ladders moved forward by three painters, in order that the work might progress, and in doing this struck the deceased, who was working about 15 feet away, with his back to them, wholly unconscious that the ladders were being moved upon him until he was struck and dashed to the rocks below, sustaining injuries from which he died.

The evidence tends to show: (1) That the accident was the result of the foreman's attempt to move the ladders forward with three men, when four was the least number that could make the move with safety; (2) that the foreman, who was directing the work, was standing where he could see, or by the exercise of ordinary care could have seen, the deceased, and could have warned him of his danger, or could by an order to the men under his control have stopped them from attempting to move the staging until the deceased was in a place of safety; and (3) that the foreman had been drinking, and at the time of the accident was under the influence of liquor. This condition of the foreman was alone sufficient to account for the negligence of which the jury's verdict convicted him.

[1-3] The first assignment of error is to

the action of the court in refusing a continuance of the case on the motion of the defendant company.

The witness whose absence was the ground of this motion was out of the state, and was one of the three painters engaged in moving the ladders. The other eyewitnesses to the accident were present at the trial, and it is not probable that the evidence of a fourth eyewitness could have been more than cumulative. A motion for a continuance is always addressed to the sound discretion of the trial court, under all the circumstances of the case, and an appellate court will not reverse its judgment, in the exercise of that discretion, unless plainly erroneous. *N. & W. Ry. Co. v. Shott*, 92 Va. 35, 22 S. E. 811; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Kinzle v. Riley's Ex'rs*, 100 Va. 709, 42 S. E. 872.

The record in the present case does not show that the action of the court in overruling the motion for a continuance was plainly erroneous.

[4] The second assignment of error is to the action of the court in refusing to require the plaintiff to elect upon which ground of negligence stated in the declaration he would proceed, and, having refused to require this, in failing to strike out the declaration upon the ground of duplicity.

The declaration, which contains but one count, is not amenable to the charge of duplicity or any other objection. It sets forth that the foreman had the supervision, control, and direction of the men moving the scaffolding, that it was dangerous to move the scaffolding without a sufficient number of men to do the work with reasonable safety, and that the defendant and its foreman knew that it was dangerous to move it with only three men, and it was the duty of the defendant not to attempt to move it with only three of the painters, but that, notwithstanding this, the foreman negligently ordered the three painters to move the scaffolding, although he saw, or by the exercise of ordinary care could have seen, the danger of the decedent, and that if the scaffolding was so moved the decedent would be struck. These matters constitute but one connected proposition. They are conjunctively alleged as concurrent causes co-operating together to produce the injury complained of, and are in no sense allegations of separate and distinct causes of action that should not have been combined in one count. *N. & W. Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

The third assignment of error is to the action of the court in giving, refusing, and modifying instructions.

[5] Objection is made to the two instructions given for the plaintiff, the first of which is as follows:

"The court instructs the jury that, if they believe from the evidence that the plaintiff's decedent at the time of the accident was engaged

in painting the trestle of the defendant in the performance of his duties, and that while so engaged the defendant company attempted to move the swinging scaffold with the aid of three of its employes, including the foreman, Wood, and that this was not a sufficient number of men to do this work with reasonable safety to the plaintiff's decedent, and thereby the injury complained of was caused, then this is negligence for which the defendant is liable, unless the plaintiff's decedent was guilty of contributory negligence."

No valid objection is suggested to this instruction. It is based upon the evidence in the case, and correctly states the law applicable thereto.

[6, 7] The second instruction given for the plaintiff is as follows:

"The court instructs the jury that, if you believe from the evidence that the plaintiff's decedent at the time of the accident was engaged in painting the trestle of the defendant in the performance of his duties, and that while so engaged the defendant company attempted to move the swinging scaffold, and in doing this the agents of the defendant began to move the ladder towards the back of plaintiff's decedent, and to do this, under all the circumstances, was negligence on the part of the said defendant's agents, including the foreman, and that said foreman had the supervision of said work, and was the superior to said decedent, or had the right, or was charged with the duty, of controlling and directing the general services and the immediate work of the decedent and the other men engaged in said work, and thereby the accident resulted without negligence of the said decedent, you must find for the plaintiff. And the court further instructs the jury that, if you believe from the evidence that the accident was caused as set forth in this instruction by the manner in which said ladder or scaffold was being moved, and that this put the said decedent in a perilous position without any negligence on his part, and that this peril was seen, or could have been seen, by said foreman by the use of ordinary care and caution on his part, in time to avoid the accident, and that the said foreman failed to do this, then the defendant is liable, and you must find for the plaintiff, even though you may believe from the evidence the defendant [manifestly meaning the deceased] was guilty of contributory negligence."

It is objected that this instruction gives some assent to the idea that there could be a recovery for negligence on the part of the fellow servants of the deceased, other than the foreman.

In this case the foreman occupied the relation of vice principal to the deceased and the other painters who were working under him. His position was one of admitted superiority, and the evidence shows or tends to show that the three painters who were attempting to move the ladders were acting under the immediate control and direct orders of the foreman. The case proceeded throughout upon the theory that the deceased was struck and thrown from the trestle solely as a result of the negligence of the foreman in ordering the ladders to be moved by an insufficient force to properly handle and control them. Under such circumstances it is not at all probable that the jury could have been misled by this instruction in the particular now suggested. If, however, the misconduct of the vice principal entered into and consti-

tuted part only of the negligent act which caused the injury, then the courts will not undertake to distribute the fault, but will hold the railroad company responsible as though it alone were guilty. *N. & W. Ry. Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342; *Va. & S. W. R. Co. v. Bailey*, 103 Va. 205, 226, 49 S. E. 33.

[8] It is further objected that this instruction gives assent to the theory that there could be a recovery for an injury occasioned on account of the manner in which the work was done. This was not the intent or effect of the instruction. The evidence, as already seen, tends to show that this scaffolding could not be moved with three men without danger to the deceased, who was on the trestle painting at a distance from the ladders of 15 feet. It further tends to show that no attempt to move the ladders with three men had ever been made before. If this were the only time the work of moving the ladders had been attempted with three men, and it was being done at the rear of the decedent without his knowledge, then it was not a risk incident to the manner in which he knew, or in the exercise of ordinary care ought to have known, that the defendant conducted its business, and was therefore not one of the risks assumed by him. On the contrary, the decedent had the right to assume that the defendant, through its foreman, would not attempt the unusual task of moving the scaffold with an insufficient force, while he was doing something else with his back to them.

[9] Objection is further made that the instruction under consideration improperly bases the plaintiff's right to recover upon the doctrine of the "last clear chance." This objection is not well taken. As already seen, when the foreman was having this scaffolding moved with an insufficient force, he was standing on the structure above the deceased, where he could see, or by the exercise of ordinary care could have seen, his peril, and could have averted the accident by warning him of his danger or by a word to the men to stop with the ladders until the deceased could get out of the way. These facts present a plain case for the application of the doctrine of the "last clear chance," if the jury believed that the deceased was, as contended by the defendant, guilty of negligence in being at the point on the trestle where he was when the accident happened; because, notwithstanding such negligence, the defendant, through its foreman, saw the deceased, or by the exercise of ordinary care could have seen him, in ample time to have saved his life.

What has been here said touching the application to this case of the doctrine of the "last clear chance" sufficiently disposes of the further objection made to the action of the court in modifying instructions "B" and "E," asked for by the defendant. In view of the evidence already adverted to, it was prop-

er that each of those instructions, which told the jury to find for the defendant, should have concluded with the proviso:

"Unless the defendant saw, or by the exercise of ordinary care could have seen, that the decedent was in a perilous position, and failed to exercise ordinary care to avoid the accident."

[10] Instruction "F" asked for by the defendant was properly refused, because there was no evidence upon which it could be based.

[11] Instruction "G" asked for by the defendant was as follows:

"The court instructs the jury that there can be no recovery in this case on the ground of any alleged insufficiency in the number of servants employed."

In view of the evidence it is difficult to understand upon what theory this instruction was requested. The record furnishes no justification for it, and it was properly refused.

The fourth assignment of error was to the action of the court in refusing to set aside the verdict as contrary to the law and the evidence.

We are of opinion that the motion to set aside the verdict was properly overruled. The case was fairly submitted to the jury, and their verdict was amply supported and justified by the evidence.

The judgment complained of must be affirmed.

Affirmed.

(117 Va. 557)

PROVIDENCE FORGE FISHING & HUNTING CLUB, Inc., et al. v. GILL.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

VENDOR AND PURCHASER — 230 — BONA FIDE PURCHASER — NOTICE — CONSTRUCTIVE NOTICE.

Defendant's grantor, who had already contracted to sell complainant 10 acres off of a tract of land, executed a deed of trust on the land, except the 10-acre tract. The trust deed was duly recorded and the 10-acre parcel was conveyed to defendant. *Held*, that as defendant did not have actual notice of the contract, the trust deed did not operate as constructive notice of complainant's rights; the instrument not being in defendant's chain of title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502-512; Dec. Dig. ¶ 230.]

Appeal from Chancery Court of Richmond.

Bill by William I. Gill against the Providence Forge Fishing & Hunting Club, Incorporated, and another. From a decree for complainant, defendants appeal. Reversed.

Lamb & Lamb, of Richmond, and Chas. L. Page, of Manchester, for appellants. Christian, Gordon & Christian, of Richmond, and L. M. Nance, of Roxbury, for appellee.

HARRISON, J. The bill in this case was filed by the appellee, William I. Gill, to obtain specific performance of a contract for the sale and purchase of certain real estate,

made with him by one J. M. Bossieux as the agent of the appellant Providence Forge Fishing & Hunting Club, Inc., hereinafter for convenience spoken of as the "Club." Subsequent to the making of the alleged contract with Gill the Club sold and conveyed the land involved to one Gilbert K. Pollock, who was made a party defendant to the bill and is one of the appellants before this court.

It appears that on September 5, 1911, the board of directors of the Club adopted a resolution authorizing J. M. Bossieux, as its agent, to sell a tract of land containing 10 acres more or less with improvements thereon, belonging to the Club, providing that any less offer than \$1,000 should be reported to the board. Acting under the authority of this resolution, Bossieux, as agent for the Club, made a contract in writing dated October 14, 1911, with William I. Gill, agreeing to sell him the 10 acres and improvements thereon for \$1,000, to be paid within 60 days, and providing that the deed from the vendor to the vendee should contain a covenant that the stream bounding the property on the east should not be obstructed so as to prevent the free passage of fish up and down the same. After the adoption of the resolution of September 5, 1911, authorizing the sale of the 10 acres, no further action with respect to the matter was taken by the board of directors of the Club until March 8, 1912, on which day the following resolution was adopted:

"Whereas, William I. Gill failed to comply with his contract of the 14th day of October, 1911, and failed to pay the sum of \$1,000, the contract price for the ten acres of land, with dwelling, stable and improvements thereon, within sixty days as provided by said contract; and whereas no extension of time was ever authorized by the board of directors of this club: Be it resolved, that said contract be canceled and the sum of \$100.00 paid by said Gill be returned to him."

The foregoing action of the board of directors was followed on the same day by the adoption of the following resolution:

"Whereas this club has received an offer of \$1,000.00 from G. K. Pollock for the ten acres of land with dwelling, stable and other improvements thereon, the same to be paid in cash: Be it resolved that the president and secretary be directed to convey to said G. K. Pollock said ten acres of land with dwelling, stable and improvements thereon, when and as soon as he shall have paid the sum of \$1,000.00."

In pursuance of this resolution G. K. Pollock paid the purchase price of \$1,000 and received a deed duly executed by the officers of the Club, which was recorded March 29, 1912.

There has been much discussion of questions between the Club and Gill growing out of the contract of sale between the latter and Bossieux, agent, particularly as to how far the Club was bound by certain dealings of the agent with Gill. In our view of the case, these contentions throw no light upon the crucial question involved, and therefore need not be considered. There is no question that the appellant Gilbert K. Pollock bought the

10 acres and its improvements, paid the purchase money therefor, and received a deed from the Club conveying him the same, which was duly recorded. The sole question, therefore, is whether or not Pollock is a bona fide purchaser for value and without notice of the rights asserted by Gill.

The proof wholly fails to sustain the contention that the appellants were guilty of fraud in selling the property in question to G. K. Pollock. It is clear from the record that the appellant Pollock had no actual notice of the rights asserted by Gill, which leaves as the only open question whether or not he had constructive notice of any such rights.

The sole ground for the contention that Pollock had constructive notice of Gill's claim is a recital in a certain deed of trust, to which neither Gill nor Pollock was a party, and which deed did not affect the property involved in any manner. It appears that in November, 1911, the Club conveyed its real estate in trust to secure its note for \$2,000. The property is described in the deed of trust as containing 111½ acres, except 9 acres conveyed to James H. Christian, and—
"except a tract of land estimated to contain ten acres * * * which the party of the first part has agreed to sell to William I. Gill."

For convenience of description this deed of trust conveyed in the first instance the entire tract originally purchased by the Club, but immediately by apt words expressly excepted the 10 acres in question from the grant, so that the deed did not prejudice or affect in any manner the title to the 10 acres. Had Pollock examined the records before buying and discovered and read this deed of trust, he would undoubtedly have acquired notice of Gill's agreement to purchase. This would, however, have been actual notice, which is not shown, instead of the implied or constructive notice which is here relied on and sought to be imputed to Pollock.

The established rule is that for a deed and its recitals to operate as constructive notice to a bona fide purchaser of land, it must be a link in the purchaser's chain of title. A purchaser is not chargeable with constructive notice of all matters of record, but only of such as the title deeds of the estate refer to, or put him on inquiry for. *Lewis v. Barnhardt*, 145 U. S. 56, 12 Sup. Ct. 772, 36 L. Ed. 621; *Le Neve v. Le Neve*, 2 Lead. Cas. in Eq. 189-190, et seq.; *Meacham v. Blaess*, etc., 141 Mich. 258, 104 N. W. 579; *Pillow v. So. W. Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681.

In *Lewis v. Barnhardt*, supra, Mr. Justice Harlan, speaking of the recitals in a deed which lay outside of the chain of title, says:

85 S.E.—30

"Some reliance is placed upon the fact that the recitals in a deed for certain lands, made by Mrs. Lewis to one Mohr in 1853, indicated that they were devised to her by the will of her husband. It is scarcely necessary to say that those recitals were not notice to those who purchased other lands from Mrs. Lewis of the existence of such a will or of its provisions; there being no valid record of it in Illinois."

The principle applied in this case is equally applicable to the present case, the effort in each being to impute notice from recitals in a deed, outside of the chain of title, conveying other lands by the same grantor.

In 23 Am. & Eng. Ency. L. p. 510, the law is thus stated:

"The rule that a purchaser is chargeable with constructive notice of the contents of all instruments appearing in his chain of title does not apply to instruments that do not constitute a part of his chain of title, and do not necessarily relate to it. As to the contents of such instruments the purchaser is not put upon inquiry."

In 39 Cyc. p. 1719, it is said:

"A deed lying outside of a purchaser's chain of title imparts no notice to him. Thus a recital in a deed cannot affect a purchaser with notice respecting any other land than that which is conveyed by it; nor is it notice to another purchaser of different land from the same grantor."

The result of the law as it is laid down in *Pomeroy's Equity* is that the doctrine of notice by recital in a prior deed applies only where the subsequent purchaser is obliged to make out his title through the deed in which the recital occurs. In other words, the recital, to bind the purchaser, must lie in the path of his title, not outside of it. *Pom. Eq. Jur.*, vol. 2, § 626.

It is clear that the deed of trust containing the recital relied on is not a link in the chain of title to the 10 acres of land bought from the Club by the appellant Pollock. He does not claim through it or against it; nor does it convey or concern the land purchased by him, but conveys other land of the grantor in which he has no interest.

We are of opinion that, inasmuch as the deed of trust relied on is wholly apart from and outside of the appellant Pollock's chain of title to the 10 acres of land purchased by him, he is not charged by its recitals with constructive notice of the unrecorded contract which the appellee, Gill, claims under.

It should have been stated at the outset of this opinion that the demurrer to the bill was properly overruled.

The decree of July 17, 1914, appealed from, must be reversed, and this court will enter such decree as the lower court ought to have entered, dismissing the complainant's bill, with costs.

Reversed.

(117 Va. 467)

BRADLEY et al. v. TOLSON.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. VENDOR AND PURCHASER ⇨33—FRAUD—MISREPRESENTATIONS AS TO QUANTITY—KNOWLEDGE OF FALSITY.

Reckless misrepresentations by an agent for the sale of land as to the quantity of the land are fraudulent regardless of the agent's knowledge of their falsity when he made them.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. ⇨33.]

2. VENDOR AND PURCHASER ⇨36—FRAUD—AFFIRMANCE OF CONTRACT.

Where a purchaser of land, after learning that the agent had misrepresented the quantity of land, wrote to the owners that he left it entirely with them as to whether they would do anything about it, and on their refusal to make any concessions finished paying for the land according to the contract, he cannot thereafter recover compensation for deficiency in quantity, even though he did not know, when he wrote the letter, that the agent knew his representations were false, since the agent's knowledge of the falsity was immaterial, and the purchaser affirmed the contract after he knew all the material facts.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 984; Dec. Dig. ⇨336.]

3. CONTRACTS ⇨97—FRAUD—AFFIRMANCE.

One who has elected to affirm a contract after learning of the fraud cannot thereafter disaffirm it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 442-446; Dec. Dig. ⇨97.]

Appeal from Circuit Court, Culpeper County.

Suit by F. S. Tolson against Peter B. Bradley and another. Decree for complainant, and defendants appeal. Reversed, and bill dismissed.

Keith & Richards and J. Stuart White, all of Warrenton, for appellants. William Horgan, of Warrenton, and J. G. Hiden, of Culpeper, for appellee.

KELLY, J. This suit in equity was brought by F. S. Tolson against Peter B. and Robert S. Bradley to recover compensation for a deficiency in acreage upon a purchase of land. The bill alleges a purchase in gross, but charges that the contract in this respect was fraudulent. From a decree in Tolson's favor the Bradleys obtained this appeal.

The appellants were the owners of a farm in Culpeper county lying on both sides of a certain county road. They had owned this farm for a number of years, but resided in Boston and had never seen the farm and had no accurate knowledge as to its acreage or how it was divided by the road. On July 4, 1907, one G. S. P. Triplett, who seems to have been renting or looking after the land for the Bradleys, and who was thoroughly familiar with it, and who knew also that they wanted to sell it, entered into a written

agreement with Tolson, which read as follows:

"I have this day agreed to sell as agent for Peter B. and Robert S. Bradley, of Boston, Mass., to F. S. Tolson, of Culpeper county, Virginia, that portion of their Greenfield farm that contains the buildings on the right-hand side of the road from Ball's X roads leading to Freeman's ford on the Rappahannock river—supposed to contain 360 acres—for the sum of \$5,250, payable on time as follows: Two thousand dollars cash on August 15, 1907, and five annual payments as follows: \$650 each payable September 15, 1908, 1909, 1910, 1911, and 1912, or five thousand dollars cash, the rate of interest to be 5% per annum, the deferred payments to be secured by deed of trust.

"The land to be surveyed and if it should fall short of 360 acres then a reduction will be made at the price paid per acre for the 360 acres. As witness our signatures this 4th day of July, 1907.

"Peter B. Bradley and Robert S. Bradley,
 "[Signed] Per G. S. P. Triplett, Agt.
 "[Signed] F. S. Tolson."

On the same day, July 4, 1907, Tolson wrote to the Bradleys informing them of the contract he had made with Triplett, referring specially to the terms of payment, and adding:

"I have agreed to buy the farm but reserve the right to choose either of the propositions between now and August 15, 1907. I would like very much to see one of you beforehand, and will meet either of you in Philadelphia. Please let me hear from you at once."

The Bradleys replied confirming the sale, and a meeting was later on, at Tolson's request, arranged for and held in New York on August 13, 1907, between him and Peter B. Bradley. At that meeting the terms of the contract were changed so as to give Tolson better terms of payment, and so as to eliminate the provision for a survey and to provide, in lieu thereof, for a sale in gross and not by the acre. Shortly after Tolson's return to Virginia he wrote Peter B. Bradley, asking him to send all necessary papers to Judge C. M. White at the earliest convenience, so as to close the matter up. This request was complied with, the papers being sent to Judge White, who prepared a deed, dated September 10, 1907, which was duly executed by the Bradleys, and which described the land as being that part of the farm on the right-hand side of the road, "supposed to contain 360 acres, be the same more or less, it being sold in gross and not by the acre."

Early in 1910 Tolson sold a part of this land to raise some of the money due the Bradleys, and upon a survey then made to lay off the portion sold it was discovered that the boundary contained 295 instead of 360 acres. Thereupon, under date of February 4, 1910, Tolson wrote Peter B. Bradley, telling him of the discovery and using this language:

"However, not meaning to back down from my agreement, but owing to the misrepresentation in the place by Mr. Triplett, I, as well as yourself, was led to understand the place conveyed to me contained somewhere near 360 acres, but upon surveying I find a shortage of

65 acres. Now, I bought the place in gross, and it is left entirely with you whether you see fit to do further anything to remedy the shortage of 65 acres which falls to me, but if you do not see fit to do anything further to help me in this matter, I am ready to settle as soon as the bond is sent to Judge White."

Peter B. Bradley replied, expressing in his letter surprise and regret at the deficiency, but adding that under the circumstances they did not feel that they could make "any further concession," and Tolson accordingly paid the balance of the purchase money in full. (The concessions made to Tolson previously, as implied in the foregoing letter, doubtless consisted of the change in the terms of payment and a subsequent reduction of \$250 in the price which had been agreed upon.)

It is conceded on behalf of the appellee that upon the face of the conveyance his contract for the purchase was one of hazard, and that he would have no right upon that showing to any relief. Nor, as we understand his contention, does it rest upon anything that passed between him and Peter B. Bradley at the meeting in New York, or at any other time. His claim for relief is based solely upon certain representations alleged to have been made to him by Triplett, which he says he relied upon, and was thereby defrauded. He claims that after the contract of July 4, 1907, was entered into Triplett advised him not to have the land surveyed, stating that he had lived on it, cultivated it, knew it, and that Tolson would lose land by the survey, and would have to pay the cost of the survey also. He further claims that, although he relied upon these representations, he did not know until after he had settled in full for the land that Triplett at the time he made them knew them to be false. It appears that after Tolson's purchase Triplett obtained a deed to his daughter for the balance of the farm, and subsequently stated to a witness that he knew all the time that the land was short on the right-hand side of the road, and that the land which his daughter got from the Bradleys contained the difference.

Tolson's contention, therefore, is that although neither he nor Bradley knew the acreage, Triplett did know it; that under the influence of Triplett's representations he entered into the contract, and that the Bradleys, having benefited by a contract which Triplett made for them, were bound by the fraud which he perpetrated, although they themselves may have been innocent of it.

The Bradleys, on the other hand, contend that Triplett's connection with the sale, in so far as they are chargeable with it, ended with the contract of July 4, 1907, which expressly provided for a reduction in the price if the estimated quantity should fall short; that Tolson, not content to rely entirely upon Triplett's agency, and not altogether confident of his authority, took the matter up directly with them, and obtained a confirmation of the contract, and thereafter, finding him-

self unable to meet its alternative terms of payment, either in cash or on time, secured a second contract on his own initiative, of which he now unjustly complains. And they further contend that, even if they could be held responsible for Triplett's misrepresentations, Tolson, by his letter of February 4, 1910, and his subsequent conduct waived any possible right to take advantage of the alleged fraud.

In our opinion the latter contention is conclusive of the controversy, and renders it wholly unnecessary to discuss any other aspect of the case.

[1] It appears to be conceded by counsel for Tolson that the letter in question, followed by the payment of the balance of the purchase money, as above set out, would ordinarily constitute an effectual bar to his suit, but it is sought to avoid this result by the claim that at the time the letter was written he did not know the "misrepresentation" had been made by Triplett with knowledge that it was untrue. The letter is couched in language which conflicts with this claim, and the evidence to explain away this language is not satisfactory. But the claim, if true, is immaterial, because the fraudulent intent of the misrepresentation is itself immaterial. As is correctly stated in the brief of counsel for appellee, addressed there to a different point, however:

"It is immaterial whether the party making the representation knew it to be false or fraudulent or not; neither does his belief in its truth affect the question."

Triplett could not, under the circumstances as claimed by the appellee, make the reckless misrepresentations imputed to him, even if he did not have actual knowledge of their falsity, without committing a fraud both at law and in equity. The clear weight of authority sustains this view. *Grim v. Byrd*, 32 Grat. (73 Va.) 293, 301; *Wilson v. Carpenter*, 91 Va. 183, 190, 21 S. E. 243, 50 Am. St. Rep. 824; *Spoor v. Tilson*, 97 Va. 279, 282, 33 S. E. 609; *Lowe v. Trundle*, 78 Va. 65, 67; *Cerriglio v. Pettit*, 113 Va. 533, 544, 75 S. E. 303; 2 *Cooley on Torts* (3d Ed.) 953; *Nerwin's Equity*, §§ 502-506; *Hilligas v. Kuns*, 86 Neb. 68, 124 N. W. 925, 26 L. R. A. (N. S.) 284, 20 Ann. Cas. 1124; *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629.

[2] The letter of February 4, 1910, was written by Tolson after he knew all the facts of which he now complains, except the alleged actual scienter and fraudulent intent on the part of Triplett. This was, at most, merely a newly discovered incident or feature of the alleged fraud sufficient to change in degree the moral aspect of the case, but not to create any new right. *Wilson v. Hundley*, 96 Va. 96, 102, 30 S. E. 492, 70 Am. St. Rep. 837. His right to disaffirm the contract was no better when he brought this suit than it was on February 4, 1910. By the letter in question he distinctly affirmed it, waived any

legal claim to relief on account of Triplett's "misrepresentation," submitted the matter of a reduction of the purchase money to the appellants, and, upon their refusal to make "any further concession," settled the balance in full, less \$250, a voluntary abatement allowed from other considerations, which of course would have been denied him if he had then elected to litigate. Having once elected to affirm the contract, he cannot thereafter disaffirm it, but must abide by the decision he has made. *Wilson v. Hundley*, supra, 96 Va. page 101, 30 S. E. 492, 70 Am. St. Rep. 837; *University of Va. v. Snyder*, 100 Va. 567, 579, 42 S. E. 337; 2 Pom. Eq. Jur. § 897.

We are of opinion that the decree appealed from should be reversed and annulled, the attachment in the cause abated, and the bill dismissed. A decree to this effect will be entered by this court.

Reversed.

(117 Va. 490)

EAST v. ATKINSON.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. SPECIFIC PERFORMANCE §47 — VERBAL CONTRACT TO SELL LAND — PARTIAL PERFORMANCE.

Where a verbal contract to convey land was certain, definite, and clear in its terms, and the purchaser went into possession when it was made, and continued in exclusive possession under it, and made improvements of substantial and peculiar value, there was such part performance as entitled the purchaser to compel specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 132; Dec. Dig. §47.]

2. SPECIFIC PERFORMANCE §97 — VERBAL CONTRACT TO CONVEY LAND — DEFENSE — NONPAYMENT OF PURCHASE MONEY.

In a purchaser's action to enforce specific performance of a partially performed verbal contract to convey land, it was no defense that plaintiff had not paid the installments of the purchase money as they became due, where time was not of the essence of the contract, and neither the vendor nor her agent demanded that such payments be made, until the agent, on succeeding to his principal's rights, without giving the purchaser reasonable notice, declared the contract forfeited for nonpayment of the purchase money.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. §97.]

Appeal from Circuit Court, Pittsylvania County.

Suit by W. P. Atkinson against G. W. East. From decree for complainant, defendant appeals. Affirmed.

Clement & Clement, of Chatham, for appellant. H. Dillard, of Chatham, and S. A. Anderson, of Richmond, for appellee.

KELLY, J. This suit was brought by W. P. Atkinson to enforce the specific performance of a contract whereby, as he alleges, Mrs. Scenia Ann Yeatts agreed to sell to him 98 acres of land. The decree of the circuit

court awarded the relief prayed for, and this appeal is brought by G. W. East, who has succeeded to the rights and liabilities of Mrs. Yeatts under the alleged contract.

The following are the essential facts: In August, 1905, Atkinson contracted with John Hodnett, his father-in-law, for the purchase of about 154 acres of land, of which the 98 acres here involved is a part. He gave Hodnett his bond, effective January 1, 1906, for \$796, the amount of the purchase price, was placed in possession, moved into the dwelling house on the land, and has resided there ever since. He was a man of small means and bought the place for a home. By deed of November 28, 1906, Hodnett, in furtherance of an understanding between Atkinson and Mrs. Yeatts, conveyed to the latter the said 154 acres for a consideration of \$839.78 in cash, the amount of Atkinson's bond to Hodnett with its accumulated interest. It was understood when this conveyance was made that Mrs. Yeatts would cut off and sell to Atkinson the said 98 acres at the price of \$519.21, payable in annual installments of \$100 each, with interest. Accordingly G. W. East, acting for his aunt, Mrs. Yeatts, procured a survey and plat of the 98 acres, and also prepared a bond for \$519.21, which was dated March 11, 1907, and executed by Atkinson to Mrs. Yeatts. This bond showed on its face that it was for the purchase price of the 98 acres, referred to the survey and plat aforesaid, and recited that payment was to be made at the rate of \$100 a year, with interest, until discharged. The dwelling then occupied by Atkinson was situated on the 98 acres, and he has remained in exclusive possession of the land. He has kept up the interest on the bond and paid a small part of the principal. The bond was written by East, and all of the payments were indorsed thereon in his handwriting. The last payment of \$30, covering the interest for the year 1911, was made to East after the death of Mrs. Yeatts. There is no question about the fact that Atkinson has occupied the land under and by virtue of the contract, and that upon the faith of it he has improved the residence, built a stable, planted an orchard, cleared some of the woodland, and dealt generally with the property as his own, all with the knowledge and acquiescence of Mrs. Yeatts and G. W. East, who resided together and within a short distance of the land. Mrs. Yeatts died intestate in April, 1911. G. W. East's mother, Mrs. N. E. East, and his aunt, Mrs. L. M. Motley, were Mrs. Yeatts' only heirs. On the 19th of June, 1912, Mrs. East and Mrs. Motley, for an expressed consideration of \$5 and natural love and affection for their son and nephew, conveyed to him the entire tract of 154 acres aforesaid, ignoring Atkinson's contract. It is shown that Mrs. Yeatts did not demand at any time that Atkinson should pay the principal of the bond, being content to receive the

interest. No demand was ever made on him for the payment of the bond, and on March 25, 1912, after the death of Mrs. Yeatts, he tendered to G. W. East \$30 to cover the interest for the year 1911, and \$25 to be credited on the principal. East accepted \$30 for the interest and credited the same upon the bond, but refused the \$25, and, to use his own words, "then and there declared the contract forfeited and demanded possession of the place." In a short time thereafter, but before this suit was brought, Atkinson tendered to East the full amount due upon the bond and requested a conveyance; but East declined to accept the money and refused to make the conveyance, and Atkinson thereupon instituted suit.

The circuit court was of opinion, and so held, that the bond of Atkinson, and the various receipts which were given by Mrs. Yeatts for the payments thereon, did not constitute sufficient written evidence to take the contract out of the statute of frauds. This view is controverted by counsel for Atkinson in a cross-assignment of error. It is also contended that the statute of frauds cannot be relied upon in this case by the appellant, because (as claimed for appellee) he did not insist upon it in his answer or otherwise, but based his defense upon the appellee's failure to comply with a contract the terms of which were admitted.

We do not find it necessary to pass on either of these contentions, because, waiving them, and conceding that the contract was not sufficiently evidenced by writing, and that the statute was adequately insisted upon, we think the decree complained of properly directed the specific performance of the agreement.

[1] The contract was entirely certain, definite, and clear in its terms; Atkinson was in possession when the contract was made, and continued in exclusive possession until this suit was brought; this possession was admittedly held under the contract made with Mrs. Yeatts; the improvements were not costly or extensive, worth at most not over \$300, but they were directly referable to and in pursuance of the contract; and, viewed in the light of the value of the land, the plaintiff's means and station in life, and the fact that he was trying to convert the property into a permanent home, they were of substantial and peculiar value.

The case on behalf of the appellee, as it appears in the record before us, meets all the requirements of the rule established in Virginia for compelling the specific execution of a partly performed verbal contract for the sale of land.

"From the numerous decisions on the subject the following principles may be extracted, and briefly stated, as follows: (1) The parol agreement relied on must be certain and definite in its terms. (2) The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. (3) The

agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. Where these three things concur, a court of equity will decree specific execution." *Wright v. Puckett*, 22 Grat. (63 Va.) 374. See, also, *Lester v. Lester*, 28 Grat. (69 Va.) 737; *Henley v. Cottrell Real Estate Co.*, 101 Va. 70-73, 43 S. E. 191; *Plunkett v. Bryant*, 101 Va. 814-818, 45 S. E. 742; *Reed v. Reed*, 108 Va. 794, 62 S. E. 792.

[2] The fact that Atkinson had not paid the installments of purchase money as they became due does not, under the other facts of this case, constitute a valid defense to the bill. The plain terms of the contract and the conduct and dealings of the parties preclude any claim that time was of the essence of the contract. Neither Mrs. Yeatts nor G. W. East ever made any demand upon Atkinson for the principal of the bond, and when, on March 25, 1912, East undertook to declare the contract forfeited for nonpayment of the purchase money, he did so without giving Atkinson the reasonable notice to which he was entitled under the law. Under these circumstances East had no right to declare the contract forfeited, and is not entitled to anything more than interest as the measure of his damage for the delay in the payment of the purchase money. *Booten v. Scheffer*, 21 Grat. (62 Va.) 491; *Smith v. Proffit*, 82 Va. 832-849, 1 S. E. 67; *Bethel & Co. v. Salem Imp. Co.*, 93 Va. 354-359, 25 S. E. 304, 33 L. R. A. 602, 57 Am. St. Rep. 808; *Secombe v. Steele*, 61 U. S. (20 How.) 94-104, 15 L. Ed. 833-836; *Pomeroy on Contracts*, § 393. The decree of the circuit court was right, and will be affirmed.

Affirmed.

CARDWELL, J., absent.

(117 Va. 563)

RATCLIFFE v. COSTELLO et al.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. BILLS AND NOTES — NEGOTIABLE INSTRUMENTS ACT—HOLDER IN DUE COURSE.

Under Negotiable Instruments Act (Code 1904, § 2841a) § 52, defining a holder in due course, section 57, providing that such a holder holds the instrument free from any defect of title of prior parties and free from prior defenses, and may enforce payment of the full amount, and section 56, providing that, to constitute notice of an infirmity in the instrument or in its title, the person to whom it is negotiated must have actual knowledge thereof, one who has purchased a promissory note for value before maturity, without notice of defenses available to the maker, was a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.]

2. BILLS AND NOTES — NOTICE OF INFIRMITIES UPON REPURCHASE.

That a purchaser of a note before maturity for value in good faith, and without notice of defenses available to the maker thereof upon re-

purchasing the note was chargeable with knowledge of infirmities therein did not impair his original possession as holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 790, 791, 960, 962; Dec. Dig. § 363.]

3. TRIAL ¶252 — INSTRUCTIONS — INSTRUCTIONS NOT SUPPORTED BY EVIDENCE.

It is reversible error to give an instruction not supported by evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ¶252.]

Error to Circuit Court, Loudoun County.

Action by G. M. Ratcliffe against Robert Costello and another. There was a judgment for defendants, and plaintiff brings error. Reversed and remanded.

R. A. Hutchison and C. A. Sinclair, both of Manassas, for plaintiff in error. John W. Rust, of Fairfax, for defendants in error.

KEITH, P. The plaintiff, to maintain the issue on his part, introduced in evidence the three notes sued upon, all of which are of like tenor, and that first falling due is as follows:

"Fairfax, Va., Jan. 20th, 1912. 466.67/100. Eighteen months after date, for value received, we jointly and severally promise to pay W. B. Bullock or order four hundred and sixty-six 67/100 dollars with interest at the rate of six per cent. per annum, from date payable annually. It is stipulated and agreed that if any payment or part payment thereon, or any interest that may become due and unpaid, the holder thereof may at his option, declare that such delinquency shall cause the whole note to become due and collectible. And we, maker and indorser, hereby waive the benefit of the homestead exemption as to this contract. Payable at People's Nat'l Bank of Leesburg, Va.

"Robert Costello.
"I. S. Young."

This note was protested for nonpayment. The plaintiff then took the stand in his own behalf, and proved that he had bought these notes from the payee, W. B. Bullock; that he was familiar with Bullock's handwriting, and that it was his indorsement on the back of the notes; that the notes aggregated \$1,400, and he had paid Bullock for them the sum of \$1,112.28; that he had purchased them before maturity, and without notice or knowledge of any kind or degree as to what the notes were given for, as to any infirmity with respect to them, or any condition affecting their payment; that he had sold the notes to his father, G. M. Ratcliffe, and H. M. Daniel immediately after he had purchased them; that he was not the agent for either G. M. Ratcliffe or Daniel for the purchase of the notes, but that he had purchased them outright from the payee, Bullock, and paid for the same; that he had guaranteed to his vendees, Ratcliffe and Daniel, the payment of the three notes, and when the first note was protested he wrote several letters to the defendant, Costello, demanding payment, but received no reply; that when it was apparent that suit would be necessary to enforce

payment, he took back the three notes, the first note having been previously protested, and that he had not paid his vendees the price of the same, but was still owing to them the price of the notes; that he did not indorse the notes when he transferred them to Daniel and Ratcliffe; that before making the purchase he had inquired of the People's National Bank of Leesburg as to the financial responsibility of Robert Costello and I. S. Young, and upon receiving a favorable report, he purchased the notes, with no notice whatever of any defect in the title of Bullock, or of any guaranty, or of the circumstances under which the notes were executed and delivered; and that the witness did not know of other checks of Bullock being protested at his bank subsequent to May, 1912; that he did know at the time that Bullock was in the horse business, but he did not know for what the notes were given.

The defendants then introduced testimony which proves, or tends to prove, that the notes were for the purchase price of a stallion; that at the time of the sale Bullock entered into a verbal contract with Young to the effect that if Young was not prepared to meet his notes at maturity, Bullock would extend the time and permit Young to renew such note or notes as long as Young might desire or find necessary, and that in fact the profits and proceeds from the service or use of the stallion would pay off and discharge the notes, and that as a part of the verbal agreement one of the conditions on which the stallion was sold was a guaranty that sixty per cent. of the mares regularly bred to the stallion would become with foal; that the horse did not come up to the guaranty, but was worthless as a foal-getter.

A number of witnesses were introduced, and we may sum up the result of their evidence by saying that it may be conceded that if the suit had been between the original parties to the note, Bullock, the payee, and Costello and Young, makers, it would have been sufficient to have established the contention of the defendants. But the suit is not between the original parties to the note; the plaintiff, Ratcliffe, occupies the position of purchaser of a negotiable note before maturity, for valuable consideration, and without notice of any defect or infirmity with respect to it.

[1] By section 52 of the Negotiable Instruments Act, a holder in due course is one who takes the instrument under the following conditions:

"(1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; and (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

By section 57 it is provided:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

And by section 56 it is provided that:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

We have searched the record in this case diligently, and have been unable to find a scintilla of evidence proving, or tending to prove, that Ratcliffe had actual knowledge of any infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, but on the contrary he stood before the court, by evidence wholly uncontradicted, as a holder in due course of an instrument complete upon its face, which had not been dishonored, and that he took it in good faith and for value, without notice of any infirmity in the instrument or defect in the title of the person negotiating it.

[2] There seems to have been some misapprehension with respect to the case of Aragon Coffee Co. v. Rogers, 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623. It will be recalled that Ratcliffe, after he purchased the notes, sold them with a guaranty to his vendees that they should be paid, and that in order to keep faith with them he took the notes back after the first one was protested. It is true that when the notes came back to his possession they came under circumstances which would have imputed to him knowledge of the infirmities in the instruments, but that knowledge did not relate back so as to impair his original position as a purchaser for value and without notice. In the case of Aragon Coffee Company exactly the converse of these facts existed. The original payee in that case was the party guilty of a gross fraud, as a result of which the negotiable note in that case was given. He indorsed it to an innocent holder and afterwards repurchased it; and the court held that if a payee sells a negotiable instrument to an innocent third party and then repurchases it, he does not thereby acquire a better title against the maker than he had in the first instance. We refer to that case and the authorities there cited as not at all in conflict with the position of the plaintiff in error in this case.

[3] When the introduction of evidence was concluded the plaintiff asked for three instructions, of which the court gave two as requested, but amended the third, as we think improperly, because there is no evidence that the plaintiff was other than an innocent holder for value and without notice. All the instructions asked for by the

defendants and given by the court are subject to the same objection—that they are wholly unsupported by evidence. The instructions given by the court of its own motion correctly propound the law, but so much of the fourth instruction as tells the jury that if they believe that the plaintiff did not purchase said notes and is not a holder in due course as defined, and further believe that the defendants gave said notes as purchase money for a horse bought under a guaranty and said horse did not fulfill the said guaranty, then they shall find for the defendants, and that these questions are to be determined from all the facts and circumstances introduced in evidence, should not have been given, for the reason, already stated, that there is no evidence which tends to prove that the plaintiff had notice of any infirmity in the notes at the time at which he purchased them.

The judgment of the circuit court must be reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views herein expressed.

Reversed.

(117 Va. 514)

LEONARD v. VAUGHAN & CO.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

BROKERS ~~§~~65—RIGHT TO COMMISSION—DEFECT IN TITLE.

Where one purchasing in reliance on the statements of the real estate agents as to the title to the property and its boundaries, and their assurance that they could make a quick sale of the property as they represented it to him, listed the land with the same agents, and they procured a purchaser who refused to complete the purchase because of a defect in the title, the principal, the original purchaser, was not liable for a commission, though he afterwards sold the land at a profit subject to the defect; the rule that real estate agents may act on the assumption that the owner can tender a title free from infirmities not applying where the facts are such that the ordinary presumption of knowledge by the owner and of his guaranty in favor of the agents cannot be implied.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50; Dec. Dig. ~~§~~65.]

Error to Hustings Court of City of Richmond.

Action by Vaughan & Co. against Thomas B. Leonard. From judgment for plaintiffs, defendant brings error. Reversed, and remanded for new trial.

McGuire, Riley, Bryan & Eggleston, of Richmond, for plaintiff in error. Gunn & Mathews and W. M. Justis, Jr., all of Richmond, for defendants in error.

HARRISON, J. This controversy involves the right of the plaintiffs, Vaughan & Co., to recover of the defendant, Thomas B. Leonard, commissions alleged to be due them

as real estate agents for making sale of certain property for Leonard.

It appears that Vaughan & Co. had in their hands for sale certain real estate situated on the west side of Thirteenth or Governor street, in the city of Richmond, belonging to one Wallerstein, to whom it had been sold and conveyed by a former owner through the agency of Vaughan & Co. This same agency, acting for Wallerstein, sold the property to the defendant, Leonard, who immediately replaced the same in the hands of Vaughan & Co. to be sold for his benefit, one of the inducements to his purchase being the statement of the agents that they could certainly resell it for him at a profit in a few days. In 10 days thereafter a sale was made for the defendant to one Dunlop at an advance. The contract between Wallerstein and the defendant and that between the latter and Dunlop were both in writing, and each contained a provision making the sale conditional on the title being free from valid objection. Dunlop, the purchaser from the defendant, had the title examined, and found that no title could be made to a certain small vacant space in the rear of the lot, which was regarded as a material inducement to the purchase. Thereupon Dunlop declined to consummate the sale that had been made to him, and the defendant, Leonard, a few days thereafter, through another agency, sold the property to other parties for a still larger price, and subject to the defect which had been developed in the title.

The theory of the plaintiffs is that this was only the ordinary case of real estate agents procuring a purchaser ready, able, and willing to buy property at a stipulated price; that, having done this, they cannot be defeated of their commissions because of a defect in the title; that the employer guarantees his title as to the agents, and must pay their commissions although the sale they have made fails because of defect in the title.

This general rule is not denied by the defendant, but it is insisted, on his behalf, that it is not applicable to the facts of this case, it being contended that the sale to Dunlop failed through a material misrepresentation as to the lines of the property made by the plaintiffs, without fault on the defendant's part, and relied on by the latter both in his own purchase and in authorizing a sale to Dunlop, and that under such circumstances he cannot be held liable.

In support of this theory of the case the evidence tends to show that when approached by the plaintiffs on the subject of buying the property in question, the defendant knew nothing about the property or the state of the title thereto, except such information as he acquired from the plaintiffs, who had, as real estate agents, handled the property several times; that he was shown the property by one of the plaintiffs, who pointed out the lines and told him that they included the

vacant space, to which the title proved defective—

"that the property was cheap; that he could certainly turn it over in a few days; and that it was unnecessary to have the title examined, mentioning that as part of the sale."

These declarations of the real estate agents were intended to and had the effect of inspiring full confidence and assuring the defendant as to what land was embraced within the lines of his purchase. The deed conveying this property to Wallerstein included within its boundary the vacant space mentioned, and it was upon this deed and the plat filed therewith that the plaintiffs were relying in making their representations to the defendant, and subsequently to Dunlop, in making the sale to him. It further appears that the defendant did not see any plat of the property, nor was there any reference to what the title papers showed. He relied solely on the statement of the agents, which was without qualification as to the land included in the sale. The evidence further tends to show that, in pursuance of a previous understanding with them, the defendant, contemporaneously with his purchase, directed the plaintiffs to find a purchaser for him with a view to a quick sale at a profit, that no time was taken for an examination of the title, and that all concerned knew it had not been examined, and that the agents knew the defendant had no knowledge of the title, and that he was relying on their representation and assurance as to the true lines and the property embraced therein.

Under these circumstances, Dunlop having declined to take the property because of defective title as to a part thereof, the defendant insisted that it was neither just nor equitable to hold him liable to the plaintiffs for commissions on a sale that had failed because of their misrepresentation. We do not mean to say that there is evidence tending to prove that the plaintiffs knowingly deceived the defendant, but merely that the evidence tends to show that they represented to the defendant and to Dunlop that the lines of the property included a larger area than the fact justified, and did this knowing that the defendant's sole knowledge of the property came from them; that he was buying at their solicitation and on their assurance that they could make a quick resale of the property, as they had represented it to him, and accepted the employment to make such sale before "the ink was dry on the defendant's contract of purchase."

The lower court, being of the opinion that the plaintiffs' right to recover was not affected by the facts and circumstances shown of record tending to sustain the defendant's theory of the case, wholly disregarded all such evidence, refused the instructions asked for by the defendants submitting his theory of the case to the jury, and gave a single instruction for the plaintiff, which told the jury that if they believed from the evidence

that the defendant, Leonard, placed the property in the hands of the plaintiffs, and that they procured a valid contract to purchase signed by Dunlop and accepted by the defendant, then the plaintiffs had completed their contract, were entitled to their commissions, and the jury must find for them.

This instruction ignored the defendant's theory of the case, and practically directed a verdict for the plaintiffs. We have not been cited to one and there does not appear to have been, a case involving similar facts, or an express decision on the particular question here presented. The general rule unquestionably is that in making their contract and in producing a customer, real estate agents may act upon the assumption that the owner can tender a title free from infirmities, there being an implied contract that he has the ability to confer upon a purchaser a perfect title to that which he offers for sale. We are, however, of opinion that this general rule can have no application where the facts are such that the ordinary presumption of knowledge by the owner and his guaranty in favor of the agents cannot be implied. The presumption afforded by the general rule is not conclusive. It may be waived by the act of the parties, and when the facts are inconsistent with the usual presumption, it will not be implied. Under the facts which the evidence in the present case tends to establish, if believed by the jury, the plaintiffs would not be entitled to the benefit of the usual presumption that the owner knows his own title and guarantees it as to the agents, because the established facts would be wholly in conflict with such a presumption. The evidence tends to show that the sale in question failed without fault on the part of the defendant, and solely as the result of a representation that the plaintiffs assumed the responsibility of making, as to the true lines of the property, which proved to be unfounded, and caused the purchaser, Dunlop, to exercise his undoubted right to abandon the purchase.

As said by this court in *Middle, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588:

"If the plaintiff is entitled to recover, it must be for a breach of contract upon the part of the defendant by reason of his having omitted to do that which by his contract he ought to have done, or having done that which by the terms of his contract he should have refrained from doing. The recovery must be based upon some default or misconduct on the part of the defendant."

In conclusion, we are of opinion that the lower court erred in giving the instruction asked for by the plaintiffs, and further erred in refusing to give the instructions offered by the defendant in the form in which they were requested, which instructions submitted the defendant's theory of the case to the jury without prejudice to the rights of the plaintiffs.

For these reasons, the judgment complain-

ed of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion.
Reversed.

(117 Va. 474)

CARNER v. MIDDLEKAUF et al.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. FRAUDULENT CONVEYANCES §277—ACTION TO SET ASIDE—BURDEN OF PROOF—HUSBAND AND WIFE.

Where, in a suit by creditors of C. to set aside as fraudulent a conveyance to C.'s wife and M. and a subsequent conveyance from M. of her undivided one-half interest to C.'s wife, the evidence showed that C. was insolvent, and that the stock traded for the land belonged to C. and remained in his name until transferred to the original grantor in payment for the land, the burden was on his wife to show that she, in good faith, furnished the consideration from her own, and not from her husband's means.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 799, 809-814; Dec. Dig. §277.]

2. FRAUDULENT CONVEYANCES §300—ACTION TO SET ASIDE—SUFFICIENCY OF EVIDENCE—HUSBAND AND WIFE.

Evidence, in an action by creditors of C. to set aside as fraudulent conveyances to C.'s wife, it being contended that the consideration was furnished by C., held insufficient to sustain the burden resting on C.'s wife to prove that she furnished the consideration from her own, and not from her husband's, means.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 896-903; Dec. Dig. §300.]

3. FRAUDULENT CONVEYANCES §181—FRAUDULENT GRANTEE—LIABILITY FOR AMOUNT OF INDEBTEDNESS.

Where a fraudulent grantee, the wife of the debtor, borrowed money, giving a deed of trust on the land as security therefor, she was liable to the creditors for the amount of such indebtedness.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 554-559, 561-567; Dec. Dig. §181.]

Appeal from Law and Chancery Court of City of Norfolk.

Suit by one Middlekauf and others against M. F. Carner. From decree for complainants, defendant appeals. Affirmed.

R. R. Hicks, of Norfolk, for appellant. Wingfield & Hoag and L. P. Matthews, all of Norfolk, for appellees.

KELLY, J. Joel T. Lumsden and wife, in November, 1911, conveyed a tract of land to Clara V. Lynch Carner and Mary W. Carner. About one year later, Mary W. Carner, by a deed in which her husband, James E. Carner, united, conveyed her undivided half interest in this land to Clara V. Lynch Carner, and the latter, on the same day, gave a deed of trust thereon to secure \$1,500 borrowed by her upon the property. Clara V. Lynch Carner was the wife of M. F. Carner, and James E. Carner was his son.

This suit was brought by the creditors of M. F. Carner to set aside as fraudulent the

two conveyances first above mentioned, and to obtain a personal judgment against his wife for the amount obtained by her upon the deed of trust. From a decree sustaining the contention of the creditors this appeal was allowed.

The first error assigned is to the action of the court in setting aside the aforesaid deeds to Clara V. Lynch Carner and holding the land liable for the debts of her husband.

[1] The deed from Lumsden and wife expressed a consideration of \$1,650, and recited that \$1,186.35 was paid in cash and the balance by the assumption of two notes aggregating \$463.65. The real consideration, however, was \$100 cash, the assumption of said notes, and the transfer and delivery to Lumsden of 18.6 shares of the stock of the People's Furniture Company. It is not denied that this stock originally belonged to M. F. Carner, and that it remained in his name to the time of the transfer to Lumsden, but the contention of Carner and wife is that it had been hypothecated with certain banks (which is shown to be true) and that Mary W. Carner and Clara V. Lynch Carner furnished the means to procure the release of the stock, became the owners thereof, and traded it on their own account to Lumsden.

Mary W. Carner gave a deposition in the cause, stating unequivocally that she had never bought or owned any of the stock, had never claimed any interest in the Lumsden land, and had made the conveyance to Clara V. Lynch Carner at the request of M. F. Carner. This testimony is corroborated by other facts appearing in the record, and is not open to serious question.

As to Clara V. Lynch Carner's connection with this transaction, we are of opinion that the facts disclosed by the evidence, together with the legal presumptions arising through the relationship of the parties, fully warranted the lower court in finding, as set forth in the decree appealed from, that the deeds in question—

"were made to hinder, delay and defraud the creditors of the defendant, M. F. Carner, and that the said M. F. Carner furnished the consideration for the said land."

It is shown that M. F. Carner is insolvent. As between him and his wife on the one hand and his creditors on the other, this transaction must be treated *prima facie* as actually fraudulent, and the burden is upon her to show, by clear and satisfactory proof, that she in good faith furnished the consideration from her own and not from her husband's means. *Richardson v. Pierce*, 105 Va. 628, 54 S. E. 480; *Atkinson v. Solenberger*, 112 Va. 687, 72 S. E. 727; *Eason v. Lyons*, 114 Va. 392, 76 S. E. 957; 2 Minor, Real Prop. § 1181.

[2] The *prima facie* case thus made out for the appellees has not been overcome by any satisfactory evidence on the part of the appellant. It does appear that she assisted

her husband in securing the release of four shares of stock in the People's Furniture Company by indorsing his note for \$200, and that she subsequently paid this note. It also appears that the president of the bank which held these four shares of stock as collateral understood that when the stock was taken down under this arrangement it became the property of the appellant. This, however, was a mere matter of opinion on the part of the president of the bank. The arrangement did not in itself operate as a transfer, and she has in no way met the burden which the law places upon her of showing that she actually furnished the consideration and in good faith acquired the stock. Moreover, this arrangement only involved four shares of the stock. Her husband owned 23½ shares, Lumsden only got 18.6 shares and there is nothing to show that these 4 shares, even if acquired by Mrs. Carner, went into the purchase of the land.

In order to meet the acknowledged presumption of law against the good faith of the appellant's position, she invokes the doctrine announced in the case of *Kinnler v. Woodson*, 94 Va. 711, 27 S. E. 457. In that case, upon a state of facts showing that the husband could not have furnished the funds, and that the wife was engaged in a business from which resources might reasonably have been expected with which to make the purchase, it was held that the presumption was successfully met and repelled. The evidence completely removes the case at bar from the influence of that decision. If the doctrine of *Kinnler v. Woodson*, could be applied here, it could be applied in every case in which the husband is insolvent and the wife has means of her own. M. F. Carner had not only acquired the stock in question, but had been trading in real estate (taking the title, however, in the names of other persons), and also had been engaged in the building business for some years. He was admittedly insolvent, but the evidence of his business activity leaves no room to doubt that he could have furnished the consideration for the purchase from Lumsden.

[3] It is claimed, under the second and only remaining assignment of error, that the court erred in holding Clara V. Lynch Carner liable for the amount of money which she borrowed upon the property after allowing her credit for the sums which she claims to have applied on the purchase price of the land. This portion of the decree is as follows:

"It further appearing to the court that she has borrowed the sum of \$1,500, with interest, from the 26th day of November, 1912, and has secured the same by a deed of trust upon said property, * * * and that the trustee had no notice of the fraud, so that the land will have to be sold subject to the deed of trust, and it appearing to the court that should the said land, upon being sold subject to said deed of trust, not bring a sum sufficient to pay the debts of M. F. Carner, * * * the said Clara V. Lynch Carner will be personally liable to the creditors for such deficiency to the extent of

\$1,500, with interest, less the amount of the lien assumed by her at the time of the purchase of said land and the sum of \$100 paid by her at said time, it is so ordered and decreed."

The decree in this respect is free from any error to the prejudice of the appellant. It is contended in her behalf upon this branch of the case that the court ought not to have held her responsible for more than the value of the stock in the People's Furniture Company which entered into the transaction as a part of the purchase money for the land. We cannot assent to this view. As we have already seen, there was no sufficient proof that the stock, or any part of it, was ever acquired by Mrs. Carner. The fraud complained of in this case consisted in having the deed made to Mrs. Carner instead of her husband. Mrs. Carner, as a fraudulent grantee, is to be regarded as a trustee for the creditors. As such she is personally liable for the amount in which she lessened the value of the property by the incumbrance she placed upon it. The creditors are entitled to the full value which M. F. Carner would have had in the subject if the conveyance had been made directly to him. These principles, applied here concretely to the appellant, are plainly just and reasonable in the abstract, and are abundantly supported by authority. See 2 Min. Inst. 671; 1 Min. Real Prop., § 482; Williamson v. Goodwyn, 9 Grat. (50 Va.) 506; Almond v. Wilson, 75 Va. 614; Hamilton Nat. Bank v. Halstead, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693; 20 Cyc. 630, 631.

We are of opinion that the decree complained of should be affirmed.

Affirmed.

CARDWELL, J., absent.

(117 Va. 504)

JOHNSON v. JOHNSON.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

DIVORCE — ACTIONS — DESERTION.

Where a husband abandoned his wife continuously for more than three years, with the declared purpose of not returning to her, during which time he did not cohabit with her, made no effort to resume marital relations and contributed nothing to her support, there was such a desertion as entitled the wife to a divorce under Code 1904, § 2257, authorizing divorce for three years' desertion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-134, 136-138; Dec. Dig. § 37.]

Appeal from Circuit Court of City of Norfolk.

Bill by Essie H. Johnson against Eugene W. Johnson. From a decree denying divorce, complainant appeals. Reversed.

E. A. Bilisoly, of Norfolk, for appellant.

PER CURIAM. This bill was filed by Essie H. Johnson to obtain a decree of di-

vorice from her husband, Eugene W. Johnson, on the ground of desertion.

The case has been regularly matured by proper service upon the defendant who has failed to appear or make any defense to the allegations of the bill. The statute provides that when either party willfully deserts or abandons the other for three years, a divorce from the bond of matrimony may be decreed (Code 1904, § 2257); and further provides that where desertion is the ground, the husband or wife may testify (Code 1904, § 3846a).

The uncontradicted evidence in this case abundantly shows that, without adequate cause, the defendant has abandoned his wife continuously for more than three years, with the declared purpose of not returning to her; that during that time he has not cohabited with her, has had no communication with her, has made no effort to have her resume marital relations, and has contributed nothing to her support. These facts constitute such proof of desertion as entitles the plaintiff to a decree of divorce from the bond of matrimony. Washington v. Washington, 111 Va. 524, 69 S. E. 322; Lee v. Lee, 112 Va. 719, 72 S. E. 689.

The circuit court having denied the divorce, its decree must be reversed and the cause remanded for a decree to be entered in conformity with this opinion.

Reversed.

(117 Va. 546)

OGLESBY CO., Inc., v. OULD CO., Inc.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

ACCOUNT — EQUITABLE JURISDICTION — COMPLICATED ACCOUNTS — INADEQUATE REMEDY AT LAW.

Where complainant company contracted to sell its wholesale business in dry goods, notions, etc., including its entire stock of merchandise and bills receivable, to the defendant company, which agreed to discharge all debts of the complainant, and to pay it \$100,000 in preferred stock, and where, after the complainant had turned over to the defendant its premises and stock, and had transferred all the property under the contract, and such defendant had taken possession of the complainant company's business and its former employees, the defendant company repudiated the contract and abandoned the property taken over of which it had not disposed, leaving the financial relations of the parties in the greatest complication, equity had jurisdiction to entertain complainant's suit to determine the amount defendant owed it, as, by reason of mutual accounts, repeated trespasses, the investigation of a contract embracing a multitude of terms, and the complexity of accounts between the parties, the concurrent remedy at law is less adequate than that at equity.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 17, 18; Dec. Dig. § 6.]

Appeal from Circuit Court of City of Lynchburg.

Suit by the Oglesby Company, Incorporated, against the Ould Company, Incorporated. From a decree sustaining defendant's demur-

rer to the bill, complainant appeals. Reversed, and cause remanded for further proceedings.

Harrison & Long, of Lynchburg, for appellant. Coleman, Easley & Coleman, of Lynchburg, and John S. Eggleston, of Richmond, for appellee.

KEMITH, P. The Oglesby Company, Inc., was, for a number of years prior to May 24, 1911, engaged in business in Lynchburg as wholesale dealers in white goods, notions, etc. On that day it entered into a contract with the Ould Company, Inc., engaged in a similar business, by which the Oglesby Company sold to the Ould Company its entire stock of merchandise and bills receivable, the entire stock of goods being at invoice price, less all trade and cash discounts and a special discount of 10 per cent., except goods under subsections A and C of clause 1 of the contract, which were chiefly purchases for future delivery, payment of which the defendant assumed at invoice cost, including the freight charges thereon if the goods should be delivered, and as to which no special discount was allowed. The contract embraced also the bills due the Oglesby Company, the solvency of which it guaranteed to the extent of \$125,000, and also embraced the lease of the Oglesby Company's house in which its business was conducted until January 1, 1912, at a stipulated rent, with the privilege of renewal until July 1, 1912. The Ould Company also assumed and undertook to carry out and perform all contracts of the Oglesby Company for the purchase of merchandise and for the sale of merchandise, and all contracts with its employes, including traveling salesmen, the Oglesby Company having agreed to use its good offices to induce its salesmen and employes to enter the employment of the defendant, and assumed the payment of all the debts and obligations of the Oglesby Company, and the defendant, the Ould Company, agreed to pay to the petitioner the sum of \$100,000, which it was agreed might be discharged in second preferred stock of the defendant company, to be issued as speedily as practicable, and which should constitute a lien on the real estate of the defendant described in the contract; and it was further provided that upon a final settlement, to be had between the parties not later than July 1, 1912, each should pay to the other whatever amount was found to be due upon such settlement.

Upon the signing of the contract the Oglesby Company proceeded to turn over to the defendant its house and contents, and by June 1, 1911, had transferred to it all the property provided for in the contract, and the Ould Company took possession of it and assumed control and direction of the Oglesby Company's business and its former employes, including traveling salesmen, and the former management of the Oglesby Company

retired from all connection with the business. Thus upon the part of the Oglesby Company it was claimed that the contract was completely executed by the transfer and delivery of the property as therein provided, and that the Ould Company proceeded to conduct the business as its own until July 8, 1911, when it repudiated its contract and abandoned the property taken over of which it had not disposed. The bills payable (notes in bank) of the Oglesby Company, amounting to \$173,000, the payment of which the Ould Company had expressly assumed, were running to maturity, and on the 27th of June, 1911, one of these, a note for \$5,000, fell due and was permitted by the Ould Company to go to protest. At subsequent dates other bills and notes fell due, and payment was refused. Finally, on July 8, 1911, the Ould Company repudiated its contract in its entirety, and addressed the following note to the Oglesby Company:

"Gentlemen: Because you have broken your contract with us dated May 24, 1911, and have failed and refused to comply therewith, and your representations and guaranties of material facts as therein contained turn out to have been unfounded, we hereby notify you that we do not consider ourselves under any obligation by virtue of that contract, but on the contrary we do and shall regard and treat the contract as no longer of any binding force or effect."

To this note the Oglesby Company replied, through its president, acknowledging receipt of the letter of the Ould Company of July 8th, and goes on to say:

"I am availing myself of the first opportunity to ask you to specify in what way the Oglesby Company has failed or refused to comply with its contract. I ask for this information because this is the first intimation I have had of any such complaint from you."

No reply was made to this letter, and without further notice to the Oglesby Company the Ould Company abandoned the assets, so far as it had not disposed of them, and the business taken over under the contract, though it had been in control and possession of them for more than a month, and during the whole of that time had exercised over them the authority of absolute and unconditional ownership. In the conduct of the business it had canceled orders placed by the Oglesby Company amounting to thousands of dollars; it had transferred to itself many orders taken by the Oglesby Company's salesmen, filling them with goods from its own house; it had received and shipped out goods daily, and controlled and directed the 15 salesmen taken over under the contract traveling in the various states of the South, and through some of them had sold and was selling goods from its own store; it had collected over \$37,000 of accounts transferred to it under the contract, and applied the proceeds as it saw fit. Nevertheless the Ould Company repudiated its contract and abandoned the remaining assets purchased thereunder, amounting to not less than \$150,000 of merchandise, and \$160,000 of accounts and

bills receivable, leaving them without custody or direction, and the business taken over without a head and in a state of disruption and disorganization.

Being unable by negotiation to reach a satisfactory conclusion, the Oglesby Company brought a suit in chancery on the 17th day of July, 1911, against the Ould Company, and at the first rule day in August of that year filed its bill and exhibits therewith.

The contract between the parties, which was filed as an exhibit, and the averments made in the bill, of which we have given a very inadequate synopsis in the foregoing statement, disclose a situation so complicated as, to our mind, to be incapable of exaggeration. The exhibits filed with the bill run through many pages, and embrace well-nigh innumerable items; for example, there are 14 classifications of the stock of goods, bills and accounts receivable, that passed under the contract, beginning with invoices enumerated in class A, which were to be subject to all cash and trade discounts, and consist of 35 bills of goods, valued in the aggregate at many thousands of dollars. Under classification B the balance of the entire stock of merchandise is covered at invoice cost, less all trade and cash discounts, and a special discount of 10 per cent. excepting such goods as have become unsalable, or are of uncertain value by reason of their having been carried over from the previous season, or by reason of being of undesirable styles; the same in no event to be in excess of 6 per cent. of the total gross amount of the stock. This rejected stock last referred to shall be valued by a representative of the party of the first part and a representative of the party of the second part, so as to show the usual gross profit on the cost price for the following season for that class of goods; and in the event these two parties cannot agree they shall select J. F. Lee, of Roanoke, Va., or, failing to get him, shall select Herman Wells, of Bluefield, W. Va., whose decision shall be final. The goods enumerated under these several classifications were all subject to varying terms and conditions, and the character of the whole may be judged by the illustrations we have given. By Exhibit B, filed with the bill, is shown a list of accounts and bills receivable and the credits upon them, bills payable and bad debts, comprising more than 1,500 items, of which number it is impossible to say how many might become the subject of investigation. The prayer for relief is that the defendant be compelled to carry out its contract; that it may be required to resume possession and management of the abandoned assets, or that the assets may be placed in the hands of a receiver to be administered under the direction of the court; that the defendant may be compelled to pay the liabilities of the plaintiff assumed by it under its contract; and that all necessary accounts may be taken and orders entered, and such other

further and general relief be granted as to equity may seem meet.

To this bill the Ould Company filed its demurrer, in which it states several grounds, but we shall only consider that which asserts that a court of equity is without jurisdiction because the complainant has a plain, adequate, and complete remedy at law.

In *Tillar v. Cook*, 77 Va. 477, this court said:

"The jurisdiction of courts of equity in matters of account is among the most comprehensive they have assumed. * * * They have concurrent jurisdiction therein with courts of law; but the difficulty of proceeding in the latter, and the convenience of proceeding in the former, where a discovery may be had on the defendant's oath, where a multiplicity of suits will be avoided, and where fraud, accident, or mistake is connected with the subject, causes them to be most commonly resorted to."

But, as we shall see in the course of further examination of the law upon this subject, the jurisdiction over matters of account does not depend upon the existence of any independent source of equity jurisdiction.

In *Penn v. Ingles*, 82 Va. 65, it is said that:

"Equity hath jurisdiction in matters of complicated accounts, especially those involving equitable claims or trusts."

In *Beggs v. Edison Elec. Light, etc., Co.*, 96 Ala. 205, 11 South. 381, 38 Am. St. Rep. 94, the Supreme Court of Alabama said:

"Courts of equity have, for a long time, exercised a general jurisdiction in cases of mutual accounts founded in privity upon the ground of the inadequacy of the remedy afforded by the common law; and this equitable interposition has been extended until equity will now entertain suits for accounts in matters which were formerly only cognizable at law. The ancient common-law action of account being so imperfect in its processes, and so inadequate in its remedies, jurisdiction in such matters was originally given to equity, for the reason that the common-law courts could not give any remedy at all, or the remedy was not as complete as that furnished by the chancery court. As courts of equity now entertain concurrent jurisdiction with the courts of law, in matters of accounts, a decision as to the proper tribunal must be governed by considerations of convenience and adequacy; and this is determined by the facts pertaining to each individual cause of action and the relief sought."

In *Ely v. Crane*, 37 N. J. Eq. 157, it is said:

"When concurrent jurisdiction exists in matters of account, equity will not withdraw the litigation from a common-law court, unless it clearly appears that such a course is necessary, in order that complete justice may be done. But it is not necessary that the case should involve an equitable element to warrant equity in assuming exclusive jurisdiction. If the accounts are so intricate, or complicated, that they cannot be examined and tried at nisi prius with the care and deliberation necessary to insure an accurate result, equity may take jurisdiction, though an action at law was pending when the suit in equity was brought."

In *Kirby v. Lake Shore, etc., R. Co.*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569, Mr. Justice Harlan said:

"The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between

the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. * * * Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot well be doubted."

In *O'Connor v. Spaight*, 1 Schoales & Lefroy, 305, the Lord High Chancellor of Ireland said:

"The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial *ad nisi prius*, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of the account, the justice of the case cannot appear. Matter of account may indeed be made the subject of an action, but an account of this sort is not a proper subject for this mode of proceeding; the old mode of proceeding upon the writ of account shows it. The only judgment was that the party 'should account,' and then the account was taken by the auditor; the court never went into it."

In 1 Story's Eq. Jur., at section 450, it is said:

"There cannot be any real doubt that the remedy in equity in cases of account is generally more complete and adequate than it is or can be at law."

And, continuing the same subject in section 451, that author says:

"This has accordingly been considered in modern times as the true foundation of the jurisdiction. Mr. Justice Blackstone has indeed placed it upon the sole ground of the right of courts of equity to compel a discovery. 'For want,' said he, 'of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in matters of account.' But this, although a strong, yet is not the sole, ground of the jurisdiction. The whole machinery of courts of equity is better adapted to the purpose of an account in general, and, in many cases, independent of the searching power of discovery, and, supposing a court of law to possess it, it would be impossible for the latter to do entire justice between the parties; for equitable rights and claims not cognizable at law are often involved in the contest."

In 2 Pomeroy's Equitable Remedies, § 930. it is said:

"Although courts of equity have refused to entertain jurisdiction of suits for accounting in cases where the items were merely very numerous, they have interposed in many others for the sole reason that the accounts involved were extremely complicated, and even where such accounts were not mutual, but were all on one side. It is important then to determine, if possible, what degree of complication will warrant the interposition of equity. The rule became established in England that equity would step in whenever the account was so complicated that a court of law would be incompetent to examine it *ad nisi prius* with the necessary accuracy, but under the present practice in England, as in New York, matters of account

may be referred to officers or referees, so that this rule can now hardly be followed in those jurisdictions. Various tests have been laid down, but the facts of each particular case should govern the court in the exercise of its discretion, and the true principle would seem to be that whenever it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction."

The synopsis, which we undertook at the beginning of this opinion to give of the case made by the plaintiff in its bill and exhibits, is wholly insufficient to convey a just idea of the utter inadequacy of the remedy at law. As was said in *Beggs v. Edison Elec. etc., Co.*, supra, where the accounts to be examined are on one side only:

"The allegations of the bill must show the existence of certain conditions which are prerequisite to the exercise of equitable jurisdiction."

In *Shepard v. Brown*, 4 Giffard's Rep. p. 208, the court said that:

"On questions of account, courts of equity and courts of law possess concurrent jurisdiction, and the decision as to the proper tribunal must be governed by considerations of convenience."

In *Taff Vale Ry. Co. v. Nixon*, 1 H. L. Cas. 109, it is held that:

"Although the case against the company consisted of matters cognizable at law, yet as there were complicated accounts between them and the other parties, respectively, a court of equity was more competent to take them, and to dispose of the whole case, than a court of law, and the bill was sustained accordingly."

Miller v. Wills, 95 Va. 337, 28 S. E. 337, was a case not of account but of trespass, and Judge Riely, delivering the opinion of this court, said:

"Although a court of equity will not, as a general rule, interpose to prevent a mere trespass, yet if the act done or threatened would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened, or the injury is or would be irreparable, in fine, whenever the remedy at law is or would be inadequate, a court of equity will enjoin the perpetration of the wrong, and prevent the injury."

The principle which we have undertaken to illustrate is, not that the court of law has not jurisdiction in such a case to afford a remedy, but that the remedy afforded at law is not as full, adequate, and complete as that given in equity. The text-writers and adjudicated cases which we have examined show how wide is the scope of equity jurisdiction in such cases, and while we have found none precisely in point, all, we think, tend to illustrate the general proposition. Whether the authorities cited refer to mutual accounts, to long and intricate accounts, to repeated and aggravated trespass, or to the investigation of a contract embracing a multitude of terms, all converge upon and illustrate the essential proposition that a court of equity will interpose, even in the class of cases where courts of law have concurrent jurisdiction, and without the existence of a specific ground of equity, whenever it appears that the remedy at law is less adequate than that in equity to do full and complete justice between the parties; and it,

therefore, follows that each case must be determined upon its own merits. The usual course of the administration of justice is not lightly to be diverted from courts of law, where as a rule it rightfully belongs, but whenever it shall clearly appear that the remedy at law is inadequate to do justice between the parties, the jurisdiction of a court of equity may be invoked.

It is to be regretted that the bill and exhibits filed with it in this case are so voluminous as to render it undesirable to report them in full. If it were done, there could be little room for doubt that the case before us is one for the exercise of equitable jurisdiction in order to do justice between the parties.

We are of opinion that the decree of the circuit court must be reversed, and the cause remanded for further proceedings to be had therein.

Reversed.

(117 Va. 495)

**EASTERN MOTOR SALES CORPORATION
v. APPERSON-LEE MOTOR CO., Inc.**

(Supreme Court of Appeals of Virginia. June 10, 1915.)

**1. PRINCIPAL AND AGENT § 89—ACTION FOR
COMPENSATION—INSTRUCTIONS.**

In an action on a contract giving plaintiff the exclusive right to sell motor trucks in certain territory and to have the profit thereon above a specified price, an instruction that plaintiff was entitled to commissions if a sale was made prior to the cancellation of such contract was not erroneous because of the use of the word "commissions"; it being immaterial whether the percentage to which plaintiff was entitled was called commissions or discount, especially where the action was against the manufacturer's general agent, who had been paid the agreed percentage on such sale, and the evidence showed that both the manufacturer and such general agent had referred to such percentage as a commission.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 216, 229-239; Dec. Dig. § 89.]

**2. PRINCIPAL AND AGENT § 81—RIGHT TO
COMPENSATION—TERMINATION OF CONTRACT.**

Plaintiff had a contract with defendant, giving it the exclusive right to sell motor trucks in certain territory. A sale was made to a purchaser procured by plaintiff, and the car was delivered to a carrier for shipment to the purchaser before the cancellation of such contract, and it was subsequently delivered to the purchaser and paid for. *Held*, that plaintiff was entitled to a commission on such sale as fixed by the contract, even though the bill of lading was not delivered, so as to pass title to the purchaser, until after the cancellation of the contract; plaintiff's contract referring only to sales, and containing no provision as to delivery.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194-214, 219, 223; Dec. Dig. § 81.]

**3. PRINCIPAL AND AGENT § 41—BREACH OF
CONTRACT—MEASURE OF DAMAGES.**

Where a contract giving plaintiff the exclusive right to sell motor trucks in certain territory was broken by defendant by making a sale in such territory, the measure of damages for

the breach was the amount of the discount to which plaintiff was entitled on sales under the contract.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 41.]

**4. PRINCIPAL AND AGENT § 89—ACTIONS FOR
COMPENSATION—INSTRUCTIONS.**

Defendant, the general agent for a manufacturer of motor trucks, gave plaintiff the exclusive right to sell such trucks in certain territory. A sale was made by the manufacturer to a purchaser solicited by plaintiff, and defendant was so advised. On the following day it wrote plaintiff, canceling the contract, and stating that the cancellation was owing to advices from the manufacturer. The contract was subject to termination on 10 days' notice, and the cancellation became effective the day the truck was received by the purchaser from a carrier. Plaintiff made a claim for commissions, which defendant refused, on the sole ground that the contract had been canceled. In an action for commissions, defendant's vice president and general manager, who wrote the letter canceling the contract, testified, that one reason for the cancellation was that such sale had been made, and they were afraid that complications might arise with plaintiff. *Held*, that evidence of these facts justified the court in charging that, if the letter canceling the contract was written solely for the purpose of depriving plaintiff of commissions which it had earned, this constituted fraud on defendant's part, and the jury must find for plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 216, 229-239; Dec. Dig. § 89.]

**5. PRINCIPAL AND AGENT § 89—ACTIONS FOR
COMPENSATION—INSTRUCTIONS.**

Defendant, a general agent for a manufacturer of motor trucks, gave plaintiff the exclusive right to sell such trucks in certain territory. A sale was made to a purchaser procured by plaintiff by the manufacturer, which notified defendant and credited defendant with the commission on the sale. In an action against defendant for the commission to which plaintiff was entitled, the court charged that if defendant employed plaintiff to find purchasers for motor trucks, and plaintiff suggested the name of a possible purchaser, and if defendant actually made a sale to such purchaser, the jury should find for plaintiff. *Held*, that this was not erroneous, though the sale was made by the manufacturer, and not by defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 216, 229-239; Dec. Dig. § 89.]

Error to Hustings Court of Richmond.

Action by the Apperson-Lee Motor Company, Incorporated, against the Eastern Motor Sales Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Boulware & Wallace, of Richmond, for plaintiff in error. Fred G. Pollard, of Richmond, and Coleman, Easley & Coleman, of Lynchburg, for defendant in error.

CARDWELL, J. This action was brought by the Apperson-Lee Motor Company, Incorporated, against the Eastern Motor Sales Corporation, to recover of the defendant "commissions on sale of one Alco motor truck to Montrose Fruit Company, Lynchburg, Virginia, at the price of \$2,950.00 at 15 per cent., equals \$442.50," and at the trial of the cause a judgment was rendered

upon the verdict of the jury in favor of the plaintiff for the sum of \$376.12, with interest and costs, to which judgment this writ of error was allowed the defendant.

It appears that the plaintiff in error was the general agent of the American Locomotive Company for the sale of its automobiles and trucks in the state of Virginia, and on October 28, 1912, plaintiff in error entered into a contract with defendant in error by which the latter was given the exclusive right of sale of automobiles known as "Alcos" in certain territory, viz., city of Lynchburg, counties of Amherst, etc., this contract to terminate on July 1, 1913, unless sooner terminated by one of the parties as provided for in the contract; that defendant in error, proceeding under said contract, had endeavored to interest the Montrose Fruit Company in the purchase of an Alco two-ton truck at the price of \$2,950, that being the price at which defendant in error could sell said truck; that prior to April 17, 1913, while said contract was still in force, such a truck was sold to the Montrose Fruit Company, of Lynchburg, Va., by the American Locomotive Company, the manufacturer, and shipped from New York to Lynchburg, arriving in Lynchburg on or about April 26, 1913, defendant in error having assisted materially in making such sale, the sale of the truck in New York having been made not later than April 17, 1913, and at a discount of 15 per cent. off the list price, viz., \$2,950, and plaintiff in error received a commission on the sale. The contract between the parties here litigant providing that it might be terminated by either party upon 10 days' notice to the other party to that effect, "said 10 days to run from the time the notice of cancellation is deposited in the mails, inclosed in a postpaid wrapper properly addressed, * * * but no expiration or termination hereof shall in any wise affect such liabilities of second party as have been incurred prior to such expiration or termination," plaintiff in error, on April 18, 1913, wrote defendant in error canceling said contract, which letter was mailed on the following day, but under the terms thereof their contract did not terminate before April 29, 1913, after the truck in question arrived in Lynchburg, and on the day the same was delivered by the carrier to the purchaser. It further appears that subsequently, on May 21, 1913, plaintiff in error wrote defendant in error in reply to a letter from the last-named company that they would not pay the "commission" on this sale, and gave as their reason for refusing so to do that the contract was terminated before the truck arrived in Lynchburg, this being the only reason then given for the refusal to pay defendant in error the commission it demanded on said sale.

The judgment complained of is for 15 per cent. of the price actually paid by the Montrose Fruit Company for the truck in ques-

tion, and the errors assigned deal only with the instructions given and refused by the trial court.

[1] The court, at the request of the defendant in error, plaintiff below, gave three instructions, the first of which told the jury that the plaintiff was entitled to commissions on the sale of the truck in question, if sold prior to the cancellation of the contract between the parties, and the objection to the instruction proceeds upon the theory that it erroneously recognized that the relation of the parties under their contract was that of agent and principal, instead of telling the jury that the plaintiff, under the contract, was only to have as its compensation such profit as might arise on the sale of these trucks in a named territory, over and above the price it was to pay the defendant for a truck sold.

Under the contract between the parties, entitled "Agency Contract," the defendant in error was given the exclusive right to sell in the territory named certain automobiles, the contract fixing the percentage which would be allowed on sales of cars in the specified territory, and it could make no possible difference whether this percentage was called in the court's instruction commissions or discount. Not only so, but plaintiff in error construed the contract between it and defendant in error as entitling the latter to commissions on the sale of the car or truck to Montrose Fruit Company, if the sale was made before the contract had been canceled, for, as remarked, in refusing to pay defendant in error "commissions," the refusal was only upon the ground that the contract had been canceled before the sale was made. A similar contract was in existence at that time between plaintiff in error and the American Locomotive Company, by which the former was the general agent in Virginia of the latter for the sale of its automobiles, etc., and in a letter from the American Locomotive Company to plaintiff in error of April 17, 1913, informing the latter of the sale of the truck in question, the writer said:

"We draw on the Montrose Fruit Company for the price of the truck, crediting your account with the commission."

Hudley on Automobiles (2d Ed.) p. 288, cited by plaintiff in error, does say that:

"An agency within the meaning of the automobile trade, consists in giving the agent the exclusive right to purchase for cash from the manufacturer machines at a discount from the list price and retail them to customers at the full list price."

But all that is there meant, as the concluding part of the text shows, is that, while in the automobile trade the agent is entitled to compensation, such compensation is not generally called commission.

While plaintiff in error received compensation for the sale of the truck to the Montrose Fruit Company, it had done nothing in bringing about the sale; but, as plainly appears from the evidence, it was brought

about alone by the efforts of defendant in error, so that whether the compensation for the sale it seeks to recover of plaintiff in error in this action be called discount or commissions is wholly immaterial.

Instruction No. 2 complained of is as follows:

"The court instructs the jury that if they believe from the evidence that the truck in question was sold to the Montrose Fruit Company and delivered to the railroad company before the cancellation of the contract, to be carried by said railroad company to the Montrose Fruit Company in Lynchburg, Va., such delivery to the railroad company constituted the delivery contemplated and required by the contract between the plaintiff and the defendant, and the jury must find for the plaintiff a sum equal to 15% of the price paid by the Montrose Fruit Company for the truck in question, which was \$2,507.50, with interest from the date of the sale of said truck. If the jury believe from the evidence that the letter dated April 18, 1913, from the defendant to the plaintiff, was written solely for the purpose of depriving the plaintiff of commissions they had earned on the sale of the truck in question, then they are instructed that this constitutes fraud on the part of the defendant, and they must therefore find for the plaintiff."

The objections made to this instruction are: (1) That no sale was made of the truck in question until the draft attached to the bill of lading was paid and the truck delivered to the Montrose Fruit Company; (2) that the instruction is erroneous in that it fixed the measure of the plaintiff's damages in the event of a recovery at 15% of the price paid by the Montrose Fruit Company for the truck in question; and (3) the contention is made that there is no evidence in the case upon which the last clause of the instruction could be based.

[2] With respect to the first objection, it may be true that the title to the truck in question remained in the seller until the bill of lading was delivered; but it is not true that the sale was to be considered incomplete until the bill of lading was delivered to the purchaser, since the controversy here is not with respect to the ownership of the truck as between the seller and the purchaser after it was delivered to the carrier in New York and before delivery of the bill of lading therefor to the purchaser, but is a controversy between a general agent in Virginia of the manufacturer and seller of the truck, and a subagent under a contract between these agents which did not provide for any delivery, but only for a sale of certain described automobiles or Alco trucks in a prescribed territory. There is no question raised in the case that the truck in question was actually sold and delivered to the Montrose Fruit Company, nor is it denied that the purchaser at the time of the sale in New York made a payment on the purchase price therefor, nor is it denied that plaintiff in error received from the seller the "commission" on the sale which defendant in error, through whose efforts the sale was brought about, is seeking to recover of plaintiff in error in this action; therefore

the trial court, in instructing the jury that when the truck was sold and delivered to the carrier this was such a sale and delivery as was contemplated by the contract, and that the plaintiff, defendant in error here, was entitled to its commission on said sale as fixed by the contract, committed no error, certainly none of which plaintiff in error could rightly complain. *Benj. on Sales*, pp. 73, 93; *Bankers' L. Co. v. Spindle*, 108 Va. 426, 62 S. E. 266; *Gresham v. Gilliss*, 113 Va. 643, 75 S. E. 220, *Ann. Cas.* 1913E, 778.

[3] Nor did the court err in fixing the measure of damages for breach of contract for the exclusive right of sale as equivalent to the discount allowed to defendant in error on the purchase price of the truck.

[4] Referring to the latter clause of instruction No. 2, which is objected to, it appears in the evidence that plaintiff in error was advised of the sale of the truck to the Montrose Fruit Company on April 17, 1913; that on the following day they wrote defendant in error canceling the contract, stating in the letter that the contract was canceled "owing to advices received from the American Locomotive Company"; and plaintiff in error's witness, Allport, who was also its vice president and general manager and had dictated the letter to defendant in error canceling the contract, testified that one of the reasons for the cancellation of the contract was because this truck had been sold and they were afraid that complications might arise with defendant in error. It also appears, as above stated, that plaintiff in error in its letter of May 21, 1913, refused to pay defendant in error commissions on the sale of the truck solely upon the ground that the contract was terminated by the letter of April 18, 1913, and before the truck arrived in Lynchburg. This evidence was sufficient to sustain the court's instruction to the jury that if they believed that the letter of April 18, 1913, was written solely for the purpose of depriving defendant in error of commissions on the sale of the truck in question, this constituted fraud on the part of the defendant (plaintiff in error here), and they should find for the plaintiff.

[5] Instruction No. 3, complained of, is:

"If the jury believe from the evidence that the defendant employed the plaintiff to find purchasers for motor trucks in the city of Lynchburg, that the plaintiff suggested the name of the Montrose Fruit Company of Lynchburg as a possible purchaser of a motor truck to the attention of the defendant, that the defendant, the Eastern Motor Sales Corporation, actually made the sale of the motor truck to the Montrose Fruit Company at the price of \$2,950, then the jury must find for the plaintiff. That the plaintiff was the procuring cause of said sale, if said sale was brought about by the plaintiff's exertions in presenting the property to the attention of the purchasers, or by his introducing the purchaser to the defendant, or by his giving to the defendant as possible purchaser the name of the Montrose Fruit Company."

The contention is that this instruction erroneously "calls for a sale actually made by

the defendant [plaintiff in error] to the Montrose Fruit Company, and that there is no testimony that any sale was ever made," the fact being that the sale was made by the American Locomotive Company without the consent of plaintiff in error.

It is true that the sale of the truck in question to the Montrose Fruit Company was actually made by the American Locomotive Company; but the sale was brought about by the efforts of defendant in error, was immediately reported by the seller to plaintiff in error, its general agent in Virginia, by letter, the letter saying, "We draw on the Montrose Fruit Company for the price of the truck, crediting your account with the commission," so that it could make no possible difference whether the sale was actually made by plaintiff in error or by its principal, the American Locomotive Company, since plaintiff in error had authority to make the contract it did with defendant in error, and if the jury believed that defendant in error was the procuring cause of the sale, which they were warranted in believing from the evidence, it was clearly entitled to recover of plaintiff in error commissions on the sale of this truck, and especially is this true when it appears that the commissions thereon had been paid to plaintiff in error, instead of to defendant in error, who had brought the truck to the attention of the purchaser and also aided materially in the sale of this particular truck. *Gresham v. Gilliss, supra.*

The trial court having fully and fairly instructed the jury as to the law applicable to the facts which the evidence in the case tended to prove, it did not err in refusing other instructions that were asked by plaintiff in error.

Upon the whole case we are of opinion that the judgment complained of is without error, and therefore it is affirmed.

Affirmed.

(117 Va. 424)

WASHINGTON & O. D. RY. v. CARTER.

(Supreme Court of Appeals of Virginia. March 11, 1915. Rehearing Denied June 10, 1915.)

1. CARRIERS \S 317—MAIL CLERK—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In a railway mail clerk's action against the railroad for injuries claimed to have been due to the insufficient or defective equipment of the mail car, United States statutes giving the Postmaster General authority to require certain things to be done by the railway company in connection with contracts to be made for the carriage of mail under the railway mail service were properly admitted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. \S 317.]

2. CARRIERS \S 317—MAIL CLERK—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In such action, sections of the postal laws and regulations containing regulations as to railway mail cars and their equipment, and a pamphlet issued by the Post Office Department

containing specifications for fixtures for mail cars, were properly admitted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. \S 317.]

3. CARRIERS \S 241—LIABILITY FOR INJURIES TO "PASSENGER" — DEGREE OF CARE REQUIRED.

A railway mail clerk was a "passenger," to whom the railroad company owed the duty of exercising the highest degree of care for his safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 977-979; Dec. Dig. \S 241.]

For other definitions, see Words and Phrases, First and Second Series, Passenger.]

4. DAMAGES \S 216—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, the court properly charged that in estimating the damages the jury should consider plaintiff's physical and mental suffering, including such as he was likely to experience, as well as such as he might already have experienced, the effect of the injuries on plaintiff's health according to their degree and probable duration, as being temporary or permanent, the inconvenience caused plaintiff by the injuries, and the loss of earning capacity sustained by him as a result thereof.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. \S 216.]

5. CARRIERS \S 283—LIABILITY FOR INJURIES TO RAILWAY MAIL CLERK.

A railway mail car was equipped, in accordance with the postal regulations, with an iron bar across each door, to enable the mail clerk to take in and discharge mail without danger of being thrown from the car. Before the car left the terminal, and while the clerk was working in it, a man came in to clean the car and told the clerk that he was going to take the bar out. The clerk acquiesced in its removal, or at least did not forbid him to remove it, telling him, however, to be sure and put it back. The bar was not restored, and as a result the clerk fell from the car and was injured. Held, that the railway company was not liable as the employé was not acting in the line of his duty in removing the bar, and could not bind the company by his promise to restore it, and, if the clerk relied thereon, he did so at his own peril.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119-1124, 1140, 1141; Dec. Dig. \S 283.]

6. CARRIERS \S 805 — MAIL CLERK—LIABILITY FOR INJURIES—PROXIMATE CAUSE.

That the mail car was insufficiently lighted was not the proximate cause of the accident, and did not render the railway company liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1132, 1136-1139, 1245, 1246; Dec. Dig. \S 805.]

Error to Circuit Court, Fairfax County.

Action by Alfred B. Carter against the Washington & Old Dominion Railway. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

The sections of the postal laws and regulations admitted in evidence provided certain requirements as to railway postal cars and their equipment.

Instruction No. 5, given at plaintiff's request, was as follows:

(5) The court instructs the jury that, should they find for the plaintiff, that in estimating his damages, they should take into consideration his

physical and mental suffering as a result of his injuries, including such physical and mental suffering as he is likely to experience, as well as such as he may already have experienced; the effect of the injuries on the health of the plaintiff, according to their degree and probable duration, as being temporary or permanent; the inconvenience caused to the plaintiff by said injuries; the loss of earning capacity sustained by the plaintiff as a result of said injuries—such damages, however, not to exceed the sum of \$20,000, the amount claimed in the declaration.

C. E. Nicol, of Alexandria, and Wilton J. Lambert and R. H. Yeatman, both of Washington, D. C., for plaintiff in error. Moore, Barbour, Keith & McCandlish, of Fairfax, for defendant in error.

KEITH, P. The declaration in this case shows that the defendant was the owner of a certain railway running from Rosslyn, in Alexandria county, to Leesburg, in Loudoun county, Va. The railroad had formerly been operated by steam, but for a part of its line electricity had been substituted as a motive power. It was a postal road, and the plaintiff was a postal clerk. The regulations of the United States Post Office Department provided that mail or postal cars in which the mail and mail clerks were transported, and which had a door on each side through which mail could be discharged at the different stations, should be equipped with a certain iron bar, called a catcher and safety bar, the purpose of which was to enable the clerk to take the mail into the car while the train was in motion, and also to enable him to discharge mail therefrom without danger; and the plaintiff was engaged in the performance of this duty at the time of receiving the injuries of which he complains, on December 22, 1912.

The declaration charges that it was the duty of the defendant company to use due and proper care that the plaintiff should be safely carried by said road in the performance of his duties as postal clerk, and to see that the mail car in which plaintiff was riding was so provided and operated that the plaintiff, while in the discharge of his duties as mail clerk, without negligence on his part, should not be thrown from the car, and to this end to use due and proper care to see that the iron bar intended and used as a catcher or safety bar, and which operated as a barrier across the door of the car when the same was open, and thereby enabled bags or pouches of mail to be readily discharged at the various stations along the road without danger to the clerk so in charge of the same being thrown or dragged through the door, was properly placed and fastened across the outside of the side door of the mail car; yet the defendant, not regarding its duty, did not use due and proper care to see that the plaintiff should be safely carried as aforesaid, or that the safety bar and catcher was in proper place, or that the mail car was well and adequately lighted, main-

tained, and operated, but through its servants, agents, and employes negligently and carelessly removed said bar from said car, and failed and refused to replace said iron bar in position as aforesaid, and negligently and carelessly failed and refused to illuminate and light, maintain, and operate said car as aforesaid, whereby, and as the direct and proximate result of such failure and refusal, when the said mail car in which said plaintiff was riding reached a station called Wiehle, or a point in close proximity thereto, as the plaintiff opened the said door of the said car, and in the exercise of due care was assuming a proper position for the purpose of delivering the mail, he was jolted, jostled, and thrown from the car to and upon the ground with great force, by reason whereof he sustained the injuries for which he sues.

There was a demurrer to this declaration, which we shall not discuss, because the questions arising upon the demurrer may be more satisfactorily disposed of, we think, when we come to the instructions in the case.

Upon the plea of not guilty to this declaration, a great deal of testimony was introduced, with the result that the jury, after being instructed by the court, found a verdict for the plaintiff, upon which judgment was entered, and the case is before us upon a writ of error.

[1,2] During the progress of the case numerous exceptions were taken to rulings of the court upon the admission of testimony. The first assignment of error is to the admission, over the objection of plaintiff in error, of the contract between the Post Office Department and the Southern Railway Company. The third assignment of error is to the admission in evidence of certain sections of the laws of the United States, which give authority to the Postmaster General to require certain things to be done by the railway company in connection with contracts to be made for the carriage of railway mail under the railway mail service. The fourth assignment is to the admission of section 1179 of the Postal Laws and Regulations. The fifth is to the same effect. The sixth is to the admission in evidence of section 21 of paragraph A of a pamphlet issued by the Post Office Department, entitled "Specifications for Fixtures for Mail Cars."

We find no error in the rulings adverted to, and the several assignments of error are overruled.

The seventh assignment of error was to the admission of a conversation between the plaintiff and an employé of the Washington & Old Dominion Railway, which was objected to upon the ground that the statements made were not a part of the res gestæ, and that as admissions they did not bind the defendant company, for want of authority on the part of the employé to make them. Strictly speaking, it may be that the

evidence should not have been admitted; but its effect could not have been prejudicial, and we do not think it worthy of serious discussion. It is therefore overruled.

The eight assignment of error was withdrawn. The ninth assignment of error is without merit, and is overruled. The tenth and eleventh assignments are also without merit.

This brings us to the consideration of the instructions.

There is evidence in the record which proves or tends to prove that defendant in error was engaged at the time of the accident by which he was injured as a railway mail (or postal) clerk on the route between Rosslyn and Leesburg, in the state of Virginia; that he had been in the service about 20 years, and had been employed upon the line upon which he was injured since April, 1896; that in the first years of his employment the railway was operated as a part of the Southern Railway, but was afterwards acquired by the Washington & Old Dominion Railway, which had installed electricity as its motive power over a part of the road. It appears that the postal car was equipped in accordance with the instructions and regulations of the United States Post Office Department; that on each side of the car there was a door through which the mail was received and delivered at the several stations; and that across these side doors there was an iron bar, called a catcher and safety bar. There is evidence which tends to prove that the car was lighted by lamps; that the lamps were in bad condition and were insufficient and inadequate to light the car in a satisfactory manner; that the condition of these lamps had been reported; that on the evening immediately before the accident the plaintiff observed that three of the lamp chimneys were broken; that he got off the car, and went to the office, and asked the man in charge to send him lamp chimneys, but the chimneys were not sent.

The plaintiff, as a witness in his own behalf, thus describes the situation as the car was about to leave upon the trip upon which he received the injuries:

He says that he rode to the station from which the car was to leave on a wagon that transferred the mail to the Washington & Old Dominion Company; that he got on the wagon and received his mail, and rode over with it on the wagon; that when he got off the wagon into the car the bar was in the door; that he took in the mail; that the colored man threw it in, and he dragged it from the door; that he then went forward, and went to work on his mail, working over his letter case and labeling up his sacks, and was very busy at work; that the man that took charge of the car came in to clean the car up; that he said to witness, "I am going to take this thing out of here; it is in my way;" that witness turned to him and said, "What thing?" and he said, "This bar here; it is in my way;" that witness said, "Well, be sure and put it back;" that the last thing that witness remembered about the bar was that he heard him say, "I cannot get it out;" that witness

did not go to that door any more after he got into the car until he fell out of it; that there is a second dispatch of mail that comes over just before the train pulls out; that the train pulls out as soon as that is thrown in; and that one of the porters pulls it in, and when they get out the train goes on.

There is, as we have seen, a door upon each side of the car. It so happened that the mail to be delivered at several intervening stations before the accident occurred was delivered from the side of the car from which the safety bar had not been removed; but when they got to Wiehle the plaintiff went to the door, leaned out to make observations preparatory to discharging the mail, and by reason of the absence of the catcher bar lost his balance and fell or was jostled from the car, and received the injuries for which he sues.

[3] The jury were rightly instructed upon the theory that the plaintiff was a passenger, and as such it was the duty of the railroad to exercise the highest degree of care for his safety. The first instruction, therefore, on behalf of the defendant in error, was properly given.

[4] The fifth instruction asked for by the defendant in error was properly given, and the second, third, and fourth will be considered along with instructions asked for by plaintiff in error.

[5] We think that the evidence shows that the car, before the trip upon which the accident occurred commenced, was equipped in accordance with the regulations of the United States Post Office Department. It seems to have been in all respects just in the condition in which it had been for a great many years before, during which time the defendant in error had been employed as postal clerk and in the performance of his duties upon the line of road between Rosslyn and Leesburg. It appears from his own testimony that he knew of the removal of the bar and acquiesced in its removal—at least, it is certain that he did not forbid it. That he required a promise from the man who removed it, that it would be at once restored, does not affect the case. The man who removed the bar was not acting in the line of his duty, and could not bind the company in that behalf by his acts or declarations, and if the defendant in error saw fit to rely upon his promise, he did so at his own peril. If the safety bar had not been removed this accident would not have happened, and its removal was beyond question the proximate cause of the injury which is the subject of this suit.

[6] It is said that the car was improperly lighted. Let it be conceded. The insufficiency of the means to light the car was well known to the defendant in error, and the insufficiency of the light was, of course, obvious to him.

In *Recker v. Southern Ry. Co.*, 115 Va. 201, 78 S. E. 580, it is said:

"To attempt to operate a dangerous machine in the dark or without sufficient light is such an open and obvious risk that no prudent person would encounter the peril. When an employé is injured under such circumstances, he cannot escape the result of his own contributory negligence upon the ground that he was acting on the orders of the master, when obedience to those orders involves exposure to such apparent danger that no prudent person would incur the risk."

That is a stronger case than the one before us. Here there was no order given by the master, and the risk was open and obvious. In our view of the case, however, the presence or absence of the light is not material, for that was not the proximate cause of the accident. The proximate cause was the removal of the safety bar with the knowledge and consent of the defendant in error, in reliance upon the promise of the employé to restore it. It was removed without authority upon the part of the company, and the promise of restoration could not be relied upon, as we have already said, because not made by one who had authority to act for or in behalf of the company.

Without going into an extended discussion of what seems to us a case so plain as not to need discussion, we are of opinion that the court erred in granting instructions Nos. 2, 3, and 4 on behalf of the defendant in error, and in refusing to grant instruction No. 10 as asked for. That instruction reads as follows:

"If you find from the evidence that the plaintiff authorized the witness Kennedy to remove the mail grab on the car used by him, then you are instructed as matter of law that your verdict must be for the defendant."

The court amended that instruction so as to read as follows:

"If you find upon the evidence that the plaintiff authorized the witness Kennedy to remove the mail grab on the car used by him, then you are instructed as matter of law that your verdict must be for the defendant, unless the jury further believe from the evidence that the plaintiff understood and believed that the said mail grab would be replaced before the leaving of the car."

As we have already said, the defendant in error had no right to rely upon the promise of the employé who removed the mail grab to restore it, and in doing so he acted at his own peril.

We think that the first and fifth instructions given at the instance of defendant in error, and the instructions given by the court, except instruction 4, which undertook to amend instruction 10 as asked for by plaintiff in error, were quite sufficient to aid the jury in the discharge of its duties.

For the granting by the court of instructions Nos. 2, 3, and 4, as requested by defendant in error, and for its refusal to grant instruction No. 10, as requested by plaintiff in error, and amending and giving it as instruction No. 4 of the court's instructions, the judgment of the circuit court must be reversed, the verdict set aside, and the cause

remanded to be further proceeded with in accordance with the views herein expressed.

Reversed.

NOTE.—This case was argued and submitted before Judge KELLY'S term began.

(117 Va. 487)

DUNCAN et al. v. DUNCAN'S ADM'X.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

LIMITATION OF ACTIONS — 46 — DEMAND PAYABLE AT DEBTOR'S DEATH — RUNNING OF LIMITATIONS.

Where a demand is payable at the death of the debtor, limitations only begin to run from his death.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. 46.]

Appeal from Circuit, Culpeper County.

Suit by R. R. Duncan's Administratrix against one Duncan and others. From a decree for complainant, defendants appeal. Affirmed.

Waite, Perry & Jeffries, of Culpeper, and Jeffries & Jeffries, of Norfolk, for appellants. Grimsley & Miller and J. G. Hiden, both of Culpeper, and John S. Barbour, of Fairfax, for appellee.

KEITH, P. So much of the record as it is necessary to consider in disposing of the question before us presents the following case: R. R. Duncan died in September, 1912, leaving a widow and seven children. He left a will, by which he made certain provisions for his widow, which she refused to accept, renounced the will, and qualified as administratrix with the will annexed. She had taken under her father's will a tract of land which constituted her separate estate and which, during her husband's lifetime, was sold and the proceeds were lent to her husband. The administratrix proceeded to dispose of the personal property and pay the debts of her decedent, but felt it proper, with respect to the debt which she claimed was due to herself, to file a bill in equity and ask for the instruction of the court upon it, some question having been raised as to whether or not it was barred by the statute of limitations. She filed her bill in which she states her claim against her husband's estate as follows:

"About 15 years ago your oratrix sold a tract of land, which was her separate estate; the proceeds thereof, which amounted to about \$1,800.00 she loaned to the said R. R. Duncan, with the distinct understanding that the relation of debtor and creditor should exist between them, and that the amount loaned should be returned to her."

There was a demurrer to the bill, and those resisting her claim relied upon the statute of limitations. Upon her motion, which was resisted by the defendants, she was allowed to amend her bill by inserting at the close of the quotation we have just made,

the words "at his death," and thereupon, the case coming on to be heard upon the bill and exhibits and the demurrer thereto, the answers of the parties defendant and the depositions of witnesses, the circuit court decreed that the administratrix recover from the estate of her decedent the sum of \$1,732.50, with interest from the date the same was received by R. R. Duncan and converted to his own use, and referred the cause to a commissioner of the court to ascertain and report from what date or dates the said amount bears interest; and from that decree an appeal was allowed.

We are of opinion that the evidence clearly proves the debt. There is, indeed, no conflict upon the subject; the defendants having introduced no witnesses.

Upon the authorities, we think it well settled that upon a demand payable by the debtor at his death, the statute of limitations only begins to run from the happening of that event. See *Banks v. Howard*, 117 Ga. 94, 43 S. E. 438; *Gullet v. Gullet*, 28 Ind. App. 670, 63 N. E. 782; *Green v. Orgain* (Tenn. Ch. App.) 46 S. W. 477; *Cann v. Cann's Heirs*, 45 W. Va. 563, 31 S. E. 923; *Stone v. Todd*, 49 N. J. Law, 274, 8 Atl. 300; and *Morrissey v. Morrissey*, 180 Mass. 480, 62 N. E. 972.

In the latter case it was held that where the plaintiff had advanced certain sums of money to the defendant's intestate in consideration of the intestate's oral agreement to convey or devise her house to him, and the intestate died without doing so, the plaintiff's right of action to recover the money paid by him accrued only upon the death of the intestate, and that the statute of limitations ran from that time.

Upon the whole case, we are of opinion that there was no error in the decree of the circuit court, which is affirmed.

Affirmed.

(117 Va. 480)

CRAFT v. MOLONEY BELTING CO. et al.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

PLEADING §8—CONCLUSIONS—MALICIOUS PROSECUTION—DECLARATION—WANT OF PROBABLE CAUSE.

In an action for malicious prosecution, the declaration showed that plaintiff was convicted before the police justice, but that on appeal to the corporation court he was acquitted. To avoid the force of the disclosure on its face that he was found guilty by the police justice, it alleged that before such police justice defendants, by means of evidence which they knew to be false, caused him to be convicted, without alleging that defendants testified falsely or at all, or that they were even present at the trial, or that they suborned other persons to testify falsely and without showing what the false testimony was, or that it was material. Held, that the declaration pleaded merely a conclusion of law, and was insufficient, as a declaration must plead the facts constituting the cause of action, so that they may be understood by the party

who is to answer them, by the jury, and by the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. §8.]

Error to Law and Chancery Court of City of Norfolk.

Action by Luther Craft against the Moloney Belting Company and another. Judgment of dismissal, and plaintiff brings error. Affirmed.

J. Edward Cole and Fred C. Abbott, both of Norfolk, for plaintiff in error. W. H. Venable and R. E. Miller, both of Norfolk, for defendants in error.

CARDWELL, J. The plaintiff in error, Luther Craft, was arrested, tried, and found guilty by the police justice of the city of Norfolk of petit larceny upon a warrant issued by a justice of the peace of said city, upon the complaint of the defendants in error, James Moloney, trading as Moloney Belting Company, and Albert E. Anderson, charging the accused with grand larceny of certain goods and chattels of the value of \$50. Upon an appeal to the corporation court of the city of Norfolk the judgment of the police justice was reversed, and the accused acquitted; and thereupon he instituted this action of trespass on the case against defendants in error for malicious prosecution.

The declaration in the case was twice amended, and to the second amended declaration there was a demurrer, which the court sustained, and dismissed the case; the plaintiff declining to further amend his declaration.

The declaration, as amended, sets out the issuance of a warrant, the arrest of the plaintiff, the search of his residence, resulting in injury to his wife, makes claim for her mental anguish, loss of her services and companionship, etc., and then alleges that the plaintiff was taken before the police justice, "and there the said defendants, by means of evidence which they knew to be false, caused the said plaintiff to be convicted of petty larceny." Then is set out the appeal and acquittal of the plaintiff.

Several grounds were relied on as sustaining the demurrer, but we deem it only necessary to consider three of them, namely: (1) The declaration sets out a conclusion of law and not of fact; (2) it does not set out the false statements which it is alleged that the defendant knew to be false; and (3) it discloses on its face that the defendants had probable cause.

In *Saunders v. Baldwin*, 112 Va. 431, 71 S. E. 620, 34 L. R. A. (N. S.) 958, Ann. Cas. 1913B, 1049, it was held a declaration in an action for malicious prosecution which shows on its face that the plaintiff was convicted, but fails to allege that such conviction was procured by the defendant by fraud or by

means of evidence which he knew to be false, is bad on demurrer.

The declaration in this case, in order to avoid the force and effect of the disclosure upon its face that the plaintiff was by the police justice found guilty of the crime which is the basis of this action, so amended his declaration as to make his charge read:

"And there the said defendants, by means of evidence which they knew to be false, caused the said plaintiff to be convicted of petty larceny."

The sole question, therefore, for consideration here is whether that allegation is sufficient to meet the requirements of such a declaration, as set forth in the case of *Saunders v. Baldwin*, supra.

In *Phillips v. Village of Kalamazoo*, 53 Mich. 33, 18 N. W. 547, the pleading showed a conviction, and the court said:

"As a general rule, a conviction before a magistrate is a bar to a malicious prosecution, and if the party complaining relies on an exception to it, he must allege the facts which create the exception. *Cooley, Torts*, 185."

And in *Blucher v. Zonker*, 19 Ind. App. 615, 49 N. E. 911, the complaint charged that the conviction was obtained through fraud, and, in addition to using the word "fraud," it was alleged that the plaintiff had not committed any crime, and that the defendant knew this, but, in order to coerce plaintiff into settling a civil controversy, had instituted the prosecution; and the court held that "the facts stated do not show fraud or collusion."

As it seems to us, the charge in the declaration here that the defendants, by means of evidence which they knew to be false, caused the plaintiff to be convicted, is merely a conclusion of law to be drawn from the facts, namely, that the defendants themselves testified, or that they suborned other persons to do so, either or both, and that the false statements were material, and not collateral. But the declaration does not do this. It does not charge that the defendants testified at all, nor is it charged that the defendants procured others to testify falsely; it merely states that false testimony was given which the defendants knew was false. When and how the defendants knew of the falsity of this testimony is not stated, nor is it stated how, under what circumstances, and by what means the defendants procured the conviction of the plaintiff by false swearing. The false statements may not have been made at their request, and they may not have known that they would be made; so that, under the well-established rule that a pleading must be construed most strongly against the pleader, the declaration merely states that at the trial testimony known to the defendants to be false was given, not that the defendants gave or procured it to be given, one or the other of which, as it seems to us, is absolutely essential to the plaintiff's right of action. The declaration does not even set forth that the defendants were present at

the trial before the police justice when the plaintiff was convicted.

It has been over and over held that facts in such a declaration must be pleaded, and not merely conclusions of law. The object of a declaration is to set forth the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment upon the jury's verdict. *B. & O. R. Co. v. Whittington's Adm'r*, 30 Grat. (71 Va.) 805; *Hortenstern v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996.

In *Eaton v. Moore*, 111 Va. 403, 69 S. E. 327, the opinion says:

"It is an elementary rule of pleading that the declaration must allege material facts sufficient to show a complete right of action in the plaintiff. The facts must, moreover, be distinctly, and not inferentially, alleged, and must be set forth with definiteness and certainty."

Had the declaration in this case charged that the conviction was obtained by fraud, instead of merely by testimony which the defendants knew to be false, under the rule laid down in *Dickenson v. Bankers Loan Co.*, 93 Va. 498, 25 S. E. 548, the charge of fraud without stating the facts which constituted the fraud would have been insufficient. By electing to set up that the conviction was obtained by testimony which the defendants knew to be false, the plaintiff brought his case within the rules governing an action for false representations, and in that class of cases it is well settled the false representations must be set out. 20 Cyc. 98; *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918.

It might well be asked in this case, as there is nothing in the declaration to give that information, who gave the false testimony, the defendants or others? If others, did the defendants suborn them to testify falsely? What were the false statements? All which information the defendants were entitled to, and those facts were essential, not only to the plaintiff's right of recovery, but to his right to maintain his action.

In *Crescent City, etc., Co. v. Butchers' Union, etc., Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614, Mr. Justice Matthews, in discussing the rule which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal, says:

That the rule "was not established out of any special regard to the person of the party," and that "it will avail him as a complete defense in an action for malicious prosecution, although it may appear that he brought his suit maliciously for the mere purpose of vexing, harassing, and injuring his adversary. The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may

be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule, therefore, has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly. The record of its proceedings imports verity; its judgments cannot be impugned, except by direct process from superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rests largely upon this wholesome principle."

In speaking of the rule as not justifying a general and indefinite mode of declaring, admitting of almost any proof, the opinion in *B. & O. R. Co. v. Whittington*, supra, has this to say:

"A declaration can, however, subserve no good purpose unless it be sufficiently specific to inform the adverse party of the ground of the complaint. If it is deficient in that particular it may as well be dispensed with altogether. The plaintiff is presumed to have some knowledge of the facts upon which his action is founded. If he is in doubt as to the precise nature of the evidence, he may frame his declaration with different counts, varying his statements to meet every possible phase of the testimony."

The declaration in the case in judgment contains but one count, and, in the light of the authorities to which we have referred, is wholly insufficient to meet the requirements of a declaration in such a case. The judgment of the court of law and chancery of the city of Norfolk sustaining the demurrer thereto and dismissing the case is plainly right, and must be affirmed.

Affirmed.

(117 Va. 627)

SOUTHERN RY. CO. v. SNOW.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. MASTER AND SERVANT ⇨ 235, 293—INJURY TO SERVANT—DEFECTIVE APPLIANCES—INSTRUCTIONS.

In an action by station agent, a man about 45 years of age having an experience of about 11 years in the work, for injuries from a fall traceable to the fact that the nut came off of the bolt which held the tongue of a baggage truck in place, an instruction that an employer must use ordinary care to provide reasonably safe appliances and to keep them in a reasonably safe condition was misleading; the truck being a common appliance, the duty to inspect which rested on the employé rather than on the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722, 1148-1156, 1158-1160; Dec. Dig. ⇨ 235, 293.]

2. MASTER AND SERVANT ⇨ 235—INJURY TO SERVANT—DEFECTIVE INSTRUMENTALITIES—NOTICE.

Where it appeared that a baggage truck was in a dilapidated condition, such condition was sufficient, of itself, to put plaintiff on no-

tice that he should not use it without first determining that it could be used with safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. ⇨ 235.]

3. MASTER AND SERVANT ⇨ 103—DEFECTIVE APPLIANCES—DUTY TO INSPECT—RIGHT TO DELEGATE.

The duty of inspecting a baggage truck constituting a simple instrumentality and used at a railway station may be delegated to the station agent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. ⇨ 103.]

4. TRIAL ⇨ 296—INJURY TO SERVANT—DEFECTIVE APPLIANCES—INSTRUCTIONS—CURE OF ERROR.

In an employé's action for injuries from a defect in a simple instrumentality, an instruction that it was the employé's unassignable duty to use all ordinary care to provide reasonably safe appliances, being in irreconcilable conflict with an instruction that under the defendant's rules it was plaintiff's duty to make a reasonable inspection of the instrumentality, was not cured thereby.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ⇨ 296.]

Error to Circuit Court, Culpeper County.

Action by W. H. Snow against the Southern Railway Company. From judgment for plaintiff, defendant brings error. Reversed.

Moore, Keith, McCandlish & Hall and John S. Barbour, all of Fairfax, and R. B. Tunstall, of Norfolk, for plaintiff in error. Grimsley & Miller, of Culpeper, and E. E. Garrett, of Leesburg, for defendant in error.

HARRISON, J. This action was instituted by W. H. Snow to recover of the Southern Railway Company damages for injuries alleged to have been sustained in consequence of the defendant's failure to furnish the plaintiff reasonably safe and suitable appliances with which to perform his duties as station agent.

There was a verdict and judgment in favor of the plaintiff which is brought under review by this writ of error.

The salient facts of the case are: That the plaintiff in August, 1912, entered the service of the defendant in the capacity of station agent, express agent, and telegraph operator at Mitchell's, Culpeper county, Va., having previously had considerable experience in the same capacity as an employé of other railroads; that his employment as station agent involved the general supervision and direction of the work done at the station, including the duty of loading and unloading express, freight, and baggage; that at the time of the accident, which occurred a few days after the plaintiff took charge at Mitchell's, there were three trucks at the station, two of them being four-wheeled trucks pulled by a tongue, and the third a two-wheeled truck with handles. One of the four-wheeled trucks was in a dilapidated condition, badly in need of repair, and the defendant had been

notified of this fact, about three weeks before the plaintiff took charge, and had promptly ordered it to be sent to the repair shop by the first freight. This the predecessor of the plaintiff at Mitchell's had neglected to do before turning the station over to his successor. The tongue by which the four-wheeled trucks are propelled is inserted between two jaws projecting from the front axle, and is held in place by an iron bolt which is run through the jaws and the tongue.

On the morning of the accident, the plaintiff, having occasion to use one of those trucks for the purpose of moving a trunk, selected, as he says, "the one most convenient," which was the one in a dilapidated condition. It appears that the tap which was screwed on the bolt holding the tongue in place was off, and in consequence of this the bolt worked loose, and while the plaintiff, with his face to the truck, was attempting to pull it, the tongue came out and he fell backward to the ground, striking his back on the edge of a trunk or some other object thereby producing the injuries complained of.

[1] Among numerous other instructions given for the plaintiff over the objection of the defendant was the following:

"The court instructs the jury that it is the duty of an employer to use ordinary care and prudence to provide his employes with reasonably safe appliances and instrumentalities with which to work, and to keep them in a reasonably safe condition. This duty rests upon the employer and cannot be delegated to any one else; and if he attempts to delegate them, and the party delegated fails to discharge the employer's duty, the same liability rests upon the employer as if he had personally failed to discharge his duty to his employes."

However sound this statement may have been as an abstract proposition of law, it had no application to the facts of the present case and was very misleading. It is an established fact that an ordinary station truck, such as here employed, is an exceedingly simple instrumentality, without the slightest complication, and is easily comprehended by the most ordinary intelligence. Such an appliance requires no expert knowledge to discover that it is out of order or to determine whether or not it can be safely used. The evidence shows that the plaintiff was a man about 47 years of age, with an experience of about 11 years as telegraph operator and station agent, familiar with and experienced in handling trucks, and it is not suggested that the truck in question was different from those he had been handling throughout his experience.

The general rule is that an employer is charged with the duty of making such reasonable inspection as may be necessary to discover defects; but it is well settled that a master is under no obligation to his servants to inspect during their use those common tools and appliances with which every one is conversant, nor is it the master's duty to repair defects arising in the daily use of these

simple appliances, such as restoring to its place a nut on the end of a bolt which holds the tongue of an ordinary station truck in its place. This is the duty of the employe in charge of the station, especially when he is using the truck himself, and the master may assume that the servant using such an instrumentality will discover any defect in it, and either apply the remedy or not use it. 28 Cyc. p. 1138; Thompson on Neg. §§ 3801, 3802; Koschman v. Ash, 98 Minn. 312, 108 N. W. 514, 116 Am. St. Rep. 373; C. & O. Ry. Co. v. Sparrow, 98 Va. 630, 37 S. E. 302; Newport News Pub. Co. v. Beaumeister, 104 Va. 744, 52 S. E. 627; Stewart v. Savannah Electric Co., 133 Ga. 10, 65 S. E. 110, 17 Ann. Cas. 1087, and note.

[2] While the absence of the nut from the bolt may not have been observable at a glance, the dilapidated condition of the truck which had been reported to the defendant was open and obvious to any one who came near it. This condition was alone sufficient to put the plaintiff on notice that he should not use the truck, or that he should, at least, before using it, satisfy himself that it could be employed with safety.

[3] The qualification added to the instruction under consideration, that the duty of inspection could not be delegated to any one else, was wholly inapplicable to the present case. It was competent for the company to delegate this duty of inspection to the plaintiff himself in the use of such an instrument as that here in question. The latest expression of this court on this subject is found in Pocahontas Consolidated Col. Co. v. Hairston, 83 S. E. 1041, where it is said:

"That a corporation owes to its employes the duty to examine and inspect the appliances used by them is true, and that this duty is a non-assignable duty is also true; but corporations, from the necessity of the case, can only act through their agents, and may by general rules impose the duty of inspection upon the employes using the machine or other appliance to the extent that he is competent to make the inspection, and the circumstances allow him an opportunity of doing so."

The general rules of the company imposed upon the station agent the duty of making the inspection here involved. That the plaintiff was competent to inspect this simple instrumentality, which was obviously out of condition, and that he had the opportunity of doing so, cannot be questioned.

[4] Plaintiff's instruction No. 9 tells the jury that it is the positive unassignable duty of an employer to use all ordinary care and caution to furnish and provide his employes with reasonably safe and suitable appliances and instrumentalities, etc. The defendant's instruction No. 8, as amended, told the jury that under the rules of the Southern Railway Company it was the duty of the plaintiff as agent in charge at Mitchell's to make a reasonable and proper inspection of the truck furnished for use at the point, etc., and that it was his duty to take sufficient time to make such inspection effective.

Instruction No. 9 for the plaintiff is erroneous for the reasons stated in connection with the instruction already considered; and, in addition, it is clearly in conflict with No. 8 for the defendant. Contradicting each other as they do, it is impossible to say by which instruction the jury was controlled in reaching the verdict which was rendered. The situation here presented was involved in the case of *Pocahontas Con. Col. Co. v. Hairston*, supra, where it was held to constitute such an irreconcilable conflict as to make it necessary to reverse on account of the manifest inconsistency between the instructions there considered. The reasoning of the court and the authorities cited in that case are equally applicable to the present consideration and need not be repeated here.

As the judgment must be reversed for the errors already pointed out, it is unnecessary to comment upon the numerous other instructions given and refused, except to say that in point of number they are out of all proportion to the necessities of the case, and are therefore, as a whole, confusing and misleading. The controlling facts and circumstances of the case are few, and three or four instructions limited and directed to the material questions would have been ample to properly submit the case to the jury. This court has frequently called attention to the fact that numerous irrelevant and unnecessary instructions should be carefully avoided for the reason that they are well calculated to mislead and confuse the jury and to hinder rather than aid the administration of justice. *Richmond, etc., Co. v. Allen*, 101 Va. 200, 43 S. E. 356; *Newport News, etc., Co. v. Beaumeister*, supra.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views herein expressed.

Reversed.

(117 Va. 445)

ADKINS et al. v. ADKINS et al.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. TENANCY IN COMMON — EXCLUSIVE OCCUPANCY BY TENANT IN COMMON — ACCOUNTABILITY TO COTENANTS.

A tenant in common occupying the premises to the exclusion of cotenants, acquiescing in the possession on the idea that the premises could safely be trusted to the management of the tenant in common, is accountable for receiving more than his just share.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 76-88; Dec. Dig. § 28.]

2. TENANCY IN COMMON — EXCLUSIVE OCCUPANCY BY TENANT IN COMMON — ACCOUNTABILITY TO COTENANTS.

A tenant in common occupying the premises to the exclusion of cotenants is chargeable, on settlement with the cotenants, with reasonable rent for his use and occupancy in the condition in which the premises were at the time he went into possession, and each year's rent bears interest from maturity; but he is not ac-

countable for any of the profits, nor can he recover for any losses by reason of being a bad husbandman.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 76-88; Dec. Dig. § 28.]

3. PARTITION — ISSUES — STATUTORY PROVISIONS.

Code 1904, § 2562, authorizing the court in partition to take cognizance of all questions of law affecting the legal title, limits the jurisdiction to settlement of questions affecting the legal title to the premises sought to be partitioned, and controversies arising between the tenants growing out of their general indebtedness to each other and having no relation to the title cannot be settled.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 228, 229; Dec. Dig. § 83.]

4. PARTITION — ACCOUNTABILITY OF TENANT IN COMMON FOR WASTE.

Where, in partition, it appeared that a tenant in common had occupied the premises to the exclusion of cotenants, but there was no evidence that he had cut or sold any timber from the premises, but that a third person who had occupied the premises for a year had cut and sold some timber, but it did not appear that the tenant in common was responsible therefor, or that he received any proceeds from any sale, he was not chargeable with any timber cut.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 226; Dec. Dig. § 81.]

5. PARTITION — SALES — RESERVATION OF RIGHTS.

Where an undivided interest in coal and mineral rights in land sought to be partitioned was reserved, the court ordering a sale for partition properly reserved the mineral rights owned by persons not parties.

[Ed. Note.—For other cases, see *Partition*, Dec. Dig. § 101.]

Appeal from Circuit Court, Goochland County.

Suit for partition by Thomas Adkins against W. P. Adkins and others, in which Mary G. Adkins, on the death of defendant W. P. Adkins pending suit, filed answer and cross-bill. From a decree directing sale for partition and distribution of proceeds, defendants appeal. Reversed and remanded.

C. R. Sands, Cabell, Garnett & Cabell, and Leslie C. Garnett, all of Richmond, for appellants. S. S. Patteson, of Richmond, for appellees.

HARRISON, J. This bill was filed by Thomas Adkins for the partition of a farm in Goochland county, containing 430.87 acres, between himself, one brother, and two sisters, who derived the same jointly from their father. The bill alleges the farm to be in a neglected condition, incapable of division in kind, and that the interest of the parties concerned would be promoted by a sale of the place as a whole and a division of the proceeds. Answers were filed by the two sisters, the brother W. P. Adkins appearing by counsel, and thereupon, by consent of parties, the cause was referred to a commissioner to ascertain and report the land involved, what liens, if any, rested thereon, and the order of their priority, and whether

the land could be conveniently divided in kind.

Before the taking of the depositions in the cause was completed, W. P. Adkins, the brother, died, and his widow, Mary G. Adkins, to whom he left his interest in his father's estate, filed her answer to the bill, asking that the same be treated as a cross-bill, charging among other things that the complainant, Thomas Adkins, had since the death of his mother the exclusive control of the farm, had used and occupied the same to the exclusion of his cotenants, that he had permitted waste to be committed upon the land by allowing large quantities of timber to be cut therefrom; that during all the time of his control and use of the farm he had made no settlement with his cotenants, to whom he was responsible; that he should be required to account to them for a fair rent for the property, and for the timber taken therefrom.

Exceptions were taken to the report of the commissioner which was filed in response to the reference mentioned. These exceptions and the action of the circuit court in overruling them, together with one other objection, raise the questions to be considered and disposed of on this appeal. The objections to the report will be considered in the following order:

First, that the commissioner failed to report that the complainant, Thomas Adkins, had enjoyed the exclusive use, occupancy, and control of the farm for years, and to hold him responsible for a fair rental of the property during each year; second, that the commissioner improperly charged the interest of W. P. Adkins with two notes claimed to be due from him to the complainant; and, third, that the commissioner did not charge the complainant with the value of the timber cut from the farm during his control of the same.

[1] As to the exclusive control of Thomas Adkins and his liability for a fair rental during the period of his use and control of the property, the evidence shows that, about the year 1886, he took possession of the farm and continued to control and use it until the institution of this suit, with the exception of one year, when it appears to have been occupied by his brother-in-law, W. T. Moulton. During this time he occupied the place for a considerable period as his home, keeping thereon a large amount of live stock, raising crops, etc., and throughout the remainder of his control had the property in the hands of tenants, either for a share of the crops or for a money rent, and at no time during all the years of his use and control of the property did his cotenants ever share with him in the crops or other proceeds of the farm. While there was no formal contract of renting, the use and control of the place by Thomas Adkins seems to have been acquiesced in by his brother and sisters upon the idea that the place had to

be managed and that they could safely trust its management to him. While there never was any ouster of his cotenants, the use and enjoyment by the complainant was exclusive in the sense that it was never interfered with by his brother or sisters during the period of his control. The facts and circumstances of the case present a situation where the tenant in common occupying the premises to the exclusion of his cotenants is accountable for receiving more than his just share or proportion. *Early v. Friend*, 16 Grat. (57 Va.) 21, 78 Am. Dec. 649; *Newman v. Newman*, 27 Grat. (68 Va.) 722; *Schroeder v. Woodward*, etc., 116 Va. 506, 82 S. E. 192.

In the last-named case it is said:

"Where a tenant in common uses the property to the total or partial exclusion of his cotenant, an accounting to such cotenant may be had, under the statute, for so much of the rents and profits as the tenant in the possession and use may have received, or should be charged with if such possession and use had been exclusive, and the best measure of his accountability is a fair rent of the property so occupied and used by him."

[2] The evidence shows that the complainant kept a detailed account of items of charge against the estate, but kept no account of items with which the estate should have been credited, contenting himself, when questioned on the latter subject, with remembering little or nothing and saying that he lost money every year. The commissioner charged the complainant with such items of rent, alone, as he could remember to have actually received, settling the account between the complainant and his cotenants on that basis, thereby bringing the three cotenants in debt to the complainant in the sum of \$2,766.72, or \$922.24 each. The result produced is alone sufficient to demonstrate the injustice of the method of settlement adopted by the commissioner and confirmed by the court. The law is well settled that, under the facts and circumstances disclosed by this record, the tenant in possession and use must be charged on settlement with his cotenants with a reasonable rent for his use and occupancy of the property in the condition in which it was at the time it went into his possession, and must not be held to account for any of the profits; nor can he recover for any of the losses by reason of his being a good or bad husbandman, and each year's rent must bear interest from the time it is due. In addition to the authorities cited, see *Graham v. Peirce*, 19 Grat. (60 Va.) 28, 100 Am. Dec. 658; *White v. Stuart*, 76 Va. 546; *Fry v. Payne*, 82 Va. 759, 1 S. E. 197; and *Minor's Real Prop.* vol. 1, § 922.

[3] As to the exception that the commissioner improperly charged the interest of W. P. Adkins with two notes claimed to be due from him to the complainant, we are of opinion that this objection to the report is also well taken and should have been sustained. It appears that the notes mentioned are vigorously contested by the representative

of the interest of W. P. Adkins, and that if due, in whole or in part, they have no relation to, or connection with, the estate sought to be here partitioned. If due at all, they represent matters wholly foreign to the estate here involved.

Complainant relies upon the statute, Code, § 2562, as authorizing the settlement in this partition suit of the controversy mentioned between himself and his cotenant. We find no warrant in the statute for this contention. The provision of the statute is that in a partition suit a court of equity "may take cognizance of all questions of law affecting the legal title that may arise." The jurisdiction of the court is limited to the settlement of questions affecting the legal title to the subject of partition. The object of the statute was to obviate the delays and difficulties which frequently arose in partition suits where questions of title were involved; but there is no provision for the settlement, in a suit for partition, of all controversies that may arise between tenants in common, growing out of their general indebtedness to each other, which has no relation or bearing upon the title to the subject of partition. *Pillow v. Southwestern Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

[4] We are of opinion that the court properly overruled the exception taken to the commissioner's failure to charge the complainant with the timber cut from the farm. There is no evidence that the complainant cut or sold any timber from the farm during the period of his use and control. It appears that about 15 years before the institution of this suit W. T. Moulton, a brother-in-law of the complainant, occupied the premises in question for one year, and that he cut and sold some timber from the place. He claims that this was done with the consent of all the parties interested. What timber was sold by Moulton, or how much was received by him on that account, does not satisfactorily appear. However, that may be, it does not appear that the complainant was in any way responsible for the timber sold by Moulton, nor is it shown that he ever received a cent from any such sales.

[5] The remaining assignment of error is to the action of the court in ordering a sale of the tract of land as a whole, without restricting the same to such of the mineral rights therein as were owned by the cotenants in this suit.

It appears from the commissioner's report that an undivided one-sixth interest in the coal and mineral rights in this land was reserved by one Joseph R. Crouch, a former owner, and was recently, by deed of record, transferred by his heirs to Alfred and Virginia Crump. The evidence indicates that this outstanding mineral right is a very shadowy and unsubstantial interest; but, such as it is, the owners are entitled to have it

recognized and respected. The Crumps are not parties to this proceeding, and the complainant disclaims any purpose to sell their mineral rights. Under the circumstances, the interests of all concerned can, as suggested, be fully protected by providing, in the decree of sale to be hereafter entered, that the land be sold subject to the mineral rights of Alfred and Virginia Crump therein.

It follows, from what has been said, that the decree appealed from must be reversed, and the cause remanded for further proceedings not in conflict with this opinion.

Reversed.

(117 Va. 616)

SHIELD et al. v. E. S. ADKINS & CO. et al.
(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. TRUSTS \S 17, 18—EXPRESS TRUST—CREATION.

An express trust in real estate can be created by parol agreement, and, such express declaration being enforceable, the rule forbidding the admission of parol evidence to contradict written instruments does not apply.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24; Dec. Dig. \S 17, 18.]

2. TRUSTS \S 25—ENFORCEMENT—DEFINITENESS OF AGREEMENT.

A parol trust will not be enforced by a court of equity unless it is clear, definite, and unequivocal in its terms, and it appears that the minds of the parties have met; hence an alleged parol trust in land, arising out of a purchase by defendants under an agreement that plaintiff should share, will not be enforced where the terms on which plaintiff should share were not agreed upon.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34-37; Dec. Dig. \S 25.]

3. PARTNERSHIP \S 22—AGREEMENT—SUFFICIENCY.

Where defendants acquired land under an agreement that they should take the timber and plaintiffs the land, but neither were to have any joint interest in the property or profits received by the other, the agreement cannot be enforced as a quasi partnership contract.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 1, 7, 8; Dec. Dig. \S 22.]

4. FRAUDS, STATUTE OF \S 74—CONTRACTS WITH REGARD TO LAND.

Under Code 1904, § 2840, subsec. 6, declaring that no action shall be brought upon any contract for the sale of real estate unless it be evidenced by a contract in writing, a parol agreement, that defendant should acquire timber land and retain the timber, but convey the land, is unenforceable.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 122-131; Dec. Dig. \S 74.]

Appeal from Circuit Court of City of Williamsburg and County of James City.

Bill by F. A. Shield and another against E. S. Adkins & Co. and others. From a decree for defendants, complainants appeal. Affirmed.

Henley, Anderson & Hall, of Richmond, and Wescott & Turlington, of Accomack, for appellants. Bruce Simmons, of Norfolk, J. Brooks Mapp, of Accomack, and F. Leonard Wallis, of Salisbury, Md., for appellees.

CARDWELL, J. The bill in this cause, as amended, filed by F. A. Shield and W. L. Shield against E. S. Adkins & Co., Dale Adkins, and others, shows that on or about the — day of February, 1913, the complainants agreed with the defendant Dale Adkins, who was acting for himself and said E. S. Adkins & Co., to purchase for their joint benefit and interest a certain tract of land situated near the city of Williamsburg, James City county, Va., known as "Spratley," held for sale by one Potts, the land to be held and owned by complainants and the timber thereon by the defendants E. S. Adkins & Co., and which land and timber the said Dale Adkins, acting for himself and said E. S. Adkins & Co., did actually purchase, but had the same conveyed absolutely and entirely to said E. S. Adkins & Co., who now deny that the land was purchased for complainants' benefit, or that they have any interest therein. The bill further shows that the purchase was made after several conferences between complainants and Dale Adkins, and, after inspection of the premises and examination of the timber by both, according to previous appointment, a distinct agreement was reached whereby the said Dale Adkins, acting for himself and E. S. Adkins & Co., would purchase the said property at the sum of \$30,000, for the joint benefit and interest of complainants and the said company, the timber to be owned and held by said company and the land by complainants, they to pay \$18,000 of said purchase money and the said company the rest or residue thereof, and with the further understanding that the complainants were to be furnished with \$2,000 worth of manufactured lumber for buildings to be erected upon the said property, for which total sum of \$20,000 complainants were to give their joint note secured by deed of trust on the land; that this agreement was then and there reduced to writing by said Dale Adkins in a memorandum book retained by him, but complainants did not know, and therefore could not say that the said writing was signed by the said defendants or either of them; that complainants relied upon the said Dale Adkins to carry out the understanding and agreement to purchase the said property, as in the bill set forth, and negotiated for a loan of sufficient funds with which to pay cash for their portion of said property, to wit, the land exclusive of the timber thereon; and that complainants' portion of said purchase price for the whole property was afterwards tendered to said Dale Adkins, acting for himself and E. S. Adkins & Co., but was refused by him upon the sole ground that the said property was worth more than he had paid for same, and then and there informed the complainants that the proposition to sell them the land, exclusive of the timber, at the price and upon the terms that complainants claimed that they were to obtain a conveyance for the same, was withdrawn.

The avowed object of the bill, as amended,

is to enforce the alleged parol express trust, the prayer for relief being that the defendants E. S. Adkins & Co., Dale Adkins, Bruce Simmons, trustee in a deed of trust upon said property of May 12, 1913, and Thos. N. Potts, special commissioner and beneficiary under said deed of trust, and each of them, be compelled to perform and comply with the contracts and agreements set forth in the bill, and to receive the sum of \$20,000 for the tract of land described and known as "Spratley," exclusive of the timber thereon, and \$2,000 worth of manufactured lumber, free from lien, etc.

Dale Adkins and E. S. Adkins & Co. appeared and filed their joint demurrer to the original and amended bill, setting forth the grounds of their demurrer in writing, upon which demurrer the complainants joined issue; whereupon the court sustained the demurrer and entered its decree dismissing the bill, and from that decree the complainants appeal.

[1] The first question presented, viz., Can an express trust in real estate be created in this state by a parol agreement? has recently been before this court and decided in the case of *Young v. Holland*, 84 S. E. 637, where, in the opinion of the court by Keith, P., the question is fully and conclusively discussed, citing and reviewing all of the authorities having a material bearing thereon, and it is held that such a trust was lawful and could be enforced at common law, and, the common law in that respect not having been changed by statute in this state, such an express declaration of trust can still be enforced; that, an oral declaration of trust being lawful and enforceable in this state, and being in the nature of things provable by oral evidence only, the rule forbidding the admission of parol evidence, to vary, contradict, add to, or explain the terms of a written instrument does not apply.

[2] While therefore an express trust with respect to real estate or an interest therein may in this state be created by parol and is enforceable in a court of equity, the application to the court for the enforcement of the trust must set forth a contract that is clear, definite, and unequivocal in all its terms, since it is elementary that there can be no contract unless the minds of the parties have met and mutually agreed, and specific performance will not be decreed where this requisite is lacking.

"Equity requires a clear mutual understanding and a positive assent on the part of each party. An offer must be accepted in the terms and form submitted, or there is no valid assent, such as will create a contract which may be specifically enforced.

"Where the court is unable from all the circumstances of the case to say whether the minds of the parties met upon all the essential particulars, or, if they did, then cannot say exactly upon what substantial terms they agreed, or trace out any practical line where their minds met, specific performance will be refused." *Creedy v. Grief*, 108 Va. 320, 61 S. E. 769, and authorities cited."

A bill for the specific enforcement of a contract which fails to set forth clearly, definitely, and unequivocally the contract, with respect to which the minds of the parties have met and mutually agreed, is bad on demurrer, for the obvious reason that the proof in the case must correspond with the allegations of the bill, and, if they do not set forth all of the requisites of a bill for specific performance, the complaining party, according to the established rule, will be left to seek compensation in damages in a court of law. *Henley v. Cottrell R. E. Co.*, 101 Va. 70, 43 S. E. 191.

In the case cited and the still later case of *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742, the well-settled principles upon which a court of equity will avoid the statute of frauds and enforce a parol agreement for the sale of land are stated to be:

"(1) The parol agreement relied on must be certain and definite in its terms. (2) The acts proved in part performance must refer to, result from, or be made in pursuance of, the agreement proved. (3) The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. These requisites must concur before a court of equity will decree specific execution." * * * "Until acts are alleged which, of themselves, imply the existence of such a contract, parol evidence to show its terms is inadmissible."

In *Pierce's Heirs v. Catron's Heirs*, 23 Grat. (64 Va.) 595, the same principles are recognized, and in referring thereto the opinion of the court says:

"The reason is obvious enough, for a court of equity ought not to act upon conjectures, and one of the most important objects of the statute of frauds was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts."

See, also, 36 Cyc. 543 et seq., where, at page 544, this authority says:

"Equity often enforces contracts in the teeth of the statute of frauds, basing its action in such case on the supposed equities growing out of plaintiff's change of position in reliance on the contract."

In the case in judgment the amended bill does not rest the right of complainants to a specific performance of the contract alleged on either the second or third grounds set out above, but mainly, if not solely, upon the ground set out as follows:

"Whereupon your said complainant, W. L. Shield, went to Keller, Va., and on said Tuesday night met the said Dale Adkins at that place; your complainant, W. L. Shield, at that time not knowing the contents of the letter dated May 14, 1913, more fully mentioned in paragraph '8' of this bill. At which time and place the said Dale Adkins told your said complainant, W. L. Shield, that at the aforesaid meeting in Norfolk, Va., they found great difficulty in agreeing as to terms with the said Potts, but that, after wrangling nearly all night, the following terms were agreed upon: That \$7,500 should be paid in cash, \$7,500 before any timber should be cut, and the balance, to wit, \$15,000, to be secured by deed of trust, but that the said Potts would not release the said E. S. Adkins & Co., from responsibility on

notes secured by deed of trust, even though your complainants should buy the property, unless the deed of trust could be reduced to \$10,000, instead of \$20,000, as agreed upon between your complainants and the said defendants, as hereinbefore set forth. Whereupon your complainant, W. F. Shield, acting for himself and the said F. A. Shield, acquiesced in and consented to the change in the terms of the agreement theretofore had and made between the said parties, and then and there offered the said sum of \$20,000 for the said real estate and timber as hereinbefore set forth. Whereupon the said Dale Adkins, acting for himself and the said E. S. Adkins & Co., agreed to accept the said sum of \$20,000 in cash for the said property, or that your complainants might reduce the lien indebtedness then on said property \$10,000, paying the remainder of the purchase price, to wit, the sum of \$10,000, in cash, in either of which events the said defendants would execute and deliver to your complainants a good and sufficient deed, properly acknowledged for recordation, conveying to them the said property, free from lien if all of said purchase money were paid in cash, or subject to a lien of \$10,000, the payment of which your complainants were to assume if all of the purchase money were not paid in cash."

The detailed conversation and alleged understanding and agreement appearing in that part of the bill just quoted occurred, as clearly appears from a reading of the whole bill, after the property in question had been bought and after legal title thereto had become vested in the defendants E. S. Adkins & Co. Other conversations between Dale Adkins and one of the complainants are set out in the bill, and certain letters are filed as exhibits therewith, and others letters written to and by the defendants were called for, all of which were produced, and upon a reading of the bill and exhibits therewith it plainly appears that the complainants have merely set out certain negotiations with Dale Adkins, acting for himself and E. S. Adkins & Co., for the purchase of the real estate in question, exclusive of the timber thereon, but which negotiations never reached the point at which the minds of the parties met upon all the essential particulars of the proposed contract, so that the parol agreement relied on has not the essential requisites of certainty and definiteness upon which a court of equity would be warranted in enforcing it, regardless of the statute of frauds, but is a case in which the complainants, if any remedy they have, should be left to seek compensation in damages in a court of law.

"The first requisite of a contract, to entitle one to its specific performance in equity, is certainty and definiteness in its terms." *Litterall v. Jackson*, etc., 80 Va. 604.

The contract sought to be enforced must be made to appear reasonable, clear, and definite both as to terms and subject, and mutual in obligation and remedy. *Edichal B. Co. v. Columbia G. Mining Co.*, 87 Va. 641, 13 S. E. 100; *Berry v. Wortham*, 96 Va. 87, 30 S. E. 443.

In the last-named case, the opinion by Harrison, J., says:

"It is an elementary doctrine of courts of equity that they will not specifically enforce any

contract unless it be complete and certain. In order that any agreement, whether covered by the statute or not, whether written or verbal, may be specifically enforced, it must be complete in all its parts; that is, all the terms which the parties have adopted, as portions of their contract, must be finally and definitely settled, and none must be left to be determined by future negotiations; and this is true without any regard to the comparative importance * * * of these several terms. Pom. Spec. Perf. of Con. § 145; *Darling v. Cumming*, 92 Va. 521, 23 S. E. 880."

[3] It is urged upon us, however, by the learned counsel for the complainants, that, though their bill could not be entertained to enforce an express trust created by parol and regardless of the statute of frauds, its allegations are sufficient as setting up a quasi partnership created between complainants and the defendants, whereby a trust relation existed between them with respect to the land in question, provable by parol and enforceable in a court of equity, and in support of that proposition cite only the case of *Miller v. Ferguson*, 107 Va. 249, 57 S. E. 649, 122 Am. St. Rep. 840, 13 Ann. Cas. 138.

The facts in the case cited were not at all similar to the facts stated in the bill in this case. In the first case, the complainant had at the outset suggested the purchase of the real estate in question, had talked the matter over with the owner of the land, and the agreement between the complainant with the respondents was that the land to be purchased should be owned equally and jointly, and that the profits arising from the purchase and resale of the entire tract were to be shared equally between the parties to the agreement. Upon a review of the evidence in that case, it clearly appeared that a partnership agreement had been entered into between the appellant and appellees, having in view the purchase of a designated piece of real estate for speculation, and after a recital of the facts in the opinion of the court by Whittle, J., as to the lack of good faith and fair dealing on the part of the appellees, and reviewing the authorities, it was held that upon the plainest principles of equity and fair dealing the appellant was entitled to participate in the profits arising from the purchase and resale of the property.

In *Bank v. Cringan*, 91 Va. 347, 21 S. E. 820, it was held that "an executory contract or agreement * * * to form a partnership, to go into effect" at a future day, "does not constitute a partnership"; and in *Sodiker v. Applegate*, 24 W. Va. 411, 49 Am. Rep. 252, the opinion of the court says that in every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds or a right of control over them, and also an agreement to share the profits or losses arising therefrom. See, also, *Hender-*

son v. Henrie, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628, Ann. Cas. 1912B, 318, and 29 A. & E. Enc. L. 899, and authorities there cited.

[4] The bill here contains a long recital of interviews between the appellants, or one of them, and appellee, Dale Adkins, acting for himself and the other appellees; but it is nowhere claimed that an agreement was entered into having in view the purchase of the "Spratley" land, to be owned equally and jointly by the complainants and defendants. The allegation of the bill is that complainants were to have the land and \$2,000 worth of manufactured lumber upon certain agreed terms, but no part of the timber or land was to be owned jointly by the parties to this alleged agreement, nor were the profits which might be realized from the land or timber to be shared in any way between the complainants and defendants, but each was to have a separate and distinct piece of property; that is to say, the defendants E. S. Adkins & Co. were to purchase and pay for the entire property and then sell the land, exclusive of the timber, to complainants upon terms which seem never to have been agreed on, and the bill does not call for an accounting or settlement of partnership affairs between the parties with respect to the land in question, but, as above stated, the relief asked is that the defendants be compelled "to perform and comply with the provisions of the alleged parol contract and agreement, and to receive the sum of \$20,000 for the tract of land in question known as 'Spratley' and \$2,000 worth of manufactured lumber (to which complainants made claim under the contract) and to execute and deliver a proper deed for said property." In no part of the bill is to be found an allegation that the complainants and defendants have a mutual interest or joint partnership in this property, or that they were to have such an interest or partnership; nor is there alleged an essential element of an implied or resulting trust in favor of complainants. So that, upon any view that may be taken of the bill, it is plainly demurrable as being within the control of the sixth clause of the statute of frauds (section 2840 of Code 1904); the contract sought to be specifically enforced being for the sale of real estate, and not an express trust created by parol affecting the real estate in question.

Applying the foregoing well-settled principles to the case before us, the conclusion is necessarily reached that the decree appealed from, sustaining the demurrer to the amended bill of the complainants and dismissing the same, is right and has to be affirmed.

Affirmed.

KELLY, J., absent, the case having been argued before his term began.

(117 Va. 636)

WASHINGTON & O. D. RY. v. JACKSON'S ADM'R.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. WITNESSES §402 — IMPEACHING OWN WITNESS—CONTRADICTING BY OTHER EVIDENCE.

In an action for the death of a person struck by a car, the motorman, called by plaintiff as a witness, testified that an object which he took to be a bunch of rags or an old tie, but which proved to be a person, was lying at the ends of the ties outside the rails. The character of the injuries sustained by deceased and the other physical facts demonstrated, however, that he was either lying on one of the rails or on the track between the rails. *Held*, that plaintiff, by relying on these physical facts, did not violate the rule forbidding a party to impeach his own witness, under Code 1904, § 3351, providing that a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but that he may, in case the witness shall in the opinion of the court prove adverse, contradict him by other evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1268; Dec. Dig. §402.]

2. TRIAL §156—DEMURRER TO EVIDENCE—TAKING VIEW MOST FAVORABLE TO PLAINTIFF.

Where, in an action for the death of a person struck by a car, the evidence would have justified the jury in finding that deceased was lying over on the rail, or between the rails, and not outside the rails, as claimed by the motorman, the court, upon a demurrer to the evidence, must find that he was so lying.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. §156.]

3. TRIAL §156—DEMURRER TO EVIDENCE—TAKING VIEW MOST FAVORABLE TO PLAINTIFF.

Where several inferences may be drawn from the evidence differing in degrees of probability, the court must, on demurrer to the evidence, adopt those most favorable to the demurree, unless they be strained, forced, or contrary to reason.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. §156.]

4. STREET RAILROADS §114—ACTIONS FOR DEATH OF PERSONS ON TRACK—QUESTIONS FOR JURY.

In an action for the death of a person struck by a car while lying, presumably asleep, on or near the track, there was evidence that he was lying on the rail, or between the rails, and about 450 feet away in a space illumined by a powerful electric headlight when first seen by the motorman and that the car could have been stopped in 100 feet. The motorman testified that he saw an object which he took to be a bunch of rags or an old tie, that he only glanced at it for half a second, and then directed his gaze up the track, without taking any further account of such object. *Held*, that a jury might well have found that ordinary vigilance on his part would have disclosed that the object was a human being in ample time to stop the car and avoid the accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. §114.]

Error to Circuit Court, Fairfax County.

Action by Frank Jackson's administrator against the Washington & Old Dominion

Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

C. E. Nicol, of Alexandria, and W. J. Lambert, of Washington, D. C., for plaintiff in error. C. V. Ford and Wilson M. Farr, both of Fairfax, for defendant in error.

WHITTLE, J. Upon a demurrer to the evidence judgment was rendered for the defendant in error, plaintiff below, in an action to recover damages for the death of his intestate, Frank Jackson, which was attributed to the wrongful act of the defendant, the Washington & Old Dominion Railway.

The controlling question submitted for our determination is the sufficiency of the evidence to support the judgment.

[1] The testimony shows that plaintiff's intestate was a colored boy 18 years old, who, at the time he was killed, was lying, presumably asleep, on the right-hand rail of the defendant's track going west, or between the rails, within 800 feet of a station called "Carvil," near the point where a much-used footpath over the track turns off in the direction of his home. About 10 o'clock on the night of the accident, car No. 74 was running as an extra, not on schedule time, and without passengers, being operated by one Johnson as motorman. The car was well equipped with approved modern automatic air brakes and an electric headlight in good condition. The motorman's position was in the front part of the car directly over the right-hand rail. He was introduced by the plaintiff, and testified that while going up a slight grade, approaching Carvil, he discovered an object (shown to have been 450 feet in front of the car) lying along the track at the ends of the ties, which he took to be a bunch of rags or an old tie; that he only glanced at the object for half a second, and then directed his gaze up the track, which at that point was straight for a mile and a half. The car was drifting, with the current off, at the rate of 20 or 21 miles an hour, and could have been stopped in 100 feet. He did not blow the whistle or sound the gong when he saw the object, or take any further account of it after the passing glance, but proceeded on his way without lessening speed, and did not know of the presence of the object on the track until he felt the jar of the collision, when he backed the car and discovered the mutilated remains of the boy. Notwithstanding the statement of the witness that the object (which proved to be Frank Jackson) was outside the rails, the physical facts demonstrated that he was either lying on the right-hand rail, or on the track between the rails. His blood and mangled flesh were besmeared on the front of the right side of the cowcatcher, and the gray trousers which he wore showed five greasy prints or marks between the knee and hip corresponding with the bars of the pilot. Moreover, as the result of the impact, his in-

juries were of a character which rendered it physically impossible for him to have been lying outside the ends of the ties, where the testimony of the motorman placed him. Reliance by the plaintiff on these physical facts does not transgress the general rule which forbids a party to impeach his own witness. Va. Code, § 3351; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677; *Ferguson v. Daughtrey*, 94 Va. 308, 26 S. E. 822; *N. & W. Ry. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

In 3 Jones on the Law of Evidence, § 860, it is said:

"The general rule that one cannot impeach his own witness must not be understood to imply that the party is bound to accept such testimony as correct. On the contrary, it is very clear that one producing a witness may prove the truth of material facts by any other competent evidence, even though the effect of such testimony is to directly contradict his own witness. A party is not bound by all the statements of a witness called by him, if adverse, even though no other witnesses are called to contradict him; the party may rely on the part of such testimony, although in other parts the witness denies the facts sought to be proved. It has been well said that, if the other rule prevailed, 'every one would be at the mercy of his own witness, and if the first witness sworn should swear against him, he would lose the testimony of all the rest. This would be a perversion of justice' [citing *Snell v. Gregory*, 87 Mich. 500]."

[2] It is clear that upon the physical facts adverted to a jury might well have found that at the time of the accident Jackson was lying either on the rail or between the rails; and, if that be true, then the court, upon a demurrer to the evidence, must so find. *Perkins v. Southern Ry. Co.*, 85 S. E. 401, and cases cited.

[3] It is likewise settled law that, where "several inferences may be drawn from that evidence differing in degrees of probability, the court must adopt those most favorable to the demurree, unless they be strained, forced, or contrary to reason." *Horner v. Speed*, 2 Pat. & H. 616; *Burk's Pl. & Pr.* 487 et seq., where the subject is discussed and authorities assembled.

[4] Upon this principle, Jackson must be held to have been lying in front of the car, and, when first seen by the motorman, was

450 feet away in a space illumined by a powerful electric headlight. Indeed, so bright was that light that a small animal would have been discernible at a distance of 1,000 feet; and on the occasion of the inquest, held shortly after the accident, the coroner at a distance of 30 feet availed of the light to do the necessary reading and writing and examination of the injuries to the person of the deceased, incident to the investigation.

While the doctrine is well settled that a railroad company does not owe to a trespasser on its track that "prudent circumspection which foresees and forestalls danger," yet this court in several cases has quoted with approval the following statement of the law from *Shearman & Redfield on the Law of Negligence* (4th Ed.) § 99:

"The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief." *Seaboard & Roanoke R. Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773; *Tucker's Adm'r v. N. & W. Ry. Co.*, 92 Va. 549, 24 S. E. 229; *N. & W. Ry. Co. v. Dunnaway's Adm'r*, 93 Va. 29, 24 S. E. 698.

In decisions of this court where liability was denied, it appeared that those in charge of the train, on seeing an unknown object on the track, invariably have kept their attention fixed upon it until its character was determined, and then, if discovered to be a human being, exercised ordinary care to avoid injury. In this case the motorman confessedly only bestowed upon the object a passing glance. Under the evidence, a jury might well have been warranted in finding that ordinary vigilance on his part would have disclosed that the object was a human being in ample time for him to have stopped the car and avoided the accident.

For these reasons, the judgment of the circuit court should be affirmed.

Affirmed.

(17 Ga. App. 55)

**CENTRAL GEORGIA TRANSMISSION CO.
v. STORER. (No. 6102.)**

(Court of Appeals of Georgia. Sept. 10, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR ⇐1050 — WITNESSES
⇐874—IRRELEVANT TESTIMONY—EXAMINATION.**

The admission of irrelevant testimony is error, but not necessarily harmful error, or in other words, such error as will require the grant of a new trial. For instance, the opinion of a witness as to the probable state of the weather at some time in the future might throw no possible light on any issue involved in a case on trial, and be therefore wholly irrelevant, but the admission of such testimony would not necessitate the grant of a new trial. Generally the connections, interests, and any other matters or things that may legitimately affect the credibility of a witness may properly be shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ⇐1050; Witnesses, Cent. Dig. §§ 1201, 1202; Dec. Dig. ⇐874.]

**2. APPEAL AND ERROR ⇐1032 — REVIEW —
HARMLESS ERROR—RECORD.**

If the evidence, the admission of which is complained of in the fourth, fifth, sixth, and seventh grounds of the motion for a new trial, was not admissible, under the rule stated above, it does not appear from the record that it resulted in any harm to the defendant, requiring the grant of a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. ⇐1032.]

**3. APPEAL AND ERROR ⇐692—RECORD—OF
FEES OF PROOF.**

The eighth ground of the motion for a new trial complains of the refusal to permit a certain question to be propounded to a witness; but it does not appear what evidence the question would have elicited, and hence this exception cannot be considered. Besides, it does not appear from the record as a whole that the question related to or could have affected the sole issue before the jury for their consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. ⇐692.]

**4. MASTER AND SERVANT ⇐80 — CONTRACT
OF EMPLOYMENT—EVIDENCE—ADMISSIBILITY.**

There was no error in admitting the evidence complained of in the ninth ground of the motion for a new trial, to the effect that the plaintiff spent as much time in carrying on the work of the defendant as he could spare from other consulting engineering work, since the original contract between the parties expressed an intention on the part of the defendant that the plaintiff should spend as much of his time in connection with this work during the early months of its pendency as he could spare from his other consulting engineering work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ⇐80.]

**5. MASTER AND SERVANT ⇐80—CONTRACT OF
EMPLOYMENT—EVIDENCE—ADMISSIBILITY.**

There is no merit in the tenth ground of the motion for a new trial, which complains that the court excluded the testimony of a witness who succeeded the plaintiff in the work the latter contracted to do, which tended only to indicate how and in what manner this witness made reports, etc., to the defendant company as to

the progress of his work. The evidence was obviously irrelevant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ⇐80.]

**6. EVIDENCE ⇐471 — CONCLUSIONS OF WIT-
NESSES.**

There is no merit in the eleventh ground of the motion for a new trial, which complains of the rejection of certain evidence, which could only have amounted to a conclusion on the part of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. ⇐471.]

**7. MASTER AND SERVANT ⇐68—EMPLOYMENT
—CONTRACTS—PERFORMANCE.**

Under his contract the plaintiff was to receive a certain amount for his services "while engaged in connection with securing power contracts" for the defendant company. Whether he was or was not competent as a solicitor or successful in his efforts could not affect his right to recover the agreed amount of compensation, if in fact he made all proper efforts, as contemplated by the contract, to carry out and perform his cross-obligations thereunder. The court properly instructed the jury on this question, and the finding of the jury is conclusive on the point that the plaintiff was faithful in the performance of his contractual duties, and that there was no failure on his part which would cause a forfeiture of his right to recover under the terms of his contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 77; Dec. Dig. ⇐68.]

8. ISSUES—SUBMISSION.

The failure of the trial judge to submit to the jury the issue raised by the pleadings as to a rescission of the contract was not error, under the record in the present case.

9. REVERSIBLE ERROR.

Taking the charge as a whole, in the light of the entire evidence, there was no reversible error in any of the rulings complained of, and no substantial merit in any of the exceptions not explicitly ruled on here; there was testimony to support the finding of the jury, and the trial judge did not err in overruling the motion for a new trial.

Error from City Court of Macon; Robt. Hodges, Judge.

Action by S. B. Storer against the Central Georgia Transmission Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Hatcher & Smith, of Macon, for plaintiff in error. T. R. Gress, J. E. Hall, and Chas. J. Bloch, all of Macon, for defendant in error.

WADE, J. Judgment affirmed.

(17 Ga. App. 46)

**NOWELL v. BRITISH-AMERICAN ASSUR.
CO. (No. 5954.)**

(Court of Appeals of Georgia. Sept. 10, 1915.)

*(Syllabus by the Court.)***INSURANCE ⇐383—FIRE POLICIES—WAIVER
OF CONDITIONS.**

The action was based upon a fire insurance containing the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance,

whether valid or not, on property covered in whole or in part by this policy." "This policy is made and accepted subject to the foregoing stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no other officer, agent, or other representative of this company shall have power to waive any provision or conditions of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." It affirmatively appears from the plaintiff's petition that the insured had, while the policy was in force, procured additional insurance from another company on the same property, and without the written consent of the insurer, or of any agent, officer, or other representative thereof. *Held*: The petition was properly dismissed on general demurrer. The fact that it is alleged that such additional insurance was requested of the agents of the defendant who had issued the policy sued on, and that they stated to the plaintiff that they were unable to write further insurance for him, but that he could procure additional insurance through certain other agents doing business in the same town, and that at the solicitation and instance of the defendant's agents the plaintiff did call upon the agents to whom he was referred, and did procure additional insurance in another company, does not alter the situation. The mere oral permission to procure further insurance was not binding on the insurer. *Morris v. Orient Ins. Co.*, 106 Ga. 472, 33 S. E. 430; *Lippman v. Aetna Ins. Co.*, 108 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62; *Beasley v. Phenix Ins. Co.*, 140 Ga. 126, 78 S. E. 722. The agent "had no power to talk away any provision or condition expressed in the policy. They were all beyond the reach of any oral declaration or representation which he might make." *Athens Mutual Ins. Co. v. Evans*, 132 Ga. 703, 708, 64 S. E. 993, 995.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1018; Dec. Dig. ¶ 383.]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by T. C. Nowell against the British American Assurance Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Harrell & Wilson, of Bainbridge, and Bryan & Middlebrooks, of Atlanta, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(117 Va. 309)

TAYLOR v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. CRIMINAL LAW ¶ 403—SECONDARY EVIDENCE—TRIPPLICATE INSTRUMENTS—LOSS OF ORIGINAL.

Where an instrument was made in triplicate on a billing machine, and the original was

lost, one of the copies was admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 889; Dec. Dig. ¶ 403.]

2. CRIMINAL LAW ¶ 417—EVIDENCE—ADMISSIBILITY.

A letter written to accused by his attorney, advising him as to the law governing the offense charged, is irrelevant and immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. ¶ 417.]

3. CRIMINAL LAW ¶ 696—EVIDENCE—OBJECTIONS—GENERAL OBJECTION.

A general objection to the admission of evidence, admissible against accused for any purpose, is properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. ¶ 696.]

4. WITNESSES ¶ 277—IMPEACHMENT—CROSS-EXAMINATION.

Where accused, charged with delivering intoxicating liquors, testified that he had no reason to believe that the shipment was not made in good faith, a cross-examination, disclosing that about the same time accused also delivered liquor on other orders in the same handwriting, was proper to discredit his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. ¶ 277.]

5. CONSTITUTIONAL LAW ¶ 48—STATUTES—VALIDITY.

A statute will not be declared unconstitutional unless its repugnancy to the Constitution is palpably plain.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶ 48.]

6. COMMERCE ¶ 9—INTERSTATE COMMERCE—REGULATION—STATUTES—VALIDITY.

Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (U. S. Comp. Stat. 1913, § 8739), prohibiting the shipment of intoxicating liquors from one state into any other state, to be received or sold in violation of any law of the latter state, is a valid exercise of the legislative authority of Congress to regulate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 6; Dec. Dig. ¶ 9.]

Error to Circuit Court, Accomac County. One Taylor was convicted of crime, and he brings error. Affirmed.

Jeffries & Jeffries and Jeffries, Wolcott, Wolcott & Lankford, all of Norfolk, for plaintiff in error. The Attorney General, for the Commonwealth.

KEITH, P. The indictment found against Taylor in this case shows that he is an operator, agent, clerk, and occupant of a store-room and office of the Baltimore, Chesapeake & Atlantic Railway Company, in Pungoteague magisterial district, in the county of Accomac, in which district the sale of wine, ardent spirits, spirituous, and malt liquors, intoxicating liquors, or any mixture thereof was prohibited by law; that he did on the

day of May, 1913, in the said district, in the county aforesaid, unlawfully deliver wine, malt liquors, and intoxicating spirits to a person other than the person to whom said wine, ardent spirits, and intoxicating liquors were billed and shipped, or in good faith addressed, or to said consignee's em-

ployé upon the written order of said consignee, to wit, a package of ardent spirits and intoxicating liquors billed, shipped, and addressed to Tom Moore; and that he, the said Taylor, did then and there unlawfully deliver the said package to one James Metcalf, said Metcalf not being the person to whom the said package was billed, shipped, and in good faith addressed, or the employé of the said Tom Moore, and without the written order of the said Tom Moore, against the peace and dignity of the commonwealth.

To this indictment he pleaded not guilty, a trial of the issue joined upon that plea resulting in a verdict and judgment assessing a fine against him of \$50, which the court refused to set aside, overruled the defendant's motion in arrest of judgment, and entered judgment against him for the payment of the fine, and in addition thereto sentenced him to confinement in the jail of Accomac county for 30 days; and the case is before us upon a writ of error to that judgment.

A number of errors were assigned during the progress of the trial to the rulings of the court admitting testimony over the objection of plaintiff in error.

[1] The first bill of exceptions is to the admission in evidence of a copy of the manifests of the steamer Eastern Shore, made up for the 11th of May, 1913, which was introduced while Edgar Northam, the assistant purser of the steamer, was on the stand. The manifests showed that on that day there had been consigned to Tom Moore two barrels of liquor weighing 500 pounds, two boxes of liquor weighing 500 pounds, and one barrel of beer weighing 250 pounds. The contention is that as these manifests were not made by Taylor, or under his direction, they should not have been received as evidence against him.

It appears that the manifests were made on an Underwood billing machine, in triplicate, by the assistant purser, whose duty it was to take the shippers' bills of lading, check the freight for each wharf, and make off the manifests therefrom. The original copy was turned in to the auditor of the company, the second sent to the agent in Baltimore, and the third to the agent on the wharf, the defendant, Taylor. The witness testified that he left a copy with F. C. Taylor, the agent at Boggs Wharf, and that it was checked as delivered.

We think that there was no error in the ruling of the court admitting this testimony, upon the authority of the case of *C. & O. Ry. Co. v. Stock*, 104 Va. 97, 51 S. E. 161, where it was held that:

"A carbon copy of a paper made by the same impression of type as the original and at the same time (but not a letter press copy) may be regarded as a duplicate original, and may be introduced in evidence without notice to the opposite party to produce the other."

The case before us is strengthened by the fact that the original is conclusively shown to have been lost.

[2] Bill of exceptions No. 2 is to the ruling of the court refusing to admit in evidence a letter offered by the defendant from his attorney in Baltimore, advising him as to the law governing the delivery of liquor. The letter was written with respect to a consignment made some months prior in point of time to that which was the subject of investigation in this case, but we shall not place our ruling upon that narrow ground, as we think the testimony wholly irrelevant and immaterial. See *Bishop's New Cr. L. cl. 2* § 294, and authorities there cited.

[3, 4] During the progress of the trial the accused was put upon the stand as a witness in his own behalf, and upon his cross-examination was shown a number of other orders than the one signed by Tom Moore and the one referred to in the indictment, and the witness was interrogated with respect thereto, and they were offered in evidence, to all of which the accused, by counsel, objected, but the court overruled the objection, and permitted the questions to be asked and the orders to be introduced; and this ruling is the subject of the third bill of exceptions.

From the evidence of several witnesses it appears that about the same time the witness delivered the liquors consigned to Tom Moore, he delivered a great number of other liquors upon orders in the same handwriting to Metcalf or Boloate. The objection to the evidence was a general one, and if it were admissible for any purpose the ruling of the trial court must be maintained.

There are two theories urged with reference to the crime defined by the statute. One is that the crime belongs to that class which are indictable irrespective of guilty knowledge, in which case the agent who delivered the intoxicating liquor to any person other than the person to whom it was addressed, or to his employé upon the written order of the consignee, would be guilty of the offense charged in the statute, whether he had reason to believe that the person to whom the liquor was delivered was the bona fide consignee or his employé or not. On the other hand it is contended, and this view is maintained by the defense, that the crime denounced by the statute is not indictable irrespective of intent, thereby making the scienter relevant. Upon that theory, it would seem that the evidence objected to was properly admitted.

In *Cluverius v. Commonwealth*, 81 Va. 787, the objection to the admission of evidence was a general one. The prisoner did not ask the court to place any limitation upon the effect of the evidence, and the court held, citing Taylor on Evidence, vol. 2, p. 1157, that where evidence was offered for a particular purpose, if the judge pronounces in favor of its general admissibility in the cause, the court will support his decision, provided the evidence be admissible for any purpose. Upon this point this case has been frequently cited with approval by this court. *Flick's*

Case, 97 Va. 775, 34 S. E. 39; Meyers v. Falk, 99 Va. 389, 38 S. E. 178; Wright's Case, 109 Va. 86b, 65 S. E. 19.

But in any event we think the evidence was admissible as tending to discredit the testimony of Taylor, who testified in his own behalf, and who had stated that he had no reason to believe that the shipment to Tom Moore was not made in good faith; and the tendency of this evidence was to show that Taylor did have reason to believe, and the evidence was relevant and proper for that purpose. The objection to its introduction being a general one, it falls within the influence of the principle announced in the *Cluverius Case*, supra.

The fourth bill of exceptions is to the introduction of a letter from C. W. Chambers to the defendant. We think this letter was clearly admissible, if for no other purpose, as impeaching the good faith of Taylor and affecting his credibility as a witness, he having testified, as we have already said in connection with bill of exceptions No. 3, that he had no reason to question the good faith of the shipment to Tom Moore. In this case also, the objection to the admissibility of the testimony was general, and, if admissible for any purpose, the objection to its admission must be overruled.

Bills of exceptions 5, 6, and 7 present similar questions, and need not be specifically discussed.

We have examined the instructions offered, given, and refused, and think that those given fairly submit the issues to the jury, and that with respect to those which the court refused it committed no error.

Upon the evidence we are of opinion that the offense was clearly proved, and that the judgment must be affirmed, unless, as the plaintiff in error contends, the act under which he was prosecuted is unconstitutional as trenching upon the authority of Congress to regulate commerce; and this brings us to the consideration of the statute known as the Webb-Kenyon law, which we shall briefly consider.

[5] We need not enlarge upon the principles which govern this court in passing upon the constitutionality of a law. The statute is not to be annulled unless its repugnancy to the Constitution be palpable and plain, and to doubt upon the subject is to affirm the constitutionality of the law in question.

[6] In *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, the Supreme Court held that a statute of the state of Iowa, forbidding any common carrier to bring within that state intoxicating liquors from any other state or territory, without having procured the certificate required by the state statute, was a regulation of commerce among the states, and therefore void; and this decision was approved and extended in *Lelsy v. Hardin*, 135 U. S. 100,

10 Sup. Ct. 681, 34 L. Ed. 128, where the court held that:

"The power to prescribe the rule by which that commerce is to be governed is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

It was by these decisions established that the state could not control the disposition of intoxicating liquors imported from another state or territory so long as they remained in the original package. This situation led to the passage of what is known as the Wilson bill, which reads as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquors or liquors had been produced in such state or territory, and shall not be exempted therefrom by reason of being introduced therein by original packages or otherwise." Act Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1913, § 8738).

This statute led to further litigation, and in *Rahrer's Case*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, the Wilson bill was attacked as an attempt to delegate to the states the power to regulate commerce, and the court held that no such delegation had been attempted by Congress, but that it had—

"taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. * * * No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

And in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, the same statute is construed as to the phrase, "arrival in such state," and the court held that this language meant arrival in the hands of the consignee, and that consignments of liquor which had been shipped from one state into another were not subject to state police laws while being moved from the platform of the railway station to a freight warehouse. This decision postponed the taking effect of laws enacted under the police powers of the state until the liquor had been delivered by the carrier to the consignee.

These cases marked a step, and an important one, in the exercise by the states of their police power with respect to the importation of intoxicating spirits. In the beginning, as we have seen, the liquors imported

did not pass under the control of the state until they had become mingled with the common mass of property in the territory entered, while by virtue of the Wilson bill and the decisions construing it, the control of the state was accelerated and was established when the imported liquors arrived in the state; that is to say, had been delivered to the consignee, though still remaining in the original package. Under the Wilson bill it is held that a state law is invalid, in so far as it attempts to prevent residents of a state from importing liquors for their own use (*Vance v. Vandercook*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100), and that a state prohibition law cannot affect cash on delivery shipments of liquor to persons who purchase the same for their own use and consumption (*American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417).

In order to meet these decisions, Congress passed what is known as the Webb-Kenyon Act, so much of which as is pertinent to the matter under discussion is as follows:

"An act divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, * * * into any other state, * * * or from any foreign country into any state, * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, * * * is hereby prohibited."

This statute has been before the courts of many states, and has been unanimously upheld. *Atkinson v. Southern Express Co.*, 94 S. C. 444, 78 S. E. 516, 48 L. R. A. (N. S.) 349; *State v. Grier* (Del. Gen. Sess.) 88 Atl. 579; *State v. U. S. Exp. Co. (Iowa)* 145 N. W. 451; *State v. Doe*, 92 Kan. 212, 139 Pac. 1169; *Van Winkle Co. v. State* (Del.) 91 Atl. 385; *Am. Exp. Co. v. Beer* (Miss.) 65 South. 575; *Southern Exp. Co. v. State* (Ala.) 66 South. 115; *Adams Exp. Co. v. Com.*, 160 Ky. 68, 169 S. W. 603; *Palmer v. Southern Exp. Co.*, 129 Tenn. 116, 165 S. W. 236.

The constitutionality of this law has also been upheld in numerous cases in the federal courts. See *U. S. v. Oregon*, etc., Ry. (D. C.) 210 Fed. 378; and in *State of West Virginia v. Adams Exp. Co.* (C. C. A.) 219 Fed. 794, in the Circuit Court of Appeals for the Fourth Circuit, Judge Woods, delivering the opinion, after an exhaustive examination of the entire subject, both upon principle and authority, upholds the validity of the Webb-Kenyon law in a convincing opinion.

When we consider the broad and comprehensive terms by which Congress is clothed with the power to regulate commerce, the opinions delivered in cases in the Supreme Court which we have cited, the strong and unbroken current of authority in the appel-

late courts of many states, concurred in by such inferior federal courts as have had the question under consideration, we are not only unable to say that the act in question is plainly unconstitutional, but we are satisfied that it is a valid and constitutional exercise of legislative authority on the part of Congress. And we deem it not amiss to say that it is a subject of congratulation to find that the Congress has been responsive in this matter to the will of the people, and has cooperated with the states in their effort to regulate commerce in intoxicating liquors, a subject upon which there is substantial unanimity of opinion, the diversity existing not as to the object in view, but as to the means most efficient in its attainment.

The judgment of the circuit court of Accomac is affirmed.

Affirmed.

(117 Va. 584)

SCOTT'S EX'R v. CHESTERMAN.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. EXCEPTIONS, BILL OF \S 7—SETTING FORTH ERRORS—RULINGS ON EVIDENCE.

A bill of exceptions, calling in question the admissibility of evidence, considered, though it was subject to the criticism that it was unduly protracted and somewhat confused.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. \S 9; Dec. Dig. \S 7.]

2. CUSTOMS AND USAGES \S 12 — BUILDING CONTRACTS—OBLIGATION OF PARTIES—EVIDENCE.

A building contract required the contractor to furnish all materials and labor of every description for the performance of the work and lay out his work and be responsible for its correctness, and provided that any dispute as to the construction of the specifications should be determined by the architect, whose decisions should be final. A question as to whose duty it was to underpin the wall of a building while excavation for the foundation was being done was submitted to the architect, who decided that it was the duty of the contractor so to do. Held, that evidence that custom did not include in the contract underpinning was inadmissible, in the absence of proof that the owner or architect knew of the custom, or that the architect was guilty of fraud.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. $\S\S$ 23, 24; Dec. Dig. \S 12.]

3. CUSTOMS AND USAGES \S 16—EVIDENCE—ADMISSIBILITY.

Evidence of custom will not be admitted under the guise of explaining a contract to ingraft on it a new provision on which to base a defense, especially when the custom is not pleaded.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. $\S\S$ 27, 28; Dec. Dig. \S 16.]

4. CUSTOMS AND USAGES \S 12—EVIDENCE—EFFECT.

Knowledge of a custom must be brought home to a party to a contract to be affected thereby, unless it is so uniform as to raise a prima facie presumption that he knew of it.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. $\S\S$ 23, 24; Dec. Dig. \S 12.]

5. CUSTOMS AND USAGES —17—CUSTOMS AFFECTING PERFORMANCE OF CONTRACT.

A custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. —17.]

6. TRIAL —252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

It is error to give an instruction where there is no evidence justifying it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. —252.]

7. CONTRACTS —286—BUILDING CONTRACTS—RIGHTS AND LIABILITIES OF PARTIES.

A building contract required the contractor to do the work within a specified time in good workmanlike and substantial manner, to the satisfaction of the owner and under the direction of the architect, to be testified to by a writing or certificate under his hand, and that final payment should be made on completion of the building to the satisfaction of the owner and the architect. The building after completion was turned over to the owner and received by him without objection. A few days later he confined his objection to the concrete basement walls and these were remedied. The contractor sent to the architect a bill for the balance due and he indorsed thereon the letters "O. K." with his initials. Subsequently he stamped the bill, "Approved." There was evidence that the owner knew of the first indorsement by the architect. *Held*, that the first indorsement was a sufficient certification of approval by the architect to sustain an action by the contractor for the balance due.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1305; Dec. Dig. —286.]

8. CONTRACTS —286—BUILDING CONTRACTS—APPROVAL BY ARCHITECT—SUFFICIENCY.

Where a building contract stipulates for approval of the work by an architect by a writing or certificate, any writing, fairly carrying out the purposes intended, is sufficient.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1305; Dec. Dig. —286.]

9. DAMAGES —123—BUILDING CONTRACTS—DEFECTIVE WORK—MEASURE OF DAMAGES.

The measure of damages for defective work in the construction by a contractor of a building is the difference between the value of the building built according to the contract, the contract price, and the value of the building as actually completed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. —123.]

10. CONTRACTS —300—BUILDING CONTRACTS—DELAY IN COMPLETION OF WORK—LIABILITY OF PARTIES.

A building contract stipulated that the contractor should observe all city ordinances and regulations of building inspection. City ordinances provided for building permits. The contractor applied for a building permit, basing his application on the original specifications calling for an excavation for foundation of a depth of 12 feet, but before the application was made the plans were modified by agreement calling for an excavation 14 feet in depth. Subsequently the building inspector, on discovering the change in plans, ordered the work stopped, and no progress was made on the work until about two months later. *Held*, that the contractor was alone responsible for the delay caused by the action of the building inspector.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372-1381; Dec. Dig. —300.]

11. DAMAGES —120—BUILDING CONTRACTS—DELAY IN COMPLETION OF WORK.

A contractor, delaying the construction of buildings for the owner, having tenants ready and eager to occupy the buildings as soon as completed, is liable for loss of rents which the owner would have received but for the delay, and the loss could not be limited to the time the buildings were turned over to the owner.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. —120.]

12. CONTRACTS —353—ACTION FOR BREACH—INSTRUCTIONS.

An instruction on the issue whether an owner, employing a contractor to erect a building, waived damages for defective work, which left to the jury to determine whether the owner accepted the building as in compliance with the contract, and which stated that the jury might consider when, to what extent, and in what manner the owner expressed, if at all, his dissatisfaction with the work, and whether by any acts or conduct during the progress of the work, or after alleged substantial completion and the surrender of the building to the owner, he waived any objection he might fairly have made to any of the work, was misleading because failing to define what acts would indicate such an acceptance, and what acts would indicate such a waiver, especially where the court also limited the alleged waiver to an intent to waive, knowing at the time that he was waiving his rights, and that it should plainly appear that he knew his rights and intended to waive them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. —353.]

13. APPEAL AND ERROR —1064—PREJUDICIAL ERROR—MISLEADING INSTRUCTIONS.

Any instruction calculated to mislead the jury, whether arising from ambiguity or any other cause, is ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. —1064.]

Error to Circuit Court of City of Richmond.

Action by W. A. Chesterman against John G. Scott, as executor of W. H. Scott, deceased. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

A. G. Collins and R. E. Scott, both of Richmond, for plaintiff in error. Meredith & Cocke, of Richmond, for defendant in error.

CARDWELL, J. This action was instituted by W. A. Chesterman, upon a notice and an amended notice under the statute (section 3211 of Code, 1904) to recover of John G. Scott, as executor of W. H. Scott, deceased, the sum of \$3,851.13 with interest thereon, alleged to be due by the defendant to the plaintiff according to an account filed with said notices, under two certain contracts in writing, by which the plaintiff agreed to erect and complete, within stated periods of time and in accordance with plans and specifications prepared by certain architects, four storehouses, at the southwest corner of Sixth and Marshall streets, in the city of Richmond. The account filed sets forth the aggregate of the contract prices, the amount of extra work claimed to have been done, and

the compensation alleged to be due therefor, as well as the aggregate of the payments on the contract prices, and showing the balance due thereon to be the sum above stated.

In the original notice it was alleged:

"That each and all of the houses mentioned therein have been constructed and completed in accordance with the terms and conditions of said contracts, except as modified under your instructions, and have been accepted by you."

The amended notice added two common counts in assumpsit, both claiming the right to a judgment for the same amount, alleged to be due the plaintiff under the two written contracts as stated in the account filed with the original notice, and for extra work, etc.

The two contracts are designated in the record as Nos. 1 and 2. By contract No. 1, the three stores nearest to the corner of said streets were to be completed by March 15, 1912, for the sum of \$14,757; and by contract No. 2 the remaining store, No. 4, was to be completed on or before August 1, 1912, for the sum of \$5,300, provided possession of the lot should be delivered to the contractor, the plaintiff, by May 1, 1912, or within 90 days from the date that the lot was actually given to him, this lot and the building thereon then being in the possession of a tenant, and upon the delivery of the possession of the lot to the contractor the building thereon was to be taken down by him to make place for the new store. Possession of lots Nos. 1, 2, 3, were given at once to the contractor, but he did not complete the stores thereon until about 7½ months after the 15th of March, 1912, the date fixed for their completion in the contract, and, as to store No. 4, to have been erected and completed under contract No. 2 on or before August 1, 1912, provided possession of the lot should be delivered to the contractor by May 1, 1912, or within 90 days after possession given, it appears that possession of the premises was obtained by the owner, Scott, from his tenant and turned over to the contractor in advance of May 1, 1912, namely, on February 2, 1912; but the new store thereon was not completed until about the 1st of November following, and, when completed, it, as well as the other three stores, did not, it is claimed, receive the approval of the owner or the architects, though the owner took possession of all of them about November 1, 1912.

The provisions of the two contracts are practically the same, with respect to the time and manner of doing the work and the payment of the contract prices therefor, and with respect to questions involved in this litigation the contracts provided: Chesterman, the contractor, was, for the consideration therein named, well and properly to erect said stores, furnishing all the materials and labor therefor according to the plans and specifications, and within the time agreed on, in a good, workmanlike and substantial manner to the satisfaction of the party of the first part

(Scott, the owner) and under the supervision and direction of the architects, Anderson, Cain & Shepherd; (b) that the owner, in consideration of the covenants and agreements of the contract being strictly performed and kept by the contractor, would pay between the first and tenth of each month, upon monthly estimates, 85 per cent. of the value of the work installed and materials delivered the preceding month; and (c) "Final payment to be made on the completion of the buildings to the entire satisfaction of the party of the first part and of the architects; provided that in each of said cases a certificate shall be obtained and signed by the said Anderson, Cain & Shepherd."

Each contract contained these further provisions:

"Should the owner at any time during the progress of the said building, request any alteration, deviation, additions or omissions from said contract, authority of same to be in writing, he shall be at liberty to do so. * * * Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Anderson, Cain & Shepherd and their decision shall be final and conclusive. * * * The tenants shall be allowed to install insulation and cold storage plants during the construction of the building. The construction not to interfere with the time of completion of building."

As stated, there was an original and an amended notice in this action, the plaintiff claiming judgment against the defendant for a balance of \$3,851.13 due under the two written contracts, including charges for extra work, etc., as shown by an account filed with the original notice. The defendant appeared and made defense to the original notice by the plea of the general issue and a special plea; and to the amended notice he filed the plea of the general issue and a special plea or answer in writing.

In substance, the defense made by the defendant was: (1) That the work done on the buildings contracted for was bad, in certain particulars; (2) that the defendant was entitled to damages for failure to complete the houses by the times set forth in the respective contracts; (3) that the plaintiff was not entitled to sue for the balance due on the original work, because he did not have the required certificate or certificates from the architects, approved by the defendant, that the work and labor done and the materials furnished for the storehouses contracted for were done and furnished in accordance with the contracts between the parties; and (4) that said stores were built to be rented to tenants then ready and waiting to occupy them, at annual rentals (which were stated), and that by reason of the default of the plaintiff in the performance of the conditions and requirements of said contracts, the defendant had suffered damages to the amount of \$8,136.61, for which he prayed judgment against the plaintiff.

No objection was interposed to these pleas, but issue was joined thereon, and upon a

trial of the case the jury, after hearing the evidence and receiving the instructions of the court, returned the following verdict:

"We, the jury, upon the issues joined find for the plaintiff and assess the damages at two thousand and nine hundred and nineteen dollars and fifty-seven cents (\$2,919.57)."

Whereupon the defendant moved the court to set aside said verdict upon the following grounds: (1) That it was not responsive to the issues made by the pleadings, and subsequently moved in arrest of judgment; (2) that it was contrary to the law and the evidence; (3) because of misdirection of the jury; and (4) because it was excessive. Each of these motions was overruled by the trial court, and judgment entered for the plaintiff in accordance with the verdict of the jury, which judgment we are asked to review and reverse.

For convenience, the parties will be spoken of here as in the court below—plaintiff and defendant.

During the progress of the trial the defendant tendered and had made a part of the record three bills of exceptions, numbered 1, 2, and 3. No. 1 is to the rulings of the court admitting certain evidence for the plaintiff over the objection of the defendant, with reference to an alleged custom among contractors and builders in the city of Richmond, and refusing to strike out said evidence.

It is urged upon us with much force that bill of exceptions No. 1 should not be considered as a part of the record, because it does not conform to the established rule of the court with respect to like bills of exceptions.

[1] The evident purpose of counsel for the defendant was to call in question in one bill of exceptions the rulings of the court with respect to the admissibility of certain evidence touching a particular question arising in the progress of the trial, and having a very material bearing upon the merits of the case; and, while the bill of exceptions is subject to the criticism that it is unduly protracted and somewhat confused, upon a careful reading of it we do not think it is enough so to justify a refusal of its consideration. *N. & W. Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

The evidence referred to was given by the plaintiff himself and his three witnesses, Beazley, Ancarrow, and Hunt, relating to an alleged custom with respect to underpinning the wall of a building on an adjoining lot to that which was being excavated, the question being whether the duty of underpinning or conserving the wall of the building on lot No. 4, made necessary by the excavation for the foundation of the building to be erected on lot No. 3, rested upon the plaintiff or the defendant, and the nature of the evidence strenuously objected to by the defendant may be made sufficiently to appear from the following, taken from the testimony given by the witness Beazley, who,

it seems, was a business manager for the plaintiff:

"Q. (By counsel for plaintiff): Now the clause in the contract which I shall ask the privilege of having explained by architects and builders, so as to show what is the customary construction of it, reads as follows:

"The contractor shall furnish all materials, labor, transportation, scaffolding, utensils, etc., of every description required for the full performance of the work herein specified, except as otherwise particularly mentioned. He shall lay out his work and be responsible for its correctness, shall obtain all the necessary permits to properly carry out his work, paying the lawful fees therefor, shall give the proper authorities all requisite notices relative to the work in his charge, shall afford the architect or superintendent every facility for inspection, shall be responsible for all violations of law, or damage to property, caused by him or his employes, shall promptly protect his work during progress, and shall be responsible for any accidents or injuries to any persons, either workmen or the public, and shall furnish a joint policy in a reliable surety company, acceptable to the owner, covering all accidents to employes of both contractor and the owner, and the public, which may occur on the premises."

"Will you state whether your experience will allow you to state as to what has been the actual custom and usage in the construction of that clause of the contract; what it means.

"A. I am.

"Q. State whether it includes underpinning, or such injuries to buildings and persons as may come from the handling of your materials and things of that kind.

"A. It does not.

"Q. Is the underpinning of an adjoining wall a part of your contract unless it is so specified, or is it additional work?

"A. In my experience it has always been additional."

The testimony given by the plaintiff and his witnesses Ancarrow and Hunt on this point was the same as that of Beazley, and the purpose and effect of the alleged custom or usage testified to was, not only to relieve the plaintiff from the obligation to underpin or otherwise take care of the wall of the old building on lot No. 4, but to justify his claim for an allowance of additional time for the completion of the buildings. None of these witnesses undertook to define the nature and extent of the custom or usage they had reference to, or state what it was, so that the jury could determine whether or not the custom in fact existed, and the court could rule as to its effect upon the contract. It had been shown in evidence that the completion of the stores on lots Nos. 1, 2, and 3 was delayed in part by the necessity of leaving a bank of earth on No. 3 to protect the adjoining wall of the old house on lot No. 4, the plaintiff refusing to shore up or underpin that wall, claiming that it should have been done by the owner, the defendant, and that as soon as this question was raised, the plaintiff presented it to the architects by letter of December 2, 1911, saying in his letter that the work on the excavation for these stores had reached the point where it was necessary to determine who should have this wall underpinned, and proposing to do it at cost plus 15 per cent. making claim al-

so for additional time in the completion of said buildings covering the time taken in determining the question and in doing this work. The defendant, the owner, at once denied his liability for this work, and on December 5, 1911, the architects decided the question against the plaintiff, calling his attention to the fact that this was one of the things considered at the time of the letting of the contracts, denied his request for the additional time, and advised that he proceed with the work; the letter so far as pertinent here being as follows:

"We think that the matter of conserving the wall mentioned was made clear to you at the time of signing contract, or rather your representative, Mr. Beazley, as the statement which Mr. Scott has repeated in his letter was made to Mr. Beazley in our office on the day mentioned and will be confirmed by our Mr. R. A. Munden, of Petersburg, who was present at the time and heard the conversation. We think that this is amply covered also in the specifications under the 'general conditions,' which state that contractor shall be responsible for any damage to adjoining property, etc. You were, of course, aware of the fact that Mr. Scott could not obtain from his tenant, now occupying this building, the lease which he desired to do and that this building would have to stand until April 30th, or time of the expiration of the lease, which the tenant of this building holds, and that this wall would have to be conserved in some manner. It is immaterial to us how it is done, so it is satisfactory to the building inspector, and so the wall stands until the time the lease expires. We think it is very clear that this comes under your contract, and see no reason for any further delay in the matter, and would advise you to proceed at once with the work."

It was also shown that neither the architects nor the defendant had ever heard of the alleged custom sought to be proved by the witness Beazley and others. The testimony of the witness Beazley and others had reference to the true construction or meaning of one of the clauses of the general conditions of the specifications which has just been quoted, and with respect to this the contract provided:

"Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Anderson, Cain & Shepherd, and their decision shall be final and conclusive."

[2] As observed, the question as to whose duty it was to underpin or otherwise conserve the wall of the building on lot No. 4 while the excavation of the foundation for the store on No. 3 was being done was referred to the architects, and they promptly and clearly decided that it was the duty of the plaintiff, the contractor, and that he was not entitled to additional time for the fulfillment of his contract by reason of delay covering the time taken in determining this question and in doing the work. Of this alleged custom, varying the meaning of the contract as construed by the architects, no intimation of any reliance upon it was given in the pleadings, in the plaintiff's statement of the particulars of his claim, or in the statement of the grounds of his defense to

the defendant's special pleas, a statement which the court required to be filed. There was no effort made by the plaintiff to bring home knowledge of this alleged custom to the defendant or to the architects, although they testified that they had never heard of such a custom; nor was there any evidence to prove that the custom was so general, uniform, and notorious as to raise a prima facie presumption of knowledge thereof on the part of the parties to be affected thereby. There was also no proof offered as to fraud, or its equivalent, on the part of the architects in deciding the question submitted to them by the letter of December 2, 1911, supra, against the contractor. In these circumstances it was error to admit testimony of the plaintiff and his witnesses, Beazley and others, above mentioned, with respect to the alleged custom.

[3] Evidence in such a case will not be admitted under the guise of explaining language used in the contract, to ingraft upon it a new provision upon which to base a substantial defense, and especially is this the rule when the usage or custom is not relied on in the pleadings. *Syer & Co. v. Lester*, 116 Va. 541, 82 S. E. 122, and authorities cited.

Among the authorities there cited is *Oriental L. Co. v. Blades L. Co.*, 103 Va. 740, 50 N. E. 270, where in the opinion of the court by Buchanan, J., it is said:

"There is some conflict among the authorities as to the necessity of pleading a custom or usage of trade. But whenever the question has been raised in this court, except in the case of *Hansbrough v. Neal & Co.*, 94 Va. 722, 27 S. E. 593, which was thought to be an exception to the general rule, it has been considered necessary for the party relying on such custom or usage to set it up in his pleadings. *Jackson's Adm'r v. Henderson*, 3 Leigh, 196; *Governor, etc., v. Withers*, 5 Grat. 24, 50 Am. Dec. 95. And this view would seem to be the better one, since such customs or usages are generally regarded as facts, and like other material facts should be averred and proved."

[4] In the still later case of *Bowles v. Rice*, 107 Va. 55, 57 S. E. 575, this court said:

"Furthermore, knowledge of the existence of the custom must be brought home to the plaintiffs [the parties affected thereby], unless the evidence shows that it is so uniform and notorious at the place where the parties affected by it reside as to raise a prima facie presumption that they knew of it."

[5] In *Ferguson v. Gooch*, 94 Va. 9, 26 S. E. 397, 40 L. R. A. 234, the opinion quotes approvingly authority for the proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character.

In the case here, the contract is neither silent nor ambiguous on the point to which the above-mentioned evidence of the plaintiff was directed, but when applied to the subject-matter and the conditions known to both parties, the contract is clear and unambiguous in the judgment of the architects, as shown by their letter of December 5, 1911, quoted from above, and which had ref-

erence to the "general conditions" clause of the contract, which provided that the contractor "shall be responsible for all violations of law, or damage to property, caused by him or his employes, shall promptly protect his work, and shall be responsible for any accidents or injuries to any persons, either workmen or the public. * * *"

The case of *Richmond City v. Barry*, 109 Va. 274, 63 S. E. 1074, greatly relied on by the learned counsel for the plaintiff as authority for the admission of said evidence, was wholly different from this. In that case the question arose upon a demurrer to the evidence, that is, as to how the bricks laid in a sewer should be counted, whether by actual count or by measurement, under the following ambiguous clause in the contract: "Price for brick furnished and laid in sewer twenty dollars and fifty cents (\$20.50) p. m." In the opinion of the learned judge of the trial court, made a part of the record in that case and adopted as a part of the opinion of this court, it is said:

"'Extrinsic evidence,' it is said in *Browne on Parol Evidence*, § 57, 'is admissible in the construction of a mercantile contract, to show that phrases or terms used in the contract have acquired, by the custom of the locality, or by usage of trade, a peculiar signification not attaching to them in their ordinary use; and this whether the phrases or terms are in themselves apparently ambiguous or not.' And again it is stated in the same work (page 216) 'that parol evidence is competent to annex to a contract a custom or usage of the business and locality known to the parties, or so generally and well settled as to be presumed to be known to them, and with reference to which they must be deemed to have contracted.' As the contract in this case contains no stipulation as to the method by which the quantity of brick was to be ascertained for settlement, but is silent, or at least ambiguous, in that respect, parol evidence was admissible to show whether there was any agreement between the parties as to this matter, and, if so, what it was; and, if there was no agreement between them, then to show what was the custom of the locality where the contract was made, or the usage of trade, and with reference to which, in the absence of any special agreement, they are to be deemed to have contracted, * * * and we have it conclusively established that, according to the usages of trade and the universal custom, the price of bricks laid in the sewer at \$20.50 per 'M' means, and meant at the time of the making of the contract, that the bricks, both for the horizontal sewer as well as for the manholes, were to be paid for by measure and not by count."

The trial court in this case having erred in admitting the evidence just discussed, it follows that it also erred in overruling the defendant's motion to strike out said evidence.

[8] We are also of opinion that the court erred in this connection in giving plaintiff's instruction No. 7, telling the jury that if they believed that the plaintiff was delayed in the execution of the work by the failure of the defendant to have his store No. 322 (on lot No. 4) underpinned, and that it was not the duty of the plaintiff under the contract to do such underpinning, but was incumbent upon the defendant, then the plaintiff was

entitled to such an extension of time for the completion of stores Nos. 1, 2, and 3 beyond the date fixed in the contracts as would equal the length of such delay. Without the evidence of Beazley and others as to said custom and usage, improperly admitted, there was no evidence in the case justifying the giving of instruction No. 7.

It appears that during the progress of the work an incorporated company known as *Shepherd & Peale, Incorporated*, succeeded to the business of *Anderson, Cain & Shepherd*, architects named in said contracts, *Cain* and *Anderson* retiring, and *Peale*, acting for said corporation, became the inspector of the plaintiff's work being done for the defendant on or about the 11th day of September, 1912, after the concrete work had been fully completed; hence he knew nothing about how it had been done. It further appears that the plaintiff made up a final statement of his account as of October 21, 1912, showing a balance of \$3,842.05, and presented it to *Peale*, and he marked it. "Approved Nov. 4, 1912, *Shepherd & Peale, Inc.*, per *Harry Peale*." Upon this statement a certificate for \$2,000 was afterwards signed by *Shepherd*, and was paid by defendant to the plaintiff through *Shepherd*, but no other or final certificate covering the balance or final payment due the plaintiff has ever been issued as provided for in the contracts, the contracts stipulating that the owner should not be liable except upon the final certificate of the architects in writing, signed by them, that the work had been accomplished to their satisfaction and that of the owner.

Peale, testifying for the defendant in this case, said:

"The concrete work on these stores was entirely unsatisfactory to me when I took charge, at which time all the concrete work was finished."

He also stated that the concrete work was never approved, and that the indorsement on the account referred to was intended merely as showing a correct statement of the payments theretofore made, saying:

"This concrete was never approved by 'Shepherd & Peale, Inc.', per *Harry Peale*.' This paper alluded to was approved, as stated by me, on November 4th, as being a correct amount of the contract, of the money paid, and of the balance due. The approval of a bill by an architect in no way can be construed as an approval of the work. All approvals by architects during the progress of the work are distinctly stated in the code of the American Institute of Architects as not approving defective work; and the only approval of the work is the last and final certificate given by the architect."

The witness further stated that no estimate was given by him to *Chesterman*, the contractor, but the bills submitted by *Chesterman* to *Shepherd & Peale* as architects for approval were gone over with him, and, finding the amounts correct, were approved as to amounts. *Cain*, one of the architects named in the contracts, who prepared the specifications and was the inspector of the work during the time the concrete work was

being done, testified in reference to it that the work had not been done to his satisfaction; that he had not at any time accepted the concrete work as having been done according to the plans and specifications; that he had examined this work since he left there, in company with several other parties, and considered it bad. Shepherd, another of the architects named in the contracts, who remained in charge of the work throughout, testified that it was his business to issue certificates upon which payments to contractors were made, upon the report of his associate, Cain, as to the manner in which the work was done; that when Cain retired Peale performed the duty of supervising the buildings, but was never vested with authority to issue certificates, all certificates upon which payments were made being issued and approved by him, except one, which went through during his absence, and that he did not issue the final certificate (in this case) because he was not satisfied with the manner in which the work had been done. Witness further stated that while Peale took the place of Cain to pass upon the work, he was given no authority to issue certificates; that in this particular case he at no time considered Peale's report or statements as to work done conclusive, and that he, witness, did not issue a final certificate, as called for by the contract, because he was not satisfied that the work was completed satisfactorily to the owner, and that he, himself, was not satisfied with its completion. The owner, the defendant, testified that the work was not done to his satisfaction; that it was done of defective materials, and, upon having it examined by competent experts, he was advised that it was materially and substantially defective, the damages to his buildings, their impaired value on account thereof, being not less than \$300. The experts and real estate agents called as witnesses for the defendant corroborated him in his statements as to defective materials used in the work, etc.

On the other hand, the plaintiff introduced witnesses and a number of letters to prove the following facts: (1) That there was never any complaint theretofore made for defective concrete work, for which \$2,000 or \$3,000 damages were claimed upon the trial of the case; (2) that the only complaint which was ever made about the concrete was the roughness of the walls, which was removed; (3) that the houses were received by the defendant without any objection; (4) that the concrete, instead of being soft, was firm and strong—capable of carrying the required load; and (5) that the cracks in the concrete work were such as could be easily repaired at a very small outlay, and that the defendant never intimated an intention to claim damages because of defective work until November 13, 1912, which was after the stores had been taken possession of by him.

Under the defendant's second assignment of error it is insisted that the court's rulings in giving and refusing instructions on this branch of the case were erroneous, and in fact it is urged that the plaintiff did not have a right to bring this suit, as the work was not done to the satisfaction of the defendant and the architects, as required by the contracts, nor had the plaintiff obtained from the architects the certificate required by the contracts.

It is true that the contracts provided that the work was to be done—

"within the time aforesaid in a good, workman-like and substantial manner, to the satisfaction of the party of the first part and under the direction of said Anderson, Cain & Shepherd to be testified to by a writing or certificate under the hand of said Anderson, Cain & Shepherd. * * * Final payment to be made on completion of the buildings to entire satisfaction of party of first part and the architects: Provided, that in each of said cases a certificate shall be obtained and signed by the said Anderson, Cain & Shepherd."

But it appears from the facts proved or admitted that after the buildings contracted for had been completed, they were, on or about November 1, 1912, turned over to the defendant, and were received by him without one word of objection or complaint; that he never made any complaint about the work until at the meeting between him, Peake, Beazley, and Chesterman, on November 13, 1912, at which meeting his complaint was confined to an objection to the rough appearance of the concrete basement walls, which was afterwards remedied, and at which meeting Peale suggested that \$350 would be fair compensation for the defects in the concrete work complained of, and advised a settlement on that basis of the balance claimed by plaintiff on the account he had presented, and which Peale had indorsed and stamped, "Approved." Neither defendant nor the architects ever made any objection to the concrete work until this suit was brought, and at the trial the defendant, as it would seem, made no claim for damages because of the roughness of the walls, but confined his testimony and complaint to the concrete floors. Not only so, but on October 5, 1912, plaintiff wrote the architects as follows:

"I am inclosing you herewith my bill for balance due on the contract work in connection with the above-mentioned store buildings. Everything in connection with said contract has been completed, except the straightening up of the concrete walls.

"I would call your attention to the fact that we have not collected anything for extra work whatever, and which will total three thousand (\$3,000.00) dollars, or more.

"Trusting that I may receive voucher for the same at an early date," etc.

To this letter the architects replied on October 8th, acknowledging the receipt of the plaintiff's bill for balance due on contract work "in connection with the above-mentioned store buildings," saying:

"We have seen Dr. Scott, and if you will call in here to-morrow morning we will have the

check on account for you. Kindly make us up a statement showing your contract price, and the various amounts itemized that have been paid on same up to date, also let us have your bill for extra work and allowances."

On October 10th a partial payment of \$3,000 was made on the account, and October 11th, the architects wrote:

"On the writer's visit to the building this morning we find that you have no workmen there at all. This is absolutely necessary that the small items that are yet to be completed should be done at once, so as to complete your contract on the above buildings."

Several meetings were then had between Peale and Beazley, representing the plaintiff, about the amount claimed, and Peale asked that a separate bill be made out for the extras, which was done. By October 21st, the two bills were made out—one for the original contract work and the other for the extras. When the bill for the original or contract work was first made out, the balance due thereon was \$3,842.05. Subsequently, on November 13th, after a conference had earlier in the month between the plaintiff, the contractor, and his agent, Beazley, and Scott, the defendant, and Peale, another payment of \$2,000 was made, leaving due on that bill \$1,842.05, and Scott, the defendant, having taken possession of the buildings 13 days prior. That bill was presented by the plaintiff upon the trial as a certificate of the architect required by the contract. The bill, as before stated, had upon it the following: "Approved November 4th, 1912, Shepherd & Peale, Inc., per Harry Peale"—also on it appeared these letters, "O. K., H. P." It is not disputed that Peale put said indorsements on the bill, and therefore the only question presented with respect thereto was, what effect was to be given to such approval, and whether the defendant knew of it. Beazley and the plaintiff contended that the defendant knew of such approval, while the latter denied knowledge thereof and proved that he was not in Richmond on that day. On the other hand, Peale, testifying for the defendant, asserted positively that the defendant was present when the paper was approved, although he (witness) denied that it was intended as a certificate. It appears, however, that the defendant himself, when testifying, made these statements:

"There were one or two conferences about extras prior to that [November 13th]." "Our interviews were very largely confined to the extras." "As to the amount of the payment on the contract, there was never any dispute as to the amount."

Peale, again speaking of this paper marked, "Approved Nov. 4th," testified:

"Dr. Scott and Mr. Chesterman and myself had a consultation a week, or perhaps two weeks, prior to this date on this bill."

It would seem from this statement that Peale at the conference he referred to, and when the defendant was present, then marked on the bill "O. K., H. P.," and stamped it

afterwards on November 4th, for he explains the circumstances as follows:

"A. This is a pencil 'O. K.' in my handwriting. 'O. K.'d for my own convenience before running the final approval stamp on it.

"Q. Did you mean when you first examined it you marked it 'O. K.,' and that was previous to your stamping it? A. Yes.

"Q. An O. K. does not mean that the bill is correct and due? A. No; the pencil 'O. K.' is only a memorandum of my own that the bill was to be approved, which it was later."

This evidence certainly strongly tended to prove that the bill was actually approved and O. K.'d before November 4th at a meeting at which the defendant was present, although it was not regularly stamped until the subsequent date of November 4th, so that whether defendant was in Richmond on the last-named date would be immaterial, for if the bill was indorsed approved by the architects in his presence, the stamping of a more formal approval thereon afterwards made it no less an approval, if the first indorsement was intended and understood between the parties to be such approval as the contracts required, which was a question of fact for the jury to determine from the evidence, since the contracts did not specify the form of the writing, but only said, "by a writing or certificate," a printed form, according to the evidence, being used in such cases only as a matter of convenience. One of the witnesses, Wright, a civil engineer, testifying on this point, said:

"My understanding is that the certificate is given as written evidence of the approval of the work and of the amount. I don't know that it makes any difference what form it is on, just so it is written and signed as evidence of approval on the part of the architect. That is my understanding of it."

To the same effect is the testimony given by witness Hunt, an experienced architect, and there was no evidence to the contrary, the defendant to avoid the effect of the paper in question relying alone upon the evidence of the architect, Peale, that he did not intend that paper to be a final estimate, but only a paper showing "a correct amount of the contract, of the money paid, and of the balance due."

We agree with the learned counsel for the plaintiff that it is quite difficult to understand the distinction which the witness Peale attempted in saying that he did not mean a paper as a certificate of approval which he first marked "O. K." and then stamped "Approved"; especially is it difficult to understand his attempted distinction when he afterwards admitted that it was broader than he claimed at first, saying: "As answered before, it was approval of workmanship, materials, and amounts, but was not the final approval."

The plaintiff, at the trial, also produced a similar paper to that of the first, dated October 21st, as his bill for extras, and it is conceded that that paper was examined by the defendant and Peale at the meeting on

November 13th, all items being then approved except two, one of \$61.60 and the other of \$63.36, opposite to which items was written the word "arbitrate," as they were to be the subject of arbitration. After that had been done the defendant asserted for the first time his right to a set-off against the plaintiff's claim for delay. This bill was not then approved in writing, as there were the two items to be settled by arbitration, and on December 11th following, plaintiff saw Peale, who had removed to New York, and asked whether or not he would approve the bill for extras with the exception of the said two items, whereupon Peale wrote upon the bill:

"The above bill is correct except the following two items, which it was agreed to arbitrate: Item of \$61.60 for cement mortar in laying old bricks, item of \$63.36 for extra thickness in concrete floor in store No. 4. Approved by Harry Peale, December 11th, 1912, New York City."

Shepherd was then seen, and, having been shown the approval of Peale, he approved it to the extent to which Peale had approved it by writing thereon, "Approved January 11, 1913, Shepherd & Peale, Inc., per A. T. Shepherd." Subsequently he wrote upon the bill as follows:

"This item of \$63.60 has been investigated and the thickness of the floor found to be 7" (inches) at a point immediately in front of refrigerators. A. T. Shepherd, January 22d, 1913."

The plaintiff then abandoned his claim as to the item of \$61.60 and brought this suit. The defendant at the trial denied also that said bill for extras was a proper certificate, although he did not deny that on November 13, 1912, all of the items thereon were in his presence checked as correct except the two items mentioned for arbitration.

[7] The defendant had the possession of the four stores from and after November 1, 1912, made a payment to the plaintiff of \$2,000 November 13th on account of the balance due on the statement and account O. K'd and stamped approved by Peale, and though he refused to pay the balance due, it nowhere appears that it was because the plaintiff had not furnished him a more formal writing or certificate of a final estimate signed by the architects. Upon the foregoing state of facts and circumstances, which, if not admitted, the evidence tended strongly to prove, the defendant, in asking instructions to the jury, recognized that the plaintiff had the right to sue for the amount claimed in his bill for extras indorsed: "Approved January 11, 1913. Shepherd & Peale, Inc., per A. T. Shepherd," but only claimed that the first paper "O. K'd" and stamped: "Approved November 4th, 1912. Shepherd & Peale, Inc., per Harry Peale"—was not a sufficient compliance with the requirements of the contract.

[8] There is therefore no dispute that Peale put on the first-named paper the words and letters appearing thereon, and the authorities seem to hold with uniformity that

when no form of writing is specified in the contract, but merely that the approval of the architects shall be "by a writing or certificate," any writing which fairly carries out the purposes for which it was intended is sufficient.

In *Mercantile, etc., Co. v. Hensey*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572, language very similar to the contracts in this case was used, the language there being, "Provided, that in each of the said cases a certificate shall be obtained from and signed by the architect," the paper relied on as a compliance with that provision of the contract being a letter, and the Supreme Court of the United States held that to be sufficient. See, also, *Wyckoff v. Myers*, 44 N. Y. 143; *Eastham v. West, etc., Co.*, 36 Wash. 7, 77 Pac. 1051.

As to the paper relied on in this case, the court by its instructions fairly submitted to the jury two facts to determine from the evidence: First, whether the defendant saw the paper and agreed that the work was satisfactory to him, as testified to by the witness Beazley; and, second, whether Peale intended said paper to be the certificate called for by the contracts—both of which questions were decided by the jury in favor of the plaintiff.

In view of the facts and circumstances narrated, it would be, as it seems to us, a manifestly unjust and unwarranted ruling that the plaintiff could not maintain this action to recover the balance alleged to be due him by the defendant for the work done and materials furnished under their contracts. But whether the defendant was entitled to a recovery on his special plea of set-off, claiming damages of the plaintiff by reason of defective concrete work and for loss of rentals from the four stores because of delay in their completion according to the terms of the contracts, and, if so, how much, was also a question for the jury under proper instructions from the court.

[9] It is too well settled to require citation of authority that the rule as to the measure of damages for the defective work in such a case is the difference between the value of the houses built according to the contract—the contract price—and the value of the houses as actually completed. There is little or no controversy here with respect to the court's instructions on that feature of the case, and we pass to the consideration of the question as to who was responsible for the delay in the completion of the buildings, and the instructions given and refused by the trial court submitting that question to the jury.

The claim for the allowance of additional time because of delay was based on three grounds: (1) Because of the refusal of the defendant to be responsible for the underpinning of the wall of the house on lot No. 4; (2) because of the act of City Inspector Beck in stopping the work between the 20th

of February, 1912, and April 4, 1912; and (3) because of delay necessarily involved in the performance of the extra work ordered from time to time.

We are unable to find in the evidence anything to justify the third ground for delay, and have already sufficiently discussed and disposed of the first ground, relating to the underpinning of the wall of building on lot 4.

[10] With respect to the question whether or not the plaintiff should be allowed additional time by reason of the work being stopped by the building inspector from February 21 to April 3, 1912, it is to be observed that the work was wholly in charge of the plaintiff, as an independent contractor, responsible for the result, and if the completion of the buildings contracted for was delayed the burden was upon him to show that the fault was not with him, but with the defendant. By the "general conditions" clause of the specifications it was expressly set forth that:

"All requisites shall be supplied for the proper construction and completion of the work, according to the true intent and meaning of the plans and specifications without any cost whatever to the owner. * * * The contractor shall observe all city ordinances and regulations of building inspection, which will form a part of these specifications."

The city ordinances provided that no building should be erected without a written permit to the owner, issued by the building inspector upon plans and specifications to be approved by him, and the first clause of the "general conditions" of the plans and specifications, made, as we have seen, a part of the contract, distinctly provided that the permit to erect the buildings should be secured by the contractor, the language of the contract being:

"He shall lay out his work and be responsible for its correctness, shall obtain all necessary permits to properly carry out this work, paying the lawful fees therefor, shall give the proper authorities all requisite notices relating to the work in his charge."

Accordingly, the plaintiff, on November 25, 1911, made an application for the necessary permit required by the city ordinances, basing the application upon the plans and specifications for the buildings as originally drawn, which called for an excavation for the cellar and foundation under stores 1, 2, and 3 of the depth of 12 feet, but before this application was made, and the day after the execution of the contract, that is, on November 11th, upon the suggestion of the plaintiff himself to carry the depth of the excavation two feet deeper, these plans had been modified by an agreement between the parties to the effect that the excavation should be carried to a depth of 14 feet. This increased depth of excavation having been agreed on, the plaintiff's compensation was increased accordingly, and for this increased consideration he undertook to carry out his contract as thus modified. But, in applying for the neces-

sary building permit, he failed to note this increased depth of the excavation called for on the plans, that is, he failed to give the building inspector any notification thereof, the consequence of which was that the permit was issued on the original plans. Subsequently, to wit, on February 21, 1912, the building inspector, upon finding that the excavation was being carried two feet deeper than called for in the plans and specifications approved by him, ordered the work stopped, and no further progress was made on the work till April 4th following. These appear as undisputed facts, and at the trial of this case there was also evidence introduced tending to prove that had the plaintiff filed with the plans and specifications submitted to the building inspector the letter of November 11, 1911, by which the defendant directed the increased depth of the excavation and agreed to allow additional compensation therefor, or notified the inspector of this change, there would have been no difficulty in going forward with the work according to the terms of the contracts.

It is insisted by the learned counsel for the defendant that the trial court erred greatly to his prejudice in its rulings with respect to instructions given and refused upon this branch of the case, in that, by the court's rulings the responsibility for the action of the building inspector, stopping the work on February 21, 1912, was put wholly upon the defendant and thereby justified the claim made by the plaintiff that he should be excused for the delay from that date to April 4th, following, in completing the work on stores 1, 2, and 3, as well as in completing the work on store No. 4, instead of leaving to the jury the determination of whether or not this stoppage of the work was due to the plaintiff or to the defendant, as was asked in instruction No. 23, offered by the defendant and refused.

Instruction No. 6, given for the plaintiff, having told the jury that the plaintiff was entitled to such an extension of time beyond the dates fixed in the two contracts for the completion of the houses, respectively, as the jury might believe from the evidence he was delayed, by the orders of the building inspector between February 21 and April 4, 1912, and also to such an additional extension of time as the jury might deem reasonable for any delay which they believed from the evidence that the plaintiff was caused to suffer by reason of the orders of the building inspector, it was clearly erroneous to refuse instruction No. 23, asked by the defendant, to the effect that if the stoppage of the work by the building inspector was due to the failure of the plaintiff to apply for the proper permit, or to give the inspector the proper notices, he could not be excused for the delay thereby occasioned, and that the defendant—

"is not responsible for, and cannot be charged with, the delay in the completion of said buildings, or any of them, caused by such stoppage,

or which could reasonably have been prevented had the plaintiff applied in due time for proper permits, or had in due time given the proper authorities "all requisite notices relating to the work in his charge."

The defendant sought to have the jury told that he should not be charged for any delay which could reasonably have been prevented had the plaintiff complied with the express terms of his contracts, and the jury should have been so instructed, especially in view of the fact that the stoppage of the work of excavating for stores 1, 2, and 3 could not have affected in any manner the progress of building No. 4, and that the evidence tended to prove that the real cause of the delay was the neglect of the plaintiff to push forward his work, coupled with the bad weather and other obstacles he encountered, and of which, under the well-settled rule in such cases, he took the risk.

The next question for consideration is whether or not the court erred in its rulings as to the measure of damages, if any, that the defendant was entitled to as a set-off against plaintiff's demand.

[11] In addition to the facts stated, it appears from the evidence that at the time these contracts were let, tenants were ready, willing, and eager to occupy the buildings as soon as completed, and that this was known to the plaintiff; that the contracts were made expressly with reference thereto, and given to the plaintiff because he undertook to complete them sooner than any of the other bidders therefor. The evidence also tended to prove that the defendant lost the reasonable rentals that he would have received had the buildings been completed on time; that is, the three stores 1, 2, and 3 by March 15, and store No. 4 by May 2, 1912; that on stores 1, 2, and 3 up to the institution of this suit, and that on store No. 4 up to the trial of the case.

With his plea of set-offs the defendant filed a statement showing the losses of rentals from the several buildings, and the evidence tended to affirmatively show that such was the fair and reasonable rental value of the stores—in fact, no question seems to have been made as to the reasonableness of the figures given in said statement. Therefore the contention of the defendant was only for the actual definitely ascertained loss he had sustained of rentals from tenants then ready and willing to take possession of the several stores at the times the plaintiff had contracted to have them completed and ready for occupancy by tenants.

Every consideration of right and justice demands that a party to a contract, based on a full and fair consideration which he receives, should make good the loss to the other party flowing from his default; and rents and profits which would have been received but for such default are recognized by the

authorities as recoverable where they are shown with reasonable certainty and are free from any element of speculation. *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875; *Perry Tie, etc., Co. v. Reynolds*, 100 Va. 264, 40 S. E. 919; *Raven Red Ash Coal Co. v. Herron*, 114 Va. 103, 75 S. E. 752.

On this point the defendant asked for instruction No. 13, which propounded correctly the rule of law laid down in the cases just cited, but the court so modified the instruction as to limit the recovery of the defendant on his plea of set-offs for lost rents to the time the houses were turned over to him, thus precluding from the consideration of the jury the loss resulting after that time, a loss which, on one store, continued up to the time of the trial. This instruction was refused, notwithstanding the court had given plaintiff's instruction No. 14, telling the jury that it was the duty of the defendant to take possession of the houses and to suffer his tenants to enter as soon as practicable, whether completed or not, and to make the best he could of the situation, thereby diminishing, as far as possible, his injury by reason of plaintiff's default in the fulfillment of his contracts.

It follows that we are of opinion that defendant's instruction No. 13 should have been given as asked.

[12] The remaining question requiring consideration is whether or not the court erred in giving plaintiff's instruction No. 1, on the question of an alleged waiver by the defendant of his right to claim damages for defective work in the buildings. This instruction left to the jury to determine from the evidence whether the defendant accepted the buildings as in compliance with the requirements of the contract, but while the instruction also told the jury that they "might consider when, to what extent, and in what manner the defendant expressed, if at all, his dissatisfaction with the work, and whether by any acts or by conduct on his part during the construction of the buildings, or after their alleged substantial completion and the surrender of the houses to the defendant, he waived any objection he might have fairly made to any of the work," it not only failed to define, as it should have done, what acts would indicate such an acceptance and what acts would indicate such a waiver, and therefore the instruction was plainly misleading, especially so when read in connection or along with instruction No. 14, given for the defendant, which rightly limited the alleged waiver to an intention to waive, knowing at the time that he was waiving his rights, and that it should plainly appear that he did know his rights and intended to waive them.

[13] It has been too often ruled by this court to need citation of authority that any instruction calculated to mislead the jury, whether it arises from ambiguity or any oth-

er cause, ought to be avoided; and, if given, it will oblige the appellate court to reverse the judgment.

We have not undertaken in this opinion to consider all of the numerous questions arising on the assignments of error and elaborately argued by counsel, for the reason that such of the questions as we have not directly discussed and ruled on are not, as it would seem to us, likely to arise upon another trial of the case.

For the reasons stated, the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

(76 W. Va. 239)

SMITH v. BOARD OF EDUCATION OF PARKERSBURG DIST.

(Supreme Court of Appeals of West Virginia.
May 18, 1915.)

(Syllabus by the Court.)

1. CONTRACTS §166—BUILDING CONTRACT—DRAWINGS AND SPECIFICATIONS—CONSTRUCTION.

A contract between the owner and builder, for the erection of a house, expressly referred to the drawings and specifications, prepared by the architect and adopted by the owner, and identified by the signatures thereon of the contracting parties, and made them parts thereof. The drawings showed, by printed words in the spaces representing the corridors, that vitrolite wainscoting was to be used therein, but the specifications made no mention of it, and, before bidding for the work, the contractor examined both the drawings and specifications, but was informed by the architect that vitrolite was not to be used, and that he would erase the words relating to it from the drawings, but he failed to do so, and did not advise the owner of what he had told the contractor, who bid for the work as a whole and did not, in terms, either include or exclude vitrolite. He refused to put it in, and completed the building without it. The owner then caused it to be put in, and deducted the cost thereof from the amount of the contractor's bid; and he thereupon filed his bill in equity, alleging a mistake in the contract, and praying for a reformation of it and for a decree for the balance claimed to be due him. *Held*, the drawings and specifications are both parts of the contract, and are not inconsistent with each other because they both do not show that vitrolite was to be used in the corridors; one supplements the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 749; Dec. Dig. §166.]

2. PRINCIPAL AND AGENT §101—BUILDING CONTRACT—ARCHITECT—AGENCY.

The architect is only a special agent, whose authority depends upon the terms of his employment, or upon the terms of the contract between the owner and contractor.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 255, 256, 330, 346; Dec. Dig. §101.]

3. CONTRACTS §284—BUILDING CONTRACT—AUTHORITY OF ARCHITECT—CHANGE OF PLANS.

The architect had no authority to change the plans and dispense with vitrolite wainscoting in the corridors, without the consent of the owner.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. §284.]

4. CONTRACTS §284—BUILDING CONTRACT—MISTAKEN AUTHORITY OF ARCHITECT—RELIANCE OF CONTRACTOR—LIABILITY OF OWNER.

The owner is not responsible for the mistaken reliance of the contractor upon the supposed authority of the architect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. §284.]

5. REFORMATION OF INSTRUMENTS §16—MUTUAL MISTAKE—RIGHT TO RELIEF.

Equity will not reform a contract on the ground of mistake unless the mistake is mutual, or, if not mutual, unless it was known to the other party who has been guilty of inequitable conduct, or unless one party, either by conduct or representations, has caused the other to be misled.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. §16.]

Appeal from Circuit Court, Wood County.

Suit by Charles A. Smith against the Board of Education of Parkersburg District. From decree for defendant, plaintiff appeals. Affirmed.

Smith D. Turner, of Parkersburg, for appellant. L. N. Tavenner and Kreps, Russell & Hiteshew, both of Parkersburg, for appellee.

WILLIAMS, J. This suit was brought by Chas. A. Smith to reform a builder's contract made by him with the board of education of Parkersburg district, for the erection of a 12-room schoolhouse at the corner of Seventh street and Park avenue in the city of Parkersburg, and to recover an alleged balance of \$1,387.25 claimed to be due on the contract. A decree was made on the 7th of July, 1914, adjudging that plaintiff was not entitled to any relief and dismissing his bill; and he has appealed.

[1-4] The minutes of the various meetings of the board of education show that on June 6, 1910, a resolution was passed inviting architects to "submit plans for a 12-room building, subject to the approval of the board of education, at the next meeting." William Howe Patton and D. W. Dally, associate architects, submitted plans, and, by a resolution passed on the 17th of June, 1910, their plans were adopted, and they were employed as architects of the building, and by resolution passed August 26, 1910, they were instructed to advertise for bids for the erection of it. Pursuant to their advertisement five separate sealed bids were filed with the board of education, and at a meeting of said board, held on the 12th of September, 1910, the bids were opened and inspected, and the contract awarded to plaintiff, at the price of \$29,400, his being the lowest bid. The writ-

ten contract, however, was not signed until November 11, 1910, although dated 12th of September, 1910. The matter in dispute relates to the use of vitrolite wainscoting, which the plans, adopted by the board of education, required to be used in the corridors on the first and second floors, plaintiff claiming that he was informed by Mr. Patton, one of the architects, that it was not to be used, and therefore he did not include it in his bid, and the board claiming that it did not authorize the architect to alter the plans in that respect, and awarded plaintiff the contract because it understood his bid to include vitrolite wainscoting. Plaintiff refused to put it in, and completed the building without it. The board then caused the corridors to be wainscoted with vitrolite, at a cost to it of \$1,387.25, and deducted that amount from plaintiff's bid.

The written contract expressly makes both the drawings and specifications a part of it; hence they must be looked to in order to determine what was comprehended in the contract. Neither the signed agreement nor the specifications expressly mention vitrolite, but the drawings or plans show that it was to be used, and they are as much a part of the contract as the specifications; both are identified by the signatures of the contracting parties and, in terms, referred to as parts of the contract. On the first floor plan in the space representing the hall, printed in conspicuous letters, are these words: "Note: Walls of corridors are to be wainscoted with vitrolite M'fg by Meyercord-Carter Co."—and similar words appear in the space representing the hall on the second floor plan. In a third plan, representing a longitudinal section of the building, with a portion of the roof, the word "vitrolite" is printed in each of the spaces representing the hallways. These words appear in plain, white letters on the blue prints, and are fac similes of the original drawings. These prints were examined by the bidders before making up their estimates and filing their bids. There is no inconsistency between the drawings and the specifications; the omission of the latter to mention vitrolite is supplied by the drawings, which show it was to be used. They are a part of the contract, and do not conflict with the specifications, which are simply incomplete in that respect. But it is wholly unnecessary to further discuss a question which the nature of the suit admits. If vitrolite were not included in the terms of the contract, plaintiff would have no standing in a court of equity, for his suit is one to reform that express contract, and equity can entertain it on no other ground.

The theory on which plaintiff has framed his bill is that the inclusion of vitrolite was either a mutual mistake of the contracting parties, or a mistake on his part, and fraud or inequitable conduct equivalent thereto, on the part of defendant; and to support this

contention he relies on the statement made to him by Patton, one of the architects, before he put in his bid, that vitrolite was not to be used, and that he would cancel the words printed on the drawings, showing that it was to be used. The architect admits he made the statement to plaintiff, but he did not erase the words. This representation was made to plaintiff after the board of education had adopted the plans for the building, as shown by the drawings, and was made without its authority or knowledge. The work on the building was begun in the fall of 1910, and progressed until some time in 1911, when the time came for vitrolite to be put on. Mr. Daily, associate architect with Mr. Patton, then called plaintiff's attention to the fact that it was about time to put on the vitrolite, and a dispute arose between them as to whether it was to be used, and whether it was included in plaintiff's bid. Mr. Daily did not know that Mr. Patton had told plaintiff not to include it in his bid, and he immediately informed the board of education of plaintiff's contention. That is the first time it knew of plaintiff's alleged misunderstanding of the agreement. Plaintiff's was a lump bid for the entire work, it did not expressly include or exclude vitrolite. The president of the board of education testified that he asked plaintiff, at the meeting when the bids were opened, if he included vitrolite in his bid and he replied that he did. Plaintiff denied that he made the statement, and there is much conflict in the testimony respecting what was actually said at that time. In our view of the case, it is not necessary to determine that disputed fact, for, even if plaintiff's testimony be regarded as true, we do not think it proves a case entitling him to relief. Assuming, therefore, that he bid for the work, with the honest belief that the plans had been changed, respecting the use of vitrolite, and did not intend his bid to include it as a part of the material to be furnished and work to be done by him, still the other contracting party had a different understanding respecting his bid, and the contract was made according to that understanding, and if the board of education is not responsible for plaintiff's having been misled, he has no cause of complaint against it. The board had made no change in the plans, as originally adopted by it, and was wholly ignorant of what Patton had told plaintiff, as was likewise his associate architect, Daily. Patton admits he never consulted the board to know if it desired the change, and never informed it that he had told plaintiff he would erase the words relating to vitrolite from the drawings; and the contract, subsequently signed, includes it.

[5] It is fully established that the board of education acted under the belief that plaintiff's bid included vitrolite. The mistake, therefore, lacks mutuality. *Crim v. O'Brien*, 69 W. Va. 754, 73 S. E. 271. And

unless the board of education has been guilty of some act, or omission of duty, which misled plaintiff and caused his mistake, the written contract is conclusive. Equity will not reform a contract on account of a mistake made by one of the parties, when the other has been guilty of no inequitable conduct. 3 Elliott on Contracts, § 2370; Williams v. Hamilton, 104 Iowa, 423, 73 N. W. 1029, 65 Am. St. Rep. 475; and Whitworth v. Lowell, 178 Mass. 43, 59 N. E. 760. It is not contended that the board of education has been directly and personally guilty of wrong, but it is urged that, by referring the contractor to the architect, and requiring him to conform to "all directions relating to the work given by the architects as interpretations of the requirements of the drawings and specifications," the board thereby constituted him its general agent, and is therefore bound by his acts and representations. Neither the clause above quoted from, nor any other clause found in either of the separate papers constituting the entire contract, conferred power upon the architect to change the plans which had been adopted. The above clause only authorized the architect to interpret and explain the drawings and specifications, not to make changes in them. There is a clause in the specifications, just preceding the one quoted from, which expressly provides that any increasing, diminishing, or making changes in any part of the work is to be done upon the written order of the architect, "when approved by the owners," meaning the board of education. Article 1 of the agreement expressly refers to the drawings and specifications prepared by Patton and Dally, associate architects, and makes them parts of the agreement, in the following words, viz.:

"Which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract."

Article 2 provides that the work shall be done under the direction of said architects, and that their decision "as to the true construction and meaning of the drawings and specifications shall be final." That article concludes as follows:

"It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in article 1."

This language shows that no change in the original drawings was contemplated, and that the architects were not authorized to make alterations in them. The pronoun "they" refers to architects, and the clause binds them to conform to the adopted plans and specifications. It would be useless to submit drawings of a building to the owner

for his inspection and adoption, if the architect had the power, to be exercised *ad libitum*, to make such material alterations and changes therein as he might think proper. The architect is not, by virtue of his employment as such, the owner's general agent for all purposes, in the erection of the building. His powers and duties are limited by the terms of his contract of employment, or by the terms of the contract between the owner and builder. 6 Cyc. 29; 3 Page on Contracts, § 1465; 4 Elliott on Contracts, § 3614; McNulty v. Keyser Building Co., 112 Md. 638, 76 Atl. 1118; Langley v. Rouss, 185 N. Y. 201, 77 N. E. 1168, 7 Ann. Cas. 210; Chicago Lumber & Coal Co. v. Garner, 132 Iowa, 282, 109 N. W. 780; Volquardsen v. Davenport Hospital, etc., Co., 161 Iowa, 706, 141 N. W. 432; Sweeney v. Aetna Indemnity Co., 34 Wash. 126, 74 Pac. 1057; and Leverone v. Arancio, 179 Mass. 439, 61 N. E. 45. Being only a special agent of the owner, it is incumbent on a person dealing with the architect to ascertain the extent of his authority, for it is a well-established principle that an agent's acts, in excess of his authority, do not bind the principal. The only evidence of Patton's authority as agent of the board of education is found in the contract between said board and plaintiff, and, as we have already seen, it does not empower him to change the plans without the board's approval. The board is not responsible for plaintiff's mistake, it was guilty of no inequitable conduct which could have caused the mistake; and there is no evidence that it even knew of it, until long after the contract was entered into.

The fact that vitrolite is manufactured in different thicknesses and weights, and is attached to the walls by different methods, coupled with the fact that neither the drawings nor the specifications gave any information concerning the thickness desired or the method of putting it on, in consequence of which it is argued that the bidder could not bid intelligently on that part of the work, does not alter the terms of the contract, nor relieve plaintiff from performing it. Those objections relate to mere matters of detail, concerning which the bidder, if he considered them material, should have informed himself before putting in his bid; or else he should have expressly excluded vitrolite from his bid, so that the board of education could not have been misled by the manner of the bid.

There are a number of legal propositions discussed in the briefs of learned counsel, which are not necessary to be passed upon in a determination of the case, and therefore we have not considered them in this opinion. The decree is affirmed.

ROBINSON, POFFENBARGER, MILLER,
and LYNCH, JJ., concur.

(76 W. Va. 246)

**PARKERSBURG & MARIETTA SAND CO.
v. SMITH. (No. 2709.)**(Supreme Court of Appeals of West Virginia.
May 18, 1915.)*(Syllabus by the Court.)***1. ASSUMPSIT, ACTION OF — 19 — DECLARATION
— SPECIAL COUNT — SUFFICIENCY AGAINST
DEMURRER.**

A special count in a declaration in assumpsit, counting upon an original and a second or modified contract, and which after averring both contracts charges a promise on the part of the defendant to pay the amount accrued to plaintiff under the contracts pleaded, is not rendered bad on demurrer because of its omission to charge a promise to pay "the sum of — dollars," alleged in a previous paragraph to be due under the first or original contract pleaded.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. — 19.]

**2. ASSUMPSIT, ACTION OF — 19 — DECLARATION
— SPECIAL COUNT — SUFFICIENCY AGAINST
DEMURRER.**

Nor is such count bad on demurrer for failure to aver a promise of defendant to pay respectively the two several sums demanded, one accruing to plaintiff under the contracts in writing pleaded, and the other under other contracts pleaded, but not in writing, such promises being comprehended under the general averment, of a promise to pay a sum larger than the aggregate of both items, intended and sufficient to cover both sums sued for.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. — 19.]

**3. ASSUMPSIT, ACTION OF — 19 — DECLARATION
— SPECIAL COUNT — SUFFICIENCY AGAINST
DEMURRER—INTEREST.**

Nor is such count bad on demurrer, because it avers a promise to pay interest on the sum sued for from a date anterior to the making of the second of said contracts, interest being incident merely to the right to recover the principal sum sued for.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. — 19.]

4. CONTRACTS — 171 — CONSTRUCTION — "CONTRACT OF ENTIRETY."

A contract to drive certain piling, at a stipulated price per pile, to make certain excavation for a coffer-dam, and to afterwards remove the embankment, at a stipulated price per cubic yard, and to provide a pump of a sufficient capacity and efficiency to perform the contract, at a stipulated price per day, etc., is not a "contract of entirety."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 754-757; Dec. Dig. — 171.]

**5. ACTION — 28 — CONTRACTS — 346 — RIGHT
OF ACTION—EVIDENCE.**

A tort may not be waived and assumpsit maintained thereon against a wrong doer, when the latter's estate has not been benefited thereby, as by the appropriation by him of plaintiff's property or the proceeds of the sale thereof, and evidence of such tort and damages to plaintiff therefrom, and not so benefiting the estate of defendant, should, in an action ex contractu against him, be rejected.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. — 28; Contracts, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. — 846.]

**6. EVIDENCE — 354 — ADMISSIBILITY — BOOKS
OF ACCOUNT.**

Point one of the syllabus in *West Virginia Architects & Builders v. Stewart*, 68 W. Va. 506, 70 S. E. 113, 36 L. R. A. (N. S.) 899, re-affirmed and applied, as justifying the admissibility of plaintiff's books of account in evidence to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. — 354.]

**7. EVIDENCE — 213 — ADMISSIBILITY — ADMIS-
SION—COMPROMISE.**

Admission by one of the parties of independent facts relating to plaintiff's claim, though made during the colloquium, or during a treaty for a compromise, are admissible in evidence, such admission not amounting to a proposition of compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745-751, 763; Dec. Dig. — 213.]

**8. PLEADING — 384 — ISSUES AND PROOF —
PAYMENTS—SET-OFF AND COUNTERCLAIM.**

In an action on an account, accruing to plaintiff under contracts, such as those sued on in this case, it is error to permit plaintiff, in the absence of counter off-sets filed by him, to prove that the payments specified in defendant's bill of off-sets were properly applicable to other items of plaintiff's account, not covered by its bill of particulars. Construing section 4, chapter 126, serial section 4824, Code 1913.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1296-1298; Dec. Dig. — 384.]

**9. TRIAL — 250 — INSTRUCTIONS—APPLICABIL-
ITY TO CASE—COMPROMISE.**

Where, as in this case, at least one of the items in the account sued for is covered by a contract of compromise between the parties, an instruction to the jury that such compromise is binding upon the parties thereto unless impeached for fraud, or because something has been inadvertently omitted therefrom, is properly given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. — 250.]

**10. CONTRACTS — 238 — CONSTRUCTION CON-
TRACT—MODIFICATION—AWARD OF ARBITRA-
TORS.**

The award of the arbitrators, Horstman and Burgess, made pending the execution of plaintiff's contracts, requiring it to remove the coffer-dam embankment to the satisfaction of the government of the United States, omitting the other words of the original contract, requiring that work to be done to the satisfaction of defendant also, and the acceptance thereof by the parties, properly construed, did not constitute a modification of that provision of the original contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1123; Dec. Dig. — 238.]

**11. TRIAL — 253 — BINDING INSTRUCTIONS—
EVIDENCE.**

A binding instruction is properly rejected which excludes the theory of one of the parties, and which the evidence tends in an appreciable degree to support.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. — 253.]

**12. ASSUMPSIT, ACTION OF — 19 — DECLARA-
TION—QUANTUM MERUIT COUNT.**

A quantum meruit count is now obsolete, and is no longer necessary in an action in assumpsit containing the common counts for work and labor done, etc.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 81-99; Dec. Dig. — 19.]

13. CONTRACTS \S 320 — PARTIAL PERFORMANCE—COMPENSATION.

Where a party to a contract fails to furnish a pumping outfit of the capacity and efficiency called for by his contract, he is not entitled to recover the full price per diem stipulated therefor in the contract, but only such sum as the same is reasonably worth to the other party to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. $\S\S$ 1459, 1469, 1493-1527; Dec. Dig. \S 320.]

Error to Circuit Court, Wood County.

Action by the Parkersburg & Marietta Sand Company against Lloyd E. Smith. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Moss, Marshall & Forrer and H. P. Camden, all of Parkersburg, for plaintiff in error. Thomas Coleman and Reese Blizzard, both of Parkersburg, for defendant in error.

MILLER, J. On two special counts and the common counts in assumpsit, and on issues joined on the general and sundry special pleas, with special replications to some of said special pleas, plaintiff obtained the verdict and judgment for \$8,280.49, complained of.

On writ of error defendant opposes to this judgment numerous assignments of error charged to have been committed on the trial below.

The first of these is that the trial court erroneously overruled his demurrer to the declaration and each count thereof. No point is made against the common counts. The first count pleads a first and a second or supplementary contract between plaintiff and defendant in *hæc verba*, and performance thereof by plaintiff, and alleges that plaintiff was entitled to recover thereon from defendant the sum of \$13,197.53, as shown by an itemized statement filed therewith, and designated "Amount due under written contracts." This count then pleads performance of certain other work, namely, the making of certain excavations, fillings, and embankments around and in a certain coffer-dam, and sinking certain piling, *and raising and repairing a certain boat*, in connection with the work done and performed by the plaintiff under said written contracts; and that at the special instance and request of defendant and for the consideration then and there agreed to be paid by defendant to plaintiff, plaintiff also performed certain labor for defendant and furnished certain material, including piling and equipment, amounting to \$791.69, according to an itemized account thereof also filed with the declaration and designated "Account for work done not under writings."

"By reason whereof," it is alleged, defendant "became indebted and liable to the said plaintiff in the said sum of Fifteen Thousand Dollars * * * with interest from the first day of August, 1910, until paid, and be-

ing so liable, the said defendant * * * in consideration thereof, afterwards, to-wit, on the — day of —, 1912, undertook and promised to pay * * * plaintiff, the sum of \$15,000.00, with interest as aforesaid, whenever the said defendant should be thereunto afterwards requested." And the allegation follows that not regarding his said promises and undertakings defendant, though often requested, had not as yet paid plaintiff said sum with interest as aforesaid, or any part thereof, but had wholly neglected to do so to the damage of plaintiff, \$15,000.00.

The second count pleads that on the — day of August, 1912, after defendant had executed and delivered the contracts in writing aforesaid, and after plaintiff had done and performed all the labor and furnished all the material mentioned and set forth in the first count, at the special instance and request of defendant, defendant accounted with plaintiff "of and concerning divers sums of money for said labor performed, and said material and equipment furnished, before that time and owing to plaintiff, and then in arrear and unpaid," and that upon such accounting "defendant * * * was found in arrear, and indebted to * * * plaintiff in the further sum of * * * \$15,000.00," and that being so indebted, and in consideration thereof, defendant "undertook and then faithfully promised" to pay plaintiff the said sum of money, when he should be thereunto afterwards requested, and as represented in the account thereof filed therewith, and that being so liable defendant in consideration thereof, on the — day of —, 1912, undertook, etc., in the same manner as alleged in the first count.

[1] The first point made against the first count is that it contains no allegation of a promise to pay "the sum of — dollars" alleged in a previous paragraph thereof to have been due and owing plaintiff under the first or original contract. We think there is no merit in this point. Immediately following this averment it is alleged that owing to disputes and controversies between the parties as to plaintiff's rights under said first contract, the second or supplementary contract pleaded was entered into, and then follows the allegation above recited in relation to the liability and promises of defendant under both contracts, and as to the amount accrued to plaintiff thereunder and the promises of defendant alleged, etc. We think these averments sufficient to satisfy all requirements of good pleading.

[2] The point is also made against those averments that there are no distinct allegations of a promise to pay the sum of \$13,197.53, accrued under the contracts in writing, and the sum of \$791.69, accrued under the contracts not in writing, but only of the sum of \$15,000.00, and which said two sums do not aggregate the sum of \$15,000.00, al-

leged to have accrued and been demanded. We see no substantive merit in this point.

It is unnecessary to aver a promise to pay each individual sum demanded. The averment of the promise to pay the aggregate of all the sums demanded is certainly sufficient, and though in this case there is no promise to pay the exact aggregate of the two sums demanded, it is plainly to be seen that the intention was to cover the aggregate of these sums by the promise to pay the sum of \$15,000.00. We know of no authority, and none is cited, for the proposition that the averment of the amount promised must exactly equal the aggregate of the different items demanded. No such strict rule is known to us when applied to an action of assumpsit.

[3] Another point is that the averment of the promise to pay interest from the first day of August, 1910, a date anterior to the making of the second or supplementary agreement, and a date anterior to the date of the work done under the contract and covered by the bill of particulars filed, is an impossible date, rendering the first two counts bad. We see no merit in this proposition. The averment of time from which interest is to run is an immaterial averment, and 4 Minor, Inst., Part II, 1175, cited, is inapplicable. Unless there is an express contract to pay interest it does not form the basis of the action, but becomes an incident only to the recovery of the principal debt. *Bennett v. Federal Coal & Coke Co.*, 70 W. Va. 456, 74 S. E. 418. Here there was no express contract to pay interest, and interest therefore was a mere incident to the recovery of the principal sum sued for, and the damage laid in the declaration constituted a sufficient cloak to cover that interest.

Some other points of demurrer are noted, but they are practically conceded to be without merit, as duplicity, etc., and will not be further regarded on this hearing. The same points are covered by other points of error, and they will have consideration in disposing of them.

[4] The second point of error is the rejection of defendant's special plea number one. This plea is based upon the theory of the entirety of the contract pleaded, and proposes to recoup in damages certain losses of interest, and damages sustained by defendant by being obliged to pay plaintiff over and over again for doing the same work contracted to be done by it, and damages sustained by defendant from delay by plaintiff in the execution of its contract.

By the terms of the contract plaintiff agreed with defendant to drive all steel sheet piling and all wooden piling, and do all the excavating called for by the contract of the defendant with the City of Parkersburg, in the construction of a filtration plant in the Ohio river, and to use such of the material excavated as was necessary to bank the coffer, and to furnish all washed sand and grav-

el to be used in the construction of the filter beds and to place the same over the strainers and pipes therein as called for by the plans and specifications, at the stipulated price per pile for driving the piling, and a stipulated price per cubic yard for excavating and for the sand and gravel furnished, and for removing the material used in banking the coffer, and also to furnish at its own expense a complete pumping outfit, consisting of one six inch pump and one ten inch pump, of sufficient capacity and efficiency, to pump out and keep pumped out the coffer-dam during the work of the construction of said filtration plant, and so that said work of construction might proceed without delay on account of water in said coffer-dam, and to furnish a plant of capacity equal to the work, and to prosecute the work to the full capacity of the plant; and it is averred that by reason of such contract it thereby became the duty of plaintiff to construct a reasonably safe and secure coffer-dam around filter beds number four and five of said filtration plant, so as to keep out of them all water, except such as could not be kept out by a reasonably safe and secure coffer-dam; and it is further averred that it became the duty of the plaintiff to maintain at its own expense said coffer-dam during said work of construction, in a reasonably safe and secure condition as aforesaid; and that the plaintiff breached this contract as to said filter beds number four and five, in that it did not construct said coffer-dam in a skillful and workmanlike manner; that the piling were not properly driven, and a large part of it was not driven to reasonable depths in the bed of the river, and was driven in such a manner that it fell down, by reason whereof the coffer-dam leaked continuously, etc., and by reason whereof defendant was not able to proceed with that part of the work of construction without great delay on account of the water, during the seasons of 1911 and 1912, wherefore he sustained the damages sought to be recouped against the plaintiff's demand against him.

We have examined all the authorities cited by counsel in support of their theory of the entirety of the contract sued on. In our opinion they do not support the proposition. Plaintiff did not undertake by its contract to build or maintain a coffer-dam. It agreed to drive the piling at a stipulated price for each pile, and to do the excavating and remove the embankment and back fill of the filter beds at so much per cubic yard, and to furnish a pumping outfit at so much per day for each day the pumping plant was employed, and this was the extent of its undertaking. For breach of these several conditions of its contract plaintiff would undoubtedly be liable to defendant in damages, but if it performed its contract faithfully it would not be liable to maintain at its own expense the coffer-dam and so forth, as alleged, as if upon a contract of entirety. Many of the authorities

cited for the proposition involve the building of houses for a stipulated price, and for the performance of other contracts of entirety. The case most relied upon by counsel, perhaps, is that of *Boyle v. Agawam Canal Co.*, 22 Pick. (Mass.) 381, 33 Am. Dec. 749. While in that case the contract was to be done at so much per cubic yard for excavation and embankment, it nevertheless called for the construction of a certain portion of the Agawam canal by a certain date. The contract called for the entire construction of that portion of the canal. That contract, we think, was properly held to be a contract of entirety, and that the contractor was thereby obliged to repair the embankment swept away by the flood during the progress of the work. But we have no such contracts involved in the case at bar. So we think plea number one was properly rejected, and there was no error therein.

The third point of error is that the court below improperly permitted C. D. Dotson, president of the plaintiff company, to give in evidence testimony as to the amount of damages claimed for sinking the pump boat, and as stated in the bill of particulars, "to expenses incurred in raising and repairing pump boat sunk Oct. 23, 1912, \$190.94." This item is one of the items sought to be covered by the allegation in the first count for "raising and repairing a certain boat," and covered into the aggregate of \$791.69, sued for.

Three points are made by counsel against the introduction of this evidence. First, that the declaration contains no sufficient allegation on which to predicate the claim; second, that if sufficiently declared for, there would be a misjoinder of counts, and the declaration would be bad on demurrer.

[5] The evidence of the witnesses tending to show a cause of action, if any, shows one arising out of tort and not *ex contractu*, and third, that there can be no recovery in an action of *assumpsit* for damages for a mere wrong.

If, as assumed in the third proposition, the wrong and injury complained of is such that the tort cannot be waived and *assumpsit* maintained for the damage done, the declaration would not be sufficient; and if a count *ex delicto* be joined with one *ex contractu* the declaration would be rendered bad on demurrer, and the first and second propositions of counsel would be well founded.

The rule which has the support of our decisions, as well as of the decisions of most of the states, is, that tort may not be waived, and an action maintained as upon an implied contract to pay the damages sustained, unless the defendant's estate has been benefited thereby, as by the appropriation of plaintiff's property, or the proceeds of the sale thereof, and that for mere damages sustained for wrong and injuries done to the person or property resulting in no pecuniary benefit to the estate of the defendant, *assumpsit* will not lie. *Burk's Pleading & Practice*, § 85,

page 121; *Wilson v. Shrader*, 79 S. E. 1083, 1086; *Walker v. Railway Co.*, 87 W. Va. 273, 277, 87 S. E. 722; *Webster v. Drinkwater*, 5 Greenlf. (Me.) 319, 17 Am. Dec. 238, and note. In this note the annotator refers to and quotes from a note by Mr. Nicholas Hill to the two cases of *Putnam v. Wise*, 1 Hill (N. Y.) 240, 37 Am. Dec. 309, and *Berly v. Taylor*, 5 Hill (N. Y.) 584, to the contrary. But whatever the rule may be elsewhere our decisions are certainly in accord with the great weight of authority, as fully shown by the note of Mr. Freeman to the principal case.

The question then occurs, does the evidence of the witness Dotson, denied by defendant, present a case for damages cognizable in *assumpsit*. The boat in question was the pump boat which plaintiff had furnished under its contract, not for the use of the defendant, but to be used by it under its contract to pump out and keep pumped out the cofferdam, during the construction of the filtration plant. Defendant had no control or right of control over the boat or over the plaintiff or any of its employes in the operation thereof. In response to a question respecting the item under consideration, Dotson answered in substance, that while in Pittsburg attending a lawsuit, on October 22nd, considerable rain had fallen in the country; that in the morning following this rain witness called up the defendant by telephone, told him of the rainfall in Beaver river and below Beaver, and asked him if it would not be advisable to break connections on these pumps and flood the coffer; that Smith replied that he would do it, and that he went over and notified some of witness' men in charge, that he expected to do that, and that these men did a part of it, and did break the connection on the six inch pump in the hole where the excavation was done for the filter bed; that witness got home about eleven o'clock on that day on a belated train; that along in the morning some time defendant called witness up and told him that the cofferdam had collapsed and that the pump boat had gone down on the inside of it; that he then inquired of him why he had not flooded the coffer as he ought to have done, and that he replied, "we thought we could hold the water out." The rest of witness' testimony relates to what he himself afterwards did in raising the boat, dismantling her of her machinery, and making the necessary repairs, putting the machinery back, etc., and the cost thereof covered by the item in controversy. Objection to all this testimony was saved by a proper bill of exceptions, and it is now contended that it was improperly admitted upon any issue presented in the case, and for the reasons assigned.

So far as we can see there is nothing in this evidence showing or tending to show any contractual relations between plaintiff and defendant by which the latter was bound to look after or disconnect the plaintiff's boat. Defendant, according to this evidence, was

not in charge of plaintiff's boat. If it was his duty to flood the coffer and save plaintiff's boat from injury, it did not grow out of any contract to do so, and his failure to do so in no wise increased or added to defendant's estate, implying a promise on his part to pay damages. There is nothing showing or tending to show that defendant did not deliver to Dotson's men the message communicated through defendant, and he was under no contractual relation to do so. Moreover, the testimony of other witnesses for plaintiff, his employes in charge of the boat, shows that they were in charge of it, and that they had the right to disconnect the boat. They were not bound to obey any orders of the defendant, if given, which is denied, for he says that he was not even present when the coffer collapsed and the boat sank. Of course the fact if material was one on conflicting evidence for jury determination. But if what these witnesses say, in connection with the evidence of Dotson, as to the conduct of the defendant, was true, that conduct amounted to nothing more than a wrong done, not benefiting the estate of the defendant, and if defendant was liable therefor it was *ex delicto* and not *ex contractu*, and damages resulting to plaintiff therefrom were not, under the authorities cited, recoverable in *assumpsit*. Wherefore, in our opinion, the evidence was improperly received and ought to have been rejected.

[6] The fourth point of error is that the court improperly admitted in evidence plaintiff's book of accounts, containing its account against defendant. In connection with its ledger plaintiff introduced a so called invoice book, proven by the witness, Mrs. C. D. Dotson, bookkeeper, both books being introduced in evidence in connection with her testimony, to show the items of the account. The objection to the introduction of these books was that the entries were not made therein contemporaneous with the facts to which they relate, and that the entrant, the bookkeeper, did not have personal knowledge of the transactions recorded. The rule stated here, in the most recent decisions on the subject is, that:

"Books of original entry of a contractor and builder kept by a bookkeeper, who, according to an established system or method of transacting the business, records the oral or written reports made to him by one or more persons in the regular course of business, of transactions lying in the personal knowledge of the latter, whether such bookkeeper have personal knowledge of such transactions or not, are admissible in evidence in connection with the testimony of such bookkeeper showing the regularity of the entries therein by him, to prove an account therein, without the evidence of the witnesses having personal knowledge of the transactions, provided the testimony of such witnesses, because of death, interest, incompetency, absence, inconvenience, or otherwise be unavailing." *West Virginia Architects & Builders v. Stewart*, 68 W. Va. 506, 70 S. E. 113, 36 L. R. A. (N. S.) 899.

We have examined the testimony of Mr. and Mrs. Dotson, and the testimony of the

workmen on the plant, and while the evidence of Mrs. Dotson shows that she did not always promptly make the entries at the time the facts were reported to her by her husband, yet they were made as promptly perhaps as it was convenient to make them, owing to the character of the business, and the witnesses swear positively as to the substantial accuracy of the items. As to the larger of the items there is no controversy. The case does not stand alone on the evidence of the books, independently of the witnesses concerned in the transaction. So we think the books were admissible in connection with the oral testimony of the witnesses verifying the same, under the rule laid down in the cases referred to and other cases cited by counsel. This point must, therefore, be overruled.

[7] The fifth point of error is that the court below improperly admitted the testimony of Thomas Coleman and C. D. Dotson, to the effect that on one occasion when an effort was being made to compromise the matters in difference between the parties the defendant had stated that there were but two of the items in plaintiff's account which he controverted, specifying them. It is contended that these alleged admissions, being objected to, were inadmissible, because they constituted offers of compromise, and that as a general rule such propositions are inadmissible when they have proven abortive. But we do not think these admissions were of that character. They were admissions of independent facts, and though they may have been made during the treaty for compromise, they are not inadmissible on that ground. The authorities cited by counsel do not support their proposition, but the contrary thereof. *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809; 2 *Jones on Evidence* (Blue Book Ed.) § 291 (293); *Brown v. Shields*, 6 Leigh (33 Va.) 440; 1 *Greenleaf on Evidence* (16th Ed.) 322; *Lovett v. West Virginia Central Gas Co.* 73 W. Va. 40, 79 S. E. 1007.

Nor was there any error committed in refusing to allow the defendant to testify, in response to the question as to whether or not he waived anything on the occasion of such proposed compromise. The record does not show a proffer on the part of the defendant as to what the witness would answer, and there was no reversible error for this, if for no other reason. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634; *Lord & McCracken v. Henderson*, 65 W. Va. 322, 325, 64 S. E. 134.

[8] The sixth point of error relied on is, that the court erred in permitting the witness Dotson to state that the items in the defendant's bill of sets-off, admitted by him and by his counsel to have been paid, covered items which had not been charged in plaintiff's declaration, or sought to be recovered; that those items had been excluded, and that defendant had been given credit

therefor. And furthermore that it was error, having admitted this evidence, to exclude the testimony of the defendant that there was no other account except the account sued on to which his off-sets were applicable. In connection with the proffer of this evidence defendant's counsel stated that it was not claimed that there was any other account. The point is made that plaintiff pleaded the two contracts in writing, and certain other contracts not in writing, and filed bills of particulars covering each, and as the defendant's bill of sets-off filed were or were claimed to be payments on plaintiff's account, and were admitted to be payments upon the work done under the contract alleged, plaintiff could not properly be permitted to swear generally that those payments and off-sets were applied and properly applicable to work done under the contract not covered by the account sued for, without specifications of counter off-sets. In our opinion this point of error is well taken, and must be affirmed. In our opinion a proper construction of section 4, chapter 128, serial section 4824, Code 1913, relating to the subject of off-sets, so provides.

[8] The seventh point of error is that the court erred in giving to the jury plaintiff's instruction number six, to the effect, that if they believed that there was at any time a compromise of all the matters then in difference between them, then the parties were bound by such compromise, and neither would be allowed to go back thereof except for fraud, or because of something inadvertently omitted therefrom. It is contended that this instruction violated the rule of *Rowan & Co. v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998, 2 Ann. Cas. 884, that an instruction without evidence covering the subject thereof is improper, and that there was no evidence of a compromise of the matters in difference in this suit.

[10] In our opinion the point is not well founded. The second or supplementary agreement pleaded covered some of the matters in difference, and the award of the arbitrators, Horstman and Burgess, of August 21, 1912, which was accepted by the parties in writing, covers at least one of the items, 4082 cubic yards, banking around sections 1, 2, and 3, of the filtration plant. This is the first item in the account sued for. There may be other items covered thereby; whether so or not is immaterial. The instruction was general and was applicable at least to this and any other items covered by the award, and the supplemental contract. While an award is not strictly speaking a compromise, nevertheless, when accepted by the parties, it bound them in like manner, and the jury could not have been misled by the instruction.

The eighth point is that the court erred in giving plaintiff's instruction number nine; and another point of error made, which should be considered in the same connection,

is the rejection of defendant's instruction number five, which was in effect the converse of plaintiff's instruction number nine. By the latter the jury were told that if they believed from the evidence that defendant took charge of plaintiff's pump boat in October, 1912, and without authority assumed control and management thereof contrary to the advice of Dotson, president, and of plaintiff's employes, and failed to flood the coffer-dam, and by reason thereof the defendant caused the coffer-dam to give way and said pump boat to sink, the plaintiff was entitled to recover from defendant the costs of raising and repairing said boat.

We do not think that any of the evidence justified this instruction. And, moreover, the cause of action, if any, was *ex delicto*, not *ex contractu*, express or implied, and the court improperly rejected defendant's instruction number five, saying that upon the pleadings in the case the jury could not allow plaintiff the sum of \$190.00, or any sum, for injuries to its pump boat. The authorities above cited for the proposition that the court below improperly received the testimony of the witness Dotson, in relation to the sinking of this pump boat, we think fully support our conclusion upon each of these instructions.

The next or ninth point of error is the giving of plaintiff's instruction number twelve. The objection to this instruction is based on defendant's theory of the entirety of the contract. We see no error in the instruction on plaintiff's theory of the case.

The next or tenth point relied on is the giving of plaintiff's instruction number thirteen. This instruction told the jury that under the contract defendant could not arbitrarily and unreasonably withhold his approval of the performance of the contract by the plaintiff, and that if the jury believed from the evidence that plaintiff and defendant accepted the terms of a supposed compromise agreement, made on August 21, 1912, whereby among other things defendant was to pay for removing the coffer-dam embankment, when it should be removed to the satisfaction of the government of the United States, as provided in the original contract between the parties, then the plaintiff was entitled to recover from the defendant for removing said material to the satisfaction of the government of the United States, whether the defendant was satisfied therewith or not, and that it was the duty of the jury to find for the plaintiff therefor such sum as was agreed upon, if any, in said compromise, with interest from the date the United States government became satisfied therewith.

The supposed compromise on which this instruction was based is the award of the arbitrators, Horstman and Burgess, and the settlement between the parties made on August 22, 1912, pursuant thereto. By their

award 4082 cubic yards of embankment to be removed from around sections 1, 2, and 3, were awarded "to be paid for when all material has been removed to the satisfaction of the Government of the United States in accordance with the terms of the original contract covering the construction of the work." The contract referred to by the arbitrators provided that this embankment was to be removed not only to the satisfaction of the government of the United States, but to the satisfaction of the defendant also. The contract of the defendant with the City of Parkersburg, referred to and made a part of the contract between plaintiff and defendant, shows that defendant was vitally interested in the subject of the removal of this embankment. By it he was under contract and bond to furnish a filtration plant of a certain capacity, and producing a specific quality of water, and the removal of said embankment, if not to his reasonable satisfaction, might greatly prejudice him, and affect the proper performance of his contract with said city. The government might be satisfied with dumping this material at a place where it would greatly damage the defendant in the performance of his contract with the city, and we cannot construe this award as intended to waive defendant's rights under the terms of the original contract. True, he could not arbitrarily withhold approval when the work of removing the embankment was done to his reasonable satisfaction. For these reasons we think the instruction should have been rejected.

[11] The next or eleventh point of error is that the court improperly rejected the defendant's instructions numbered two and eight. These are binding instructions, and the effect of them was to tell the jury that it was the duty of the plaintiff, under the contract, to drive the piling as directed by the defendant, in a substantial and workmanlike manner, and not negligently or carelessly, and if negligently and carelessly done and not done in a substantial and workmanlike manner, and that by reason thereof more material was employed in the embankment around sections four and five than would otherwise have been necessary, plaintiff would only be entitled to recover for removing such material as would have been necessary had the piling been driven as directed in a substantial and workmanlike manner.

These instructions, in the form presented, we think, were properly rejected. They ignore the theory of plaintiff, which the evidence in some degree at least tends to support, that the excess of embankment was due to the express direction of the defendant, or his duly authorized agents or representatives in charge of the work. Instruction "A," given by the court at its own instance, substantially covers the subject of these two instructions, with the omitted theory of the plaintiff inserted. Wherefore, no error to

the prejudice of the defendant was committed in rejecting his instructions.

The last or twelfth point of error is the rejection of defendant's instructions numbered nine and ten. As noted at the foot of instruction number ten, the court was requested to refuse it if number nine was given. The effect of instruction number nine was to tell the jury, that if the plaintiff failed to furnish a pumping outfit of the capacity and efficiency called for by the contract, and to pump out and keep pumped out the coffer-dam as required thereby, then plaintiff was not entitled to recover anything for the use of said pumping outfit. This instruction relating to plaintiff's failure to furnish a pumping outfit and to do the work of pumping, as required by the contract, is not covered by court's instruction "A," referred to, which related only to the right of plaintiff to recover for removing the embankment, and it would have precluded the right of the plaintiff to recover anything for the use of the pumping outfit, no matter how valuable the same may have been to the defendant.

[12] Defendant's counsel predicate the proposition contained in this instruction on the theory that there is no quantum meruit count in the declaration. This ancient count has long since been abolished, or become obsolete in fact. The value of the pumping outfit and labor performed or work done therewith is fully covered by the common counts for services and work done and materials furnished by the plaintiff. 1 Chitty on Pleading (11th Am. Ed.) star page 341; 4 Minor, Inst., part I, 699. We think, therefore, that instruction number nine was properly rejected.

[13] The effect of instruction number ten would have been to tell the jury that if they believed from the evidence that the plaintiff under its contract furnished a pumping outfit not of the capacity and efficiency called for, but one that did not come up to the requirements of the contract, and that by reason thereof plaintiff did not keep said coffer-dam pumped out, then it was not entitled to recover the price per day stipulated in the contract, and as charged in the bill of particulars filed, but was entitled to recover only so much as said pumping outfit was reasonably worth to the defendant.

We think defendant was entitled to this instruction. If the pumping outfit was not of the capacity and efficiency called for by the contract, and for this reason plaintiff did not and could not pump out and keep pumped out the coffer-dam as required by the contract, it was not entitled to recover the full compensation stipulated in the contract, although the use and service thereof may have been of some value to the defendant. This proposition could in no way be affected by the theory of the plaintiff that the pumping outfit was of the proper capac-

ity and efficiency and that its failure to pump out and keep pumped out the coffer-dam was due to the negligence or interference of the defendant.

For the errors aforesaid committed on the trial we are of opinion to reverse the judgment and award the defendant a new trial, and it will be so ordered.

(76 W. Va. 268)

PETTY et al. v. UNITED FUEL GAS CO.
et al. (No. 2595.)

(Supreme Court of Appeals of West Virginia.
May 18, 1915.)

(Syllabus by the Court.)

1. EVIDENCE — 397 — PAROL—UNAMBIGUOUS CONTRACT.

A clear, plain, definite, and unambiguous contract cannot be varied by parol evidence of facts and circumstances known to the parties, which might have induced intent different from that expressed, or contemporaneous or subsequent conduct inconsistent with the terms used.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. — 397.]

2. MINES AND MINERALS — 78 — OIL AND GAS LEASE—COVENANT FOR PENALTY—CONSTRUCTION—FAILURE TO COMPLETE WELL.

A covenant in an oil and gas lease, absolutely binding the lessee to complete a well on the premises within four months, and conditionally to complete three more within successive periods of three months, unavoidable delays after starting to drill excepted, and, upon failure to drill and complete them or any of them, to pay \$100 "forfeit for each well above specified which he has not then completed, or surrender the lease for cancellation," conditionally imposes one penalty for the nondrilling of each well; not successive penalties for each failure to be paid every three months.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. — 73.]

3. PAYMENT — 84 — MISTAKE OF LAW—RIGHT TO RECOVER MONEY PAID.

Money paid under a mistake of law and with full knowledge of the facts cannot be recovered back.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 267-271; Dec. Dig. — 84.]

4. PRINCIPAL AND AGENT — 106 — VOLUNTARY PAYMENT BY AGENT.

Payments made by an agent, acting within the scope of his authority, are binding upon the principal, under the law of voluntary payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 311, 312; Dec. Dig. — 106.]

Appeal from Circuit Court, Roane County.

Bill by R. R. Petty and others against the United Fuel Gas Company and others. From decree for defendants, plaintiffs appeal. Affirmed.

Harper & Baker, of Spencer, for appellants.
C. C. Douthitt, of Spencer, and R. G. Altizer, of Pittsburgh, Pa., for appellees.

POFFENBARGER, J. The bill, dismissal of which is complained of, sought specific per-

formance of certain covenants in an oil and gas lease, in accordance with the interpretation the plaintiffs have put upon them. The dismissal and appeal are results of an opinion on the part of the chancellor as to the meaning of the words in which the covenants are expressed, different from that of plaintiffs and their counsel. Hence the disposition of the appeal turns upon the construction of the clause in question.

The lease, bearing date August 14, 1908, was executed by R. R. Petty, M. A. Petty, his wife, and M. J. Petty to Joseph Hartman, Jr., and demises to him, his heirs and assigns, a tract of land containing 530 acres more or less, for oil and gas purposes, for the period of two years, and as long thereafter as either oil or gas shall be produced under it. Hartman assigned the gas right to the United Fuel Gas Company December 15, 1908, after having completed one unproductive well on the premises. Later, in July, 1910, the United Fuel Gas Company completed a second well, from which gas has since been produced. Under the covenant in question, imposing forfeitures for failure to drill stipulated wells, the plaintiffs have received \$1,600, all of which, except \$400 the gas company seeks to recover back by way of cross-relief, on the theory of payment under mistake as to matters of fact. In addition thereto, the rental on the producing well has been paid.

The clause of the lease containing the covenants involved reads as follows:

"Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm, and to commence operations for a well within thirty (30) days and complete the same within four (4) months from the date hereof. It is understood that a second well shall be completed within three (3) months after the completion of the first well, and that a third well shall be completed within three (3) months after the completion of the second well, and that a fourth well shall be completed within three (3) months after the completion of the third well, unavoidable delays after starting to drill each well excepted, and upon failure on the part of the party of the second part to drill and complete the wells, as above specified, he shall pay one hundred dollars forfeit for each well, above specified, which he has not then completed, or he shall surrender up this lease for cancellation and thereafter be released from all payments or liabilities hereunder."

Deeming it ambiguous, the plaintiffs rely upon extraneous evidence in support of their view that it imposes duty to drill two additional wells, or pay \$100 every three months in lieu thereof, \$100 for the nondrilling of each of them, or surrender the lease. Prior to the execution of the lease Petty had declined to give Hartman an ordinary oil and gas lease, conditioned for payment of \$2 per acre per year, as delay rental or commutation money for delay in drilling, which would have amounted to more than \$1,000 a year. Under the lease here involved, the lessee for some years construed the clause in question

as having imposed duty to pay \$100 for each three months of delay in the drilling of any of the four stipulated wells, and paid accordingly. If the clause were ambiguous, these circumstances might be sufficient to sustain the position of the plaintiffs. The potency of practical construction in the interpretation of ambiguous instruments is universally recognized.

[1, 2] But the clear and definite terms of the clause inflict one penalty of \$100 for each failure to drill any of the wells within the stipulated time, and no more. Nowhere in the lease is there a suggestion of delay rental. Desiring development of their property, the lessors declined to execute a lease providing for delay and payment of commutation. They took an absolute covenant for the drilling of one well within four months and a conditional covenant for three additional wells. They made the penalty of failure to drill any one of them an alternative one—payment of \$100 or surrender of the lease. The terms of this clause fix definite times for the payment of the \$100 penalties, the expirations of the periods prescribed for the drilling of the wells, and import finality on payment thereof. Not a word suggesting obligation to make a second payment on account of any failure can be found in it. Moreover, it is impliedly excluded by the positive terms used, requiring only one payment for each default. That different terms would have been more beneficial to the lessors and more equitable under the circumstances disclosed signifies nothing. Nobody can safely say more liberal terms could have been obtained, if they had

been demanded at the date of the execution of the lease. It is useless to cite authority for the proposition that a clear, plain, definite, unambiguous written contract cannot be varied by parol evidence of circumstances which might have induced intent different from that expressed or contemporaneous or subsequent conduct inconsistent with the terms used. There is no similarity between this case and that of *Huggins v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

In view of this conclusion, it is unnecessary to say whether equity could require, by way of specific performance, the drilling of additional wells or surrender of the lease. The penalties have been fully paid, and there is no suggestion of right to relief on the ground of drainage.

[3, 4] The cross-relief sought by the answer was properly denied; since the fuel company partially held the lease by assignment, and must have known its terms. That an agent misinterpreted it and made wrongful payments under it can make no difference. It is not pretended the matter of payment of penalties and rentals was not within his authority, and within the scope thereof, his acts were the company's acts and his knowledge the company's knowledge. The suggestion that Petty induced the error is not sustained. He did no more than accept the remittances made to him. Having been made with knowledge of all the facts, the payments were purely voluntary, and cannot be recovered back.

Being free from error, the decree complained of will be affirmed.

(76 W. Va. 263)

STATE v. JARRELL. (No. 2789.)

(Supreme Court of Appeals of West Virginia.
May 18, 1915.)*(Syllabus by the Court.)*1. INDICTMENT AND INFORMATION — 147—
JOINDER OF OFFENSES—DEMURRER.

Joinder of two or more offenses of the same general nature in an indictment is not ground of demurrer. The accused has ample protection from embarrassment by means thereof in his right to require an election by the state, as to which of the alleged offenses it will rely upon for conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490-494; Dec. Dig. —147.]

2. INDICTMENT AND INFORMATION — 125—
DUPLICITY—"FORMAL DEFECT."

The duplicity incident to the joinder, in a single count in an indictment, of two or more misdemeanors of the same general nature and subject to the same punishment, is a "formal defect" from which section 10, c. 158, Code 1913 (sec. 5559), relieves.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. —125.]

For other definitions, see Words and Phrases, First and Second Series, Formal Defect.]

3. INDICTMENT AND INFORMATION — 125—
DUPLICITY—CARRYING WEAPONS—SUFFICIENCY

An indictment, charging the accused, in a single count, with the unlawful carrying about his person of certain revolvers, pistols, dirks, bowie knives, slungshots, billies, metallic and other false knuckles, and other dangerous and deadly weapons, without a license therefor, as required by law, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. —125.]

4. WITNESSES — 318 — RECEPTION OF EVIDENCE—REBUTTAL.

Though perhaps not cause for reversal, the admission, in rebuttal, of testimony of a prosecuting witness to the effect that he had given to the grand jury the names of other persons, as witnesses for the state, who had, as witnesses in the trial, disavowed any knowledge of the guilt of the accused, is erroneous.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. —318.]

5. CRIMINAL LAW — 715—EVIDENCE—CAPISSES AND RETURNS.

Capiases for the accused in a criminal trial and the returns thereon are not parts of the record. To be available as evidence in the trial, they should be introduced as such, that the opposite party may know they are to be relied upon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1666; Dec. Dig. —715.]

6. CRIMINAL LAW — 1171—GROUND FOR REVERSAL — ARGUMENT — DOCUMENTS NOT IN EVIDENCE.

Allowance of the use, in the argument, of such writs and returns, not so introduced, for the purpose of showing incriminating conduct on the part of the accused, accompanied by refusal of permission to rebut or repel the charge of such conduct, is reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8126, 3127; Dec. Dig. —1171.]

Error to Circuit Court, Boone County.

J. M. Jarrell was convicted of carrying a pistol, and brings error. Reversed and remanded for new trial.

Chas. L. Estep, of Madison, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

POFFENBARGER, J. Sufficiency of the indictment on which the plaintiff in error was convicted of the carrying of a pistol, in violation of the statute, is denied, on the theory that it charges several offenses in a single count; the averment being that the prisoner unlawfully carried "certain revolvers and other pistols, dirks, bowie knives, slungshots, billies, metallic and other false knuckles and other dangerous and deadly weapons of like kind and character," without a state license therefor as required by law.

Though the practice illustrated here may be a departure from that anciently required and observed, it is sustained by the overwhelming weight of modern authority. The decisions cited in support of the text in 22 Cyc. p. 308, show it to have been recognized in 32 of the American states. The rule or principle enunciated by them is stated as follows in Cyc.:

"So, where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment may charge any or all of such acts conjunctively as constituting a single offense."

In conformity therewith, indictments under statutes regulating the sale of intoxicating liquors, charging sales of all the various kinds of liquors, sales of which without a license were inhibited, have been sustained, although the sale of any one of them and every separate sale of each kind constituted an offense. *Teff v. Com.*, 8 Leigh (Va.) 721; *State v. Swift*, 35 W. Va. 542, 14 S. E. 135; *State v. Boggess*, 36 W. Va. 713, 15 S. E. 423.

Intimations of disinclination on the part of this court to extend the practice beyond indictments under such statutes must be taken subject to a test of the principle, if any, on which it rests. Considerations of convenience and expedition in prosecutions for offenses, on the one hand, and undue burdens upon the accused or exposure of his liberty or rights to peril, on the other, are to be noted and observed in the inquiry. If the practice simplifies and expedites prosecutions, without substantial detriment to the accused, it is justifiable, though violative of ancient strictness in pleading; for the purpose of all procedure in criminal cases, as in others, ought to be achievement of correct legal results in the shortest and easiest manner. That the adoption of this simple

method is not substantially prejudicial to the rights of the accused is the clear consensus of opinion among American jurists.

[1] The inclusion of more than one felony of the same general nature in a single indictment is not ground of demurrer at common law. *State v. Blakeney*, 96 Md. 711, 54 Atl. 614; *State v. McNally*, 55 Md. 559; *Strawhern v. State*, 87 Miss. 422; *United States v. West*, 7 Utah, 437, 27 Pac. 84; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208. Such a joinder is improper, but the remedy for the defect is a motion to require an election by the state, not a demurrer or motion to quash or arrest the judgment. If the offenses are of the same nature, they may be joined, though they differ in degree. *Lazier v. Com.*, 10 Grat. (Va.) 708; *Arch. Crim. Proc.* 310. At common law, several misdemeanors may be joined by the use of different counts, if they are of the same nature and subject to similar punishments, and perhaps whether similar in nature or not. *Arch. Crim. Proc.* 311, note; *Young v. Rex*, T. R. 98. In view of this rule, the argument ab inconvenienti wholly fails. As the accused may be charged with two or more offenses in one indictment, by the use of several counts, he must prepare to meet all of them, when he is so charged.

[2, 3] Joinder of two or more offenses in the same count has always been condemned, because violative of the technical rule forbidding duplicity. But that rule is not designed for the protection of the accused. Its purpose is to require observance of mere matter of form, for avoidance of prolixity and confusion and in the interest of convenience and good form. *Sweeney v. Baker*, 13 W. Va. 158, 200, 31 Am. Rep. 757; *Coyle v. B. & O. R. Co.*, 11 W. Va. 94; *Bouv. L. Dict.* It was always more objectionable in pleas than in declarations or indictments, because, at common law, several defenses could not be interposed at the same time. They had to be put in separately and successively. Our statute permitting a defendant to plead as many several matters of law or fact, as he shall think necessary, renders it less obnoxious in pleas than it formerly was and reduces it to a defect of form only, except in the cases of dilatory pleas. Being such in an indictment, as well as in a declaration or an ordinary plea, another statute renders it there innocuous on demurrer. Section 10, c. 158, Code (sec. 5559), after specifically relieving from numerous formal defects, declares no indictment or other accusation shall be quashed or deemed invalid "for the omission or insertion of any other words of mere form or surplusage." Though the opinions filed in *Tefft v. Com.*, 8 Leigh (Va.) 721, *State v. Hall*, 26 W. Va. 236, and other cases, do not state at length the principle upon which the decisions are based, the text-writers and annotators refer them to the one

here stated, namely, statutory relief from defects in matters of form, and it applies to this indictment as fairly and logically as to those made under the statute regulating sales of liquors. Considerations of mere convenience and orderly appearance in the administration of justice are rapidly losing their weight in the opinions of courts, lawyers, laymen, and legislators.

[4] Rebuttal testimony of the prosecuting witness to the effect that he had given the grand jury the names of two others, as witnesses for the state, who had testified on the trial that they had been present on the occasion of the alleged offense and had not seen any pistol in the possession of the accused, was admitted over his objection. This fact was a self-serving act of the witness, put in for the purpose of strengthening his credibility. It bears no relation to any question of time or circumstance dependent upon the recollection of witnesses, as did the declarations admitted in *Roane Lumber Co. v. Lovett*, 72 W. Va. 328, 78 S. E. 102, and no principle justifying its admission is recalled or has been brought to our notice in the argument. Whether its admission was reversible error, it is unnecessary to inquire, since the judgment must be reversed for another error.

[5, 6] On the argument of the case, the prosecuting attorney was permitted, over the objection of the accused, to produce to the jury a number of capias and the returns thereon, for the purpose of showing, as incriminating conduct on the part of the latter and evasion of process, and, after having permitted this to be done, the court refused to allow him to prove he had voluntarily surrendered himself to the officer. The prosecuting attorney's position was upheld by the trial court upon the erroneous assumption that the capias are parts of the record. They are not. In an action at law in which the defendant has appeared, the writ is no part of the record, unless made so on oyer. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 816, 26 S. E. 431. Not being parts of the record, nor having been introduced in evidence, they could not properly be considered by the jury. If the action of the court in permitting them to be laid before the jury, in the course of the argument, can be regarded as an admission thereof in evidence, such admission wrought a surprise upon the accused. Had he been advised of the purpose to rely upon them as evidence, he might have been prepared to show conduct on his part entirely consistent with his innocence. He may have been absent from the county and ignorant of both the indictment and the process against him, or, being in the county, there may have been no effort to find him. These manifest errors may have led the jury to their conclusion of his guilt, the oral evidence having been conflicting, two witnesses avowing their ignorance

of the alleged act and another positively asserting it, and all having been present on the occasion. In such a state of the evidence, a circumstance indicative of guilt is often decisive, though not in itself entitled to much weight. Denial of right to meet and rebut this new phase of the case, suddenly sprung, cannot be justified on the ground of discretion in the court. In opening the case to one party, after both have rested, reason, fairness, and justice demanded that it be opened to the other also.

For these errors, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(76 W. Va. 271)

MOORE v. HENRY et al.

(Supreme Court of Appeals of West Virginia.
May 18, 1915.)

(Syllabus by the Court.)

OFFICERS \S 140 — COMMISSIONER'S BOND —
RIGHT OF ACTION — PARTIES.

One to whom money is payable from a special commissioner can not in his own name recover the same by an action at law on the special commissioner's bond. Recovery at law on the bond can only be had in the name of the State, the obligee in the bond, for the use and benefit of him to whom the special commissioner should pay.

[Ed. Note.—For other cases, see Officers, Cent. Dig. \S 243, 244; Dec. Dig. \S 140.]

Error to Circuit Court, Mercer County.

Action by A. J. Moore against J. R. Henry and others. Judgment for plaintiff, and defendants bring error. Reversed and dismissed.

John Randolph Henry, of Princeton, and D. M. Easley, of Bluefield, for plaintiffs in error. Woods & Martin, of Princeton, for defendant in error.

ROBINSON, P. Moore purchased land sold under decree in a chancery suit for the enforcement of a judgment lien. The sale was made by Henry, as a special commissioner appointed by the decree. The purchaser paid to the special commissioner the full purchase price. Thereafter the sale was confirmed. The decree of confirmation directed the special commissioner to make a deed to the purchaser and to distribute the purchase money to those named as entitled thereto. The deed was duly executed and delivered to the purchaser. But the decrees of sale and confirmation had been entered upon a bill taken for confessed as to all the defendants to the cause. Soon after the judicial sale, the entry of the decree of confirmation, and the delivery of the deed to the purchaser, the principal defendant in the cause filed a petition therein assigning errors in the proceedings and praying a reversal of the decrees. On this petition there was process as against the opposite parties. The petition operated

as a substantial compliance with Code, c. 134, \S 5 (sec. 4979). Later, at a hearing upon this petition all the proceedings in the cause were reversed and set aside. Among other errors and irregularities it appeared that the holder of the legal title to the land had not been brought into the cause or before the court.

Up to the time of the reversal the special commissioner had made no report as to any disbursements. At the time of the hearing on the petition to reverse, he came in and filed a report in which he claimed a partial distribution of the money. He returned no vouchers therewith. The court would not allow him all the items which he claimed as disbursements. It ascertained that a particular portion of the purchase money was still in his hands, and as a part of the decree of reversal made the following order:

"It is therefore considered by the court that the said Special Commissioner J. R. Henry do repay, and he is hereby directed to repay, to the purchaser A. J. Moore the said sum of \$280.35, received by said Special Commissioner from the said Moore and paid to him on the purchase price of said lands at the attempted sale thereof."

To the entry of this order the special commissioner excepted. But he prosecuted no appeal from the same.

For recovery of the sum so directed to be repaid, Moore instituted before a justice of the peace an action against Henry and his surety on the bond which he had given as special commissioner. A judgment rendered by the justice against the defendants was appealed from. In the circuit court, the case was submitted upon the record of the chancery cause and the bond of the special commissioner as the only evidence. That court, acting in lieu of a jury, gave judgment in favor of Moore against Henry and the surety for the amount which the order in the chancery cause directed to be repaid, with proper interest thereon. It is from that judgment that we have this writ of error.

There is one feature of the case that determines it finally and precludes consideration of all other matters advanced in the briefs. The action is in the name of Moore personally. Yet the obligation upon which recovery is sought, the official bond, is payable to the State pursuant to the statute. Moore is not the obligee in the bond. It contracts no liability to him. The State is the obligee. Then can Moore maintain an action on the bond in his own name? An action on it can be maintained in the name of the State for his use and benefit. But that is only by force of the statute. Code, c. 10, \S 2 and 3 (secs. 252, 253). Moore has no legal interest in the bond except through the statute which gives right of action for his use and benefit in the name of the State. He is not a party to the bond. Nor has he derived any right therein from the obligee other than by statute. For right on the bond

he must resort to the statute. No statute gives him the right to sue on a special commissioner's bond merely in his own name. The only statute that can avail him in the premises is the one which has been cited above. It gives right of action in the name of the State for his benefit, but not right of action in his own name. He has only the limited right which the State as obligee has assigned him by the statute.

Upon what principle could we say that the ordinary common-law obligation which the face of a bond payable to the State evidences, has been changed further than the statute has changed it? The statute, as we have seen, has set over to another no right or remedy in such a bond except to obtain a recovery thereon in the name of the State. No right or remedy to sue directly in the name of a private party has been given.

The suit was not maintainable in the name of Moore. The bond on its face shows no privity with him. The common law gives him no right in such a bond or remedy thereon, for he is not a party to it. The statute has given him a right and remedy, but has confined the same to a suit in the name of the State for his benefit. Only in a suit so prosecuted would the bond be admissible as warranting recovery for his claim.

We have questioned whether all this should be different, since the action is one begun before a justice. But we can not so hold. In this connection, referring to the very subject now at hand, Mr. Hogg says:

"Inasmuch as a justice of the peace has no equity jurisdiction, the proceedings before him must be conducted with reference to the parties to the suit, upon the principles regulating this matter in courts of law. It is a general rule at common law that an action upon a contract, whether express or implied, must be brought in the name of the party in whom the legal interest or right of action is vested. The legal interest in a contract is in the person to whom the consideration passes. Therefore no one can sue to recover on a contract who is not a party to it, unless he derives his rights from the original party to it, or by the express provision of the law as here shown." *Hogg's Treatise and Forms*, § 41 (1).

True, one may maintain an action in his own name on bonds executed under any of

the provisions of chapter 50 of the Code. The Legislature has seen fit to change the common law as to them, but it has neglected to do so as to other official or court bonds. As to the latter, when payable to the State, suit must be brought in the name of the State for the use of the party entitled to any benefit under the same. *Hogg's Treatise and Forms*, § 41(2).

In *Brooks v. Miller*, 29 W. Va. 499, 2 S. E. 219, this court held that in equity the party injured by the breach of an official bond payable to the State could seek recovery under it in his own name. But in the opinion Judge Snyder remarked that it was different in a law action. Referring to the statute giving right of suit in the name of the State, he said:

"In actions at common law, this statute may be regarded as mandatory and should be pursued strictly, but such has never been the practice in courts of equity."

The exact point which we have under consideration was involved in *Carmichael v. Moore*, 88 N. C. 29. There the court said:

"As the right to sue upon the bond is wholly derived from the statute, it must be exercised in the manner there provided and in no other way."

And similarly in *White v. Wilkins*, 24 Me. 299, the court held:

"No private suit can be maintained on an official bond made to the State, or its treasurer, without its consent. And when the statute giving consent prescribes the remedy, that remedy must be pursued."

Other references in point are: 15 Enc. Pl. & Pr. 105-115; 3 *Robinson's Practice*, 352.

We must dispose of the case as the circuit court should have disposed of it. That court, acting in lieu of a jury, had the case as upon demurrer to the evidence. A finding for the defendants and a judgment of dismissal was called for. The judgment will be reversed, and an order dismissing the action will here be entered. The dismissal of course will be without prejudice to a suit on the bond in the name of the State for Moore's use and benefit.

(76 W. Va. 360)

Ex parte BORNEE.(Supreme Court of Appeals of Wes. Virginia.
May 28, 1915.)*(Syllabus by the Court.)***1. CONSTITUTIONAL LAW §17 — CONSTRUCTION OF CONSTITUTIONAL PROVISION—COMMON LAW—JUDICIAL DECISION.**

A constitutional provision derived from the common law and contained in other constitutions, which has received a settled construction by judicial decisions prior to its adoption, must be interpreted in the light of the common law and the general judicial acceptance of its meaning.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 13; Dec. Dig. §17.]

2. CRIMINAL LAW §165 — SECOND "JEOPARDY"—IMMUNITY FROM PROSECUTION.

At the common law and under the interpretations in American jurisprudence, protection from second jeopardy for the same offense includes immunity from further prosecution where on a valid indictment in a court of competent jurisdiction the accused is acquitted by a jury regularly empaneled and sworn to try the issue of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290-298; Dec. Dig. § 165.]

For other definitions, see Words and Phrases, First and Second Series, Jeopardy.]

3. CRIMINAL LAW §186—SECOND JEOPARDY—APPEAL BY STATE.

Prior to the adoption of our constitution it was the general judicial acceptance that an appeal by the state in a criminal case involving life or liberty, after one jeopardy had attached by the empanelling and swearing of a jury, was violative of the principle that one should not twice be put in jeopardy for the same offense and with this meaning the inhibition became a part of the constitutional law of the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 312, 320, 345-361; Dec. Dig. §186.]

4. CRIMINAL LAW §162—JEOPARDY—LEGISLATIVE POWER.

The constitutional amendment of 1879-80, having for its purpose the revision of the judicial department, did not, wherein it provided that this court should have "such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law," give legislative power to alter the originally understood meaning of jeopardy in the bill of rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 285; Dec. Dig. §162.]

5. CRIMINAL LAW §162—APPEAL BY STATE—SECOND JEOPARDY—VALIDITY OF STATUTE.

Acts 1913, c. 13, sec. 22 (Code 1913, c. 32a, § 22 [sec. 1301]), giving right of appeal to the state, is unconstitutional and ineffective in any imprisonment case wherein it operates to put the accused again in jeopardy for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 285; Dec. Dig. §162.]

6. HABEAS CORPUS §27—RIGHT TO RELIEF—IMPRISONMENT UNDER VOID JUDGMENT.

One imprisoned by the judgment of a court which is without jurisdiction in the premises because proceeding under an unconstitutional law may be discharged by the writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22, Dec. Dig. §27.]

Habeas corpus by Steve Bornee. Prisoner discharged.

Van A. Barrickman, of Morganton, for petitioner. Fred O. Blue, of Philippi, and John T. Simms, of Fayetteville, for respondents.

ROBINSON, P. We have before us under the original jurisdiction of this court, proceedings in habeas corpus by which Steve Bornee seeks discharge from the custody of the jailer of Monongalia County. The controlling facts are as follows: Bornee was indicted by a grand jury in the circuit court of the county named, for alleged violation of a certain provision of the laws of this State prohibiting the selling and handling of liquors. Acts 1915, ch. 7, sec. 31. He pleaded not guilty and was put on trial before a jury regularly empaneled and sworn. The trial proceeded to a verdict, which was that the accused was not guilty. But the court, on motion of the State, set aside the verdict of acquittal as contrary to law and the evidence, and awarded the State a new trial, over the objection of the accused. His plea of the former acquittal was rejected, and a discharge from further prosecution on the indictment denied him. He was put on trial before another jury. This jury failed to agree, and the case was continued. Thereupon the accused was committed to the jail of the county, where he has since been, and now is, imprisoned to answer the indictment.

Our constitution forbids that one be twice put in jeopardy of life or liberty for the same offense. That Bornee is held for another trial under the very indictment on which he was once acquitted by the verdict of a jury, is conceded. That it is proposed to try him again for the same offense is plainly apparent. But the statute under which he stands indicted prescribes that the State shall have the right of appeal in all cases arising thereunder. Acts 1913, ch. 13, sec. 22 (Code 1913, c. 32a, § 22 [sec. 1301]). Such right of appeal, if it exists, of course embraces the power of the trial court to set aside a verdict of acquittal. Is the statutory right of appeal by the State constitutional and effective in Bornee's case? In other words, will the recognition of it put the accused in second jeopardy? The answer to this question must depend largely on the determination of what the makers of our constitution meant by the use of the word "jeopardy." If they meant jeopardy as generally understood by the common law and the decisions of the courts prior to and at the time of the adoption of the constitution, the course pursued as to Bornee puts him more than once in jeopardy. If they meant by jeopardy one continuous prosecution through to final judgment, even though on appeal by the State, it would be otherwise. That they meant the former, we can have

no doubt. We may venture to say that the latter idea was unknown in their day.

[1] The provision that no one shall be twice put in jeopardy for the same offense is derived from a principle of the common law. Prior to the formation of our State, Virginia had ever maintained this common-law principle, notwithstanding her constitution did not embrace it and it was not beyond the power of legislative change. It seems needless to say that in English law everywhere the principle was known and its meaning understood. The Constitution of the United States embraced it, as did most of the state constitutions. Whether made constitutional or not, the principle that one shall not be twice put in jeopardy for the same offense had been regarded as a safeguard of individual liberty. Differences there had been as to minor questions arising from its application, but indeed none as to its general meaning and effect. So it stood when West Virginia was formed. The makers of our first constitution embraced it in the bill of rights, thus deeming that it should be put beyond the power of legislative change. Art. 2, sec. 2. The provision without change was retained in our present constitution. Art. 3, sec. 5. From the beginning of this commonwealth, it has been as it stands to-day, constitutional. Prior to its adoption into our constitutional law, it had received a settled construction by the judicial decisions of our own and other courts. That construction was not by any means that jeopardy meant one continuous prosecution, even through appeal by the State, to final judgment.

Nothing appearing in a statute or constitution to change the generally accepted meaning of the terms used, they must be construed according to the general acceptance of their meaning at the time they were used. And says Judge Cooley:

"It must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them." Constitutional Limitations (6th Ed.) 74.

Speaking of the provision against a second jeopardy as found in an act of Congress relating to the Philippine Islands, the Supreme Court of the United States said:

"In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken." *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655.

In *People v. Webb*, 38 Cal. 467, wherein the construction of the second jeopardy provision was involved much as it is here, the court held:

"The settled construction of a constitutional provision made before its adoption into the constitution of this State should be held as the just interpretation thereof."

The framers of our constitution naturally had in mind the Virginia law of the subject. But that was not different from the American understanding that a prisoner was once in jeopardy whenever, upon a valid indictment, a jury in a court of competent jurisdiction was regularly empaneled and sworn to try the issue of his guilt. While we derived the principle from the common law of our English ancestors, yet in American jurisprudence to the time of the adoption of our constitution there had grown up a universally recognized, distinctly American doctrine on the subject. The principle had received sanction as a fundamental one to a degree unknown in the English law. And so with us it still stands to-day. Jurists and publicists there now are who attack the logic of its universally accepted meaning. *State v. Lee*, 65 Conn. 285, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202; dissenting opinion of Mr. Justice Holmes, in *Kepner v. United States*, 195 U. S. 134, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655; 5 *Journal of Criminal Law and Criminology*, 16; 8 *Harvard Law Review*, 354; 20 *Id.* 319. Nevertheless, proposed innovations touching the ancient principle as ordinarily understood, are still most jealously regarded. See debates on the bill for appeals by the government in criminal prosecutions, Congressional Record, 59th Congress.

[2] It must be conceded by all, without citation to the innumerable authorities, that at the common law and under the interpretations in American jurisprudence, protection from second jeopardy for the same offense included immunity from further prosecution where a jury in a court having jurisdiction had acquitted the accused of the offense. It has been universally understood that if, in an imprisonment case, an accused is once put on trial upon a valid indictment in a court of competent jurisdiction, before a jury regularly empaneled and sworn, and is acquitted, he is forever discharged of the accusation. Never again can he be prosecuted for the same offense. To do so would again put him in jeopardy. This long recognized meaning of jeopardy is the one embraced in our constitutional provision.

There are other phases of the general subject, some as to which there is diversity of opinion, but we must confine ourselves so far as may be to the concrete case before us. Here we have an accused tried on a concededly valid indictment before a court of undoubted jurisdiction and acquitted by a jury duly empaneled and sworn. The offense charged is one punishable by imprisonment. Yet it is proposed again to try the issue of his guilt. Plainly this is violative of the sense in which the constitution uses the word "jeopardy."

[3] Virginia early by statute gave the accused when convicted a right of appeal. But, though no constitutional barrier interfered, she never innovated on the common law by

giving the State the right of appeal in a criminal case, except in cases relating to the public revenue. It must, however, be remembered that the latter cases involved only fines, not imprisonment. In cases of life and liberty, Virginia steadfastly maintained the principle that one duly acquitted of an offense should not be haled to answer it again in any way. To the time of the making of our constitution in 1872, the new State followed the same understanding of jeopardy and has ever since maintained it. 2 Enc. Dig. Va. & W. Va. 183 et seq. In the framing of the constitution of West Virginia in 1863 and 1872, the right of one to appeal when convicted, was expressly guaranteed. But no right of appeal was given to the State. An appeal by the convicted person, under the idea of waiver by him, was not considered inconsistent with the prohibition against a second jeopardy. But not so as to an appeal by the State. The framers considered that violative of the second jeopardy inhibition. For in imprisonment cases, Virginia has always regarded an appeal by the State as being violative of the principle against second jeopardy. Moreover, in American law it was the general interpretation that an appeal by the State in a life or liberty case, after one jeopardy of the accused had attached by the empaneling and swearing of a jury, was violative of the principle against second jeopardy. So, when the framers made use of that principle, they could have meant only that which was its common acceptance in the law of the day. An enlightening view of the American cases, showing that the common acceptance has always been that an appeal by the State after jeopardy has attached is violative of the second jeopardy clause, is found in the opinion of Mr. Justice Gray, in *United States v. Sanges*, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445. It is well to read the same herewith. And here we may remark that it is significant to note that the act of Congress passed March 2, 1907, allowing appeals in criminal cases to the government in certain instances, is guarded in the end by the following proviso:

"That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. 1913, § 1704).

It seems pertinent to quote here from the opinion of Judge Green, in *Moundsville v. Fountain*, 27 W. Va. 182, as disclosing how this court has heretofore regarded the effect of the constitutional provision we have been considering:

"Accordingly our law provides, that a writ of error lies in criminal cases to the judgment of the circuit court in behalf of the State, only when the offence is a violation of the revenue laws. Warth's Code, ch. 160, § 3, pp. 852, 853. In these cases the punishment is a fine only. Warth's Code, ch. 32, § 3, p. 217. If the punishment had been fine and imprisonment, no writ of error could have been allowed the State. For, if after the accused has been acquitted, the

State could obtain a writ of error, and by this judgment of the appellate court the decision of the court below should be reversed, and the case sent back for a new trial, it is obvious, that, if the punishment was imprisonment, the accused would be twice put in jeopardy of his liberty in violation of our bill of rights."

[4] It is urged that the makers of our constitution did not, by the use of the words enunciating the settled principle against second jeopardy, mean to preclose the right of the law-making body to give right of appeal to the State; for, it is said that in another connection in the same constitution they provided that the Supreme Court of Appeals, in addition to jurisdiction of an appeal by one convicted, should have jurisdiction of appeals by the State in revenue cases, "and such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law." Art. 8, sec. 3. True, in the original constitution, that of 1863, these quoted words appeared in relation to the jurisdiction of this court. There they directly followed the grant of appellate jurisdiction in criminal cases where one has been convicted of a felony or misdemeanor. That constitution gave no jurisdiction for appeals by the State in revenue cases, though the Virginia statute prescribing such appeals was carried into the statute law of the new State. But the words which we have quoted would not in proper construction have the effect to cut down the express provision in the bill of rights against second jeopardy. These are only general words relating to the jurisdiction of this court. The particular provision against second jeopardy in the very charter of individual liberties which precedes these general words, can not be said to be impliedly altered in its established conception by words in another connection which do not expressly show such an intention.

Moreover, when it came to the framing of the constitution of 1872, these words, "and such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law," were omitted. In the matter of the jurisdiction of this court the section embracing it stopped with the grant of the right of appeal to one convicted for a felony or misdemeanor. In the bill of rights, by the usual terms, and we must think by the usual meaning, the prohibition against second jeopardy was re-established. Nowhere in the constitution of 1872 did the framers use these words that are now pointed to for indication that the Legislature might later say that jeopardy was not what it had theretofore been considered. That constitution as originally framed and adopted, contained no words that could even remotely imply that the Legislature might give anyone a right of appeal in a criminal case other than a convicted person. Pointedly it re-established the long settled provision against second jeopardy. It put interference with that provision unquestionably beyond the power of the Legislature.

It must be distinctly noted that the provision giving this court jurisdiction of an appeal by the State in revenue cases, "and such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law," came into our present constitution only by the amendment of 1879-80. The purpose of that amendment was to revise the judicial department of the State government. A section of the established bill of rights could not be impliedly repealed by such amendment. The former was a particular provision relating to a distinct and fundamental subject. We judicially know as a matter of State history that the amendment was contemplated and made by the people not to change the bill of rights, but solely to change the judicial department. Dissatisfaction with the latter, by no means with the former, prompted the amendment. It could not have entered the minds of the people that they were amending in any way the established bill of rights. The amendment can have force only so far as the previous particular provision against second jeopardy will permit. There is no glaring or irreconcilable repugnancy between them. The former particular provision left standing does not make the later general provision unavailing. The amendment enables the Legislature to give an appeal to the State in a criminal case if the appeal is of preliminary character—not of the character to put the accused in second jeopardy. An example of such legislative action will be found in the acts of the recent Legislature. Acts 1915, ch. 69, sec. 31. It is only where there are explicit words or a total repugnancy indicating intention of repeal that a statute general in its terms will repeal the particular provisions of a former statute which are special in their application to a particular case or class of cases. *Clemans v. Board of Education*, 68 W. Va. 298, 69 S. E. 808. The same can not be different as to fundamental statutes—constitutions. The amendment of the constitution whereby this court was given "such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law," did not give legislative power to alter the meaning of jeopardy in the bill of rights.

[5] This court is not unmindful of its duty to sustain a legislative enactment where it can be done at all consistently with the constitution. But, observing this rule cautiously as we have, we are brought to the conclusion that the statute giving right of appeal to the State in all cases arising under the chapter relating to violations in the selling and handling of intoxicating liquors, can not stand when it denies to one the protection afforded him by the constitutional mandate that he shall not be twice put in jeopardy for the same offense. Our people plainly put it beyond the power of the Legislature to subject to a second jeopardy one charged with an offense for which he may be imprisoned. That policy is so a part of our fundamental

law that only the people by constitutional amendment can change it. It has been said:

"Perhaps we have outgrown the necessity of such protection as it gives against the prosecuting officers; but except where there have been statutory changes in *states whose constitutions admit of them*, the prosecution cannot appeal, and an appeal by the prisoner is dependent upon a waiver." 18 *Harvard Law Review*, 218.

And says Mr. Bishop:

"Statutes providing for rehearings in criminal cases will not ordinarily be interpreted, and will never have force, to violate the constitutional provision under consideration. If the jeopardy has once attached, there can be no second jeopardy without the consent of the defendant, whatever the statute may direct. It will apply only where it constitutionally may. Thus, a statute which, by the device of an appeal by the State, undertakes to authorize the retrial of one acquitted on a valid indictment is void. Even where the acquittal was produced by an erroneous direction of the judge at the trial, it will stand against all doings for its reversal without the defendant's consent, whatever their forms, and from whatever source proceeding. But reversals before jeopardy are different. Whether the applicant is the defendant or the State, they do not prejudice a fresh prosecution." 1 *Bishop's New Criminal Law*, secs. 1026, 1027.

[6] It has been suggested that habeas corpus does not lie—that the remedy of the prisoner is by appeal for error. That the prisoner may be discharged by the writ of habeas corpus we have no doubt. The court was absolutely without jurisdiction to hold him again for the same offense. It can not rely on the unconstitutional legislation whereby it is said the State may appeal in such cases. No court as well as no legislature has jurisdiction or province to violate the constitutional inhibition that one shall not be twice put in jeopardy for the same offense. All orders and judgments of the court after the verdict of acquittal are totally void. They can not afford warrant for the holding of Bornee in jail. As against them he may stand on the paramount guaranty of the Constitution in his favor. The court's jurisdiction over him for the offense charged ceased by the return of a verdict of acquittal. Any further step against him on the indictment is void and without legal effect. That one may be discharged from imprisonment under any void judgment is the established law of the land. *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59; *Ex parte Mylius*, 61 W. Va. 405, 56 S. E. 602, 10 L. R. A. (N. S.) 1098, 11 Ann. Cas. 812. That one held for second jeopardy may be discharged by the writ of habeas corpus is the decision of the Supreme Court of the United States in *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118, wherein Mr. Justice Bradley says:

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus."

Other authorities in point are *Ex parte Cange*, 18 Wall. 163, 21 L. Ed. 872; *Ex parte Stebold*, 100 U. S. 371, 25 L. Ed. 717; *In re Know*, 120 U. S. 274, 7 Sup. Ct. 550, 30 L. Ed. 658; *Bailey on Habeas Corpus*, 91, 120, et seq.

An order will be entered discharging the prisoner.

LYNCH, J., was present, but took no part in the decision, for the reason that he was unable, by reason of illness, to participate in the determination of the case and examine the authorities.

(76 W. Va. 232)

GOLDEN et al. v. O'CONNELL et al.
(No. 2454.)

(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. CREDITORS' SUIT §57 — TRUSTEE FOR CREDITORS — WRONGFUL DISTRIBUTION OF FUNDS—LIABILITY.

Funds collected for distribution by a trustee, pursuant to an agreement with lien creditors pending a suit by them, whereby he undertakes, with the assent of the debtor, to sell real estate, and out of the proceeds pay liens in the order of priority as theretofore ascertained by a commissioner authorized for the purpose, should be so applied when and as collected; and, if not so applied, the ensuing loss, if any, should be charged to the creditors injuriously affected, and not to the debtor, the trustee not being his agent, but the agent of the creditors.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. § 215; Dec. Dig. §57.]

2. CREDITORS' SUIT §57 — DISTRIBUTION — TRUSTEE FOR LIEN CREDITORS—CONTROL BY COURT.

Except in so far as necessary to determine and apply the amounts in the hands of the trustee as so agreed, the trustee was not, though subsequently made a party to the suit, subject to the direction and control of the court having jurisdiction of the suit, the agreement being one in pais, merely by virtue of the reference for the ascertainment of liens on the debtor's real estate.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. § 215; Dec. Dig. §57.]

3. PRINCIPAL AND AGENT §92—PAYMENT TO AGENT—EFFECT.

Where one appoints an agent to act on his behalf in the receipt and disbursement of a fund, the transaction is complete, as to the debtor, when the fund reaches the hands of the agent; payment to him being the equivalent of payment to the principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 245, 246, 250-253, 592; Dec. Dig. §92.]

Appeal from Circuit Court, Greenbrier County.

Suit by Paul Golden and others against Daniel O'Connell and others. From decree for plaintiffs, the defendant named appeals. Reversed and remanded.

R. S. Turk, of Staunton, John A. Preston, of Lewisburg, and Wm. Gordon Mathews, of Charleston, for appellant. Andrew Price, L. M. McClintic and F. R. Hill, all of Marlinton, for appellees.

LYNCH, J. [1] After this cause was remanded on the former appeal (69 W. Va. 374, 71 S. E. 384), the commissioner appointed, acting pursuant to the order of reference, reported, among other things, a fund of \$4,080.28 in the hands of Nelson as trustee under the agreement between defendant and some of his creditors whereby certain of his lands were to be sold, and the proceeds applied to the discharge of their liens. He also reported, as the first lien against defendant's property, a debt of \$6,164.38 in favor of A. F. Mathews, who joined in the agreement mentioned. The court, by its final decree, providing for a sale of defendant's property (other than that so sold by agreement) to satisfy the numerous liens adjudged against it, credited the trust fund on the Mathews debt as of January 12, 1912, three years or more after its receipt by the trustee.

The principal contention on the present appeal is that this was error; that the money so placed in the hands of Nelson should have been credited as of the date of its receipt by him. The agreement between defendant and his creditors was executed August 4, 1908. It authorized a sale by defendant of certain lots owned by him, and provided that the assenting creditors did thereby "appoint and constitute W. E. Nelson their true and lawful attorney, and empower him to execute in their names and under their seals a release of the lien to the purchaser of any lot or lots from the said land * * * upon receipt from such purchaser of the proceeds of the price of said lot or lots, less the expenses and cost of sale, to be applied upon the liens on said land in their order and priority as reported in the suit."

In view of these express stipulations, the decree is manifestly erroneous. Nelson became the agent solely of the creditors to receive and disburse for them the funds arising from the lot sales. He acted in that capacity for them alone. They, not defendant, appointed him, and conferred and defined his authority. Prior to the trust agreement the Mathews debt had been duly ascertained by a commissioner as the first lien against defendant's property. There was no exception at any time thereafter as to its validity. Its amount was in excess of the sum afterward coming into Nelson's hands. As to these amounts there is no controversy. By the concluding clause of the agreement the proceeds of the lot sales were to be "applied upon the liens on said land in their order and priority as reported in the suit." Properly interpreted, this meant that the fund derivable from sale of the land should be applied first to the Mathews debt, and the surplus, if any, to liens subsequent in priority. Hence there could be no doubt or dispute as to the particular debt to which such fund was properly applicable.

[2, 3] In the absence of any fact constituting good cause for delay, and none appears in

the record, it was the duty of Nelson to make application of the fund coming into his hands promptly upon its receipt. The court had not assumed or exercised any control over this money, or over his functions and duties as prescribed by the instrument of his appointment. Nor did defendant have any such control. The assent of the latter to sale of lots particularly described, and to the application of the proceeds therefrom to liens specific and certain, constituted, in effect, a lawful appropriation pro tanto of his property to payment of such claims in so far as the land so set apart should be sufficient for that purpose. Clearly, he was entitled to have these entire proceeds applied, upon their receipt by Nelson, to the principal and interest of the Mathews debt. Where one appoints a person as his agent to receive a sum of money agreed to be paid in satisfaction of a claim, the settlement is complete the moment the agent receives payment. *Railroad Co. v. Ragan*, 104 Ga. 353, 30 S. E. 745. Payment to the authorized agent of a creditor by the debtor is equivalent to payment to the creditor himself. *Bicknell v. Buck*, 58 Ind. 354. So it has been held that, when money intended for the payment of a note has reached the hands of an agent authorized to collect it, the debt is paid. *Boyd v. Pape*, 2 Neb. (Unof.) 859, 90 N. W. 646; *Stuart v. Stonebraker*, 63 Neb. 554, 88 N. W. 653; *Pochin v. Knoebel*, 63 Neb. 768, 89 N. W. 264; *Osborne v. Gatewood* (Tex.) 74 S. W. 72.

Sufficient proof, however, is lacking for the correct determination of the time as of which the Nelson fund should be credited on the Mathews debt. The present record shows that in June, 1911, after the decision of the first appeal, the cause was referred to S. N. Pace as commissioner, with direction to ascertain the amount, status, and proper application of the fund. But in August, 1912, his report theretofore made, was, upon exception and affidavit, rejected and excluded from the record, because of the prior relationship of the commissioner as counsel for certain of the creditors. It does not appear what his report was. The same order substituted as commissioner W. L. Kershner, who later reported the sum of \$4,080.28 as held by Nelson, trustee. While it does appear from Nelson's testimony before Kershner in September, 1912, that the sales of lots from which this sum was derived took place on August 6, 7, and 8, 1908, that Nelson at the time of his examination had disbursed the entire fund, and as a witness was then requested, and promised, to file before the commissioner certain exhibits, specifically designated, showing an account of his collections and disbursements, these exhibits (which it would seem accompanied the Pace report) do not appear in the record; nor does the record in any wise show either the date of collection or of disbursement.

The decree is further erroneous in the

omission of an adjudication of the deed of trust debt of Daniel Reiter, amounting to \$2,796.66. The lien was reported as a valid one against defendant's property, and there was no exception to the commissioner's finding. Doubtless, the omission was due, as intimated in argument, to inadvertence of counsel in the draft of the final decree. The mistake should be corrected by the chancellor when the cause is remanded to him for further proceedings. The question raised as to costs may likewise be adjusted at that time in accordance with the equities then appearing.

We do not find merit in the other assignments. It is not suggested in what respect the bill was improperly amended by the addition of further parties, among whom were Nelson, trustee, and vendees in the lot sales who were still indebted on the notes given by them for deferred installments of the purchase money. Nor was defendant prejudiced, as claimed, by the absence of direct proof of the will of A. F. Mathews, on whose debt the Nelson fund was credited. The objection goes merely to the authority of his executors to receive payment. Prior to the first appeal the court, on the suggestion of the death of A. F. Mathews, the creditor, ordered a revival and a scire facias against his personal representatives. No writ was issued. But the court, by subsequent order, reciting that his three executors (naming them) had appeared and proved their claims before the commissioner then acting, directed that the suit stand revived as to them. On that appeal it was assigned as error that no writ of scire facias was required to be issued; but this court did not pass upon that assignment. When the case was remanded, the executors were made parties to the amended bill, which alleged that they were lien creditors of defendant, and thus was cured the irregularity, if any, in the revival; and no issue as to their representative authority was ever thereafter raised, either by answer or plea, by exception to Commissioner Kershner's report, or otherwise. At no time during the protracted litigation was the debt questioned, either as to amount or validity. Hence we cannot disturb the decree on this ground.

The remaining question is whether the decree is erroneous in failing to designate a place for the sale directed to be made of defendant's property to satisfy the liens against it. The terms and mode of sale were fixed, commissioners therefor appointed, and newspaper advertisement directed. The statute (section 1, c. 132, Code [sec. 4931]) does not require that the court shall fix the place of sale. That section provides that the court "may direct the sale to be [made] for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner to make such sale." The following section provides that "in the advertisement the commissioner shall state the time, terms

and place of sale." The last provision would seem to leave the place of sale to the discretion of the commissioner, subject to review thereof as to the reasonableness of his requirement.

For the reasons assigned, we reverse the decree of December 11, 1912, and remand the cause, with directions to ascertain the date Nelson received the funds in his hands, and to apply them as of that date to the Mathews lien, and to correct the other errors herein designated.

(76 W. Va. 290)

ROBERTS & STANLEY v. AMERICAN COLUMN & LUMBER CO. (No. 2647.)
(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. CONTRACTS — §323 — JUDGMENT — §19 — FINDINGS, OF FACT — SETTLEMENT AND ABANDONMENT — QUESTION FOR JURY — CONFLICTING EVIDENCE.

Whether the parties to an uncompleted contract finally settled all matters of account between them and abandoned the unfinished portion of the work agreed on, depending on conflicting oral evidence, is a question of fact for a jury, whose findings ought to be carried into judgment, unless plainly erroneous or unwarranted by proof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1311, 1349, 1466, 1543-1548, 1827, 1827½; Dec. Dig. §323; Judgment, Dec. Dig. §19.]

2. CONTRACTS — §303 — BREACH — DEFENSE — CONDUCT OF STRANGER.

A contract, without qualification or restriction, by one sui juris, to do or perform an act not in itself unlawful, immoral, or impossible of performance, casts upon him a duty, from the discharge of which he cannot excuse himself by reason of the lawful conduct or interference of a stranger to the undertaking. By neglecting to qualify his promise, so as to make such an excuse available, the promisor waives it as a defense against a recovery for nonperformance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1400-1443; Dec. Dig. §303.]

3. CONTRACTS — §313 — RENUNCIATION — WHAT CONSTITUTES — DAMAGES.

The failure or refusal of one party to a contract to perform his covenants, and who, ignoring the rights of the other party thereto not in default, undertakes to complete the work agreed by the other to be done, operates as a renunciation of the agreement, and renders him liable in damages at the suit of the party so injured thereby.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. §313.]

Error to Circuit Court, Fayette County.

Assumpsit for breach of contract by Roberts & Stanley against the American Column & Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dillon & Nuckolls, of Fayetteville, for plaintiff in error. R. T. Hubbard, Jr., and F. N. Bacon, both of Fayetteville, for defendant in error.

LYNCH, J. In assumpsit for breach of contract, the jury awarded plaintiffs \$750

damages. For reversal of the judgment upon the verdict, the defendant company relies mainly on the giving and refusal of instructions. The objection to exclusion of evidence cannot now be considered, because not covered by bill of exceptions or embodied in the motion below for a new trial.

By the contract sued on, dated July 30, 1907, plaintiffs agreed to cut and manufacture into lumber all the timber owned by defendant on Likens branch, in Fayette county, for \$9 per 1,000 feet, and also all its timber on Rattlesnake draft and Lick draft in the same vicinity for \$9.50 per 1,000 feet. Operations were to begin first on Likens branch and within 30 days. Payments were to be made by defendant on the 15th of each month for the lumber sawed during the preceding month, except that 10 per cent. thereof was to be retained by it until completion of the entire contract, which amount was to be forfeited by plaintiffs, or so much thereof as might be necessary to reimburse defendant, for their failure to do the work to the extent and in the manner particularly stipulated. Then followed this language:

"The second party grants the first parties sufficient surface for mill sites, for the erection and operation of sawmills and for log yards and buildings, together with necessary rights of way for the proper carrying out of this agreement. The party of the second part anticipates no difficulty in getting access to Rattlesnake draft and Lick draft, but, should they for any reason be delayed in entering these hollows, it is understood and agreed that the parties of the first part will not demand any damages for such delay."

Plaintiffs promptly began, and within the ensuing year satisfactorily completed, the manufacture of the timber on Likens branch. To complete the remainder of the contract, it was necessary to secure the rights of way therein prescribed from the Gallego Coal & Land Company on and over its adjoining land. These defendant attempted for several years to obtain, without success. But in January, 1913, it did secure, from the vendee of that company, restricted and qualified rights of way, whereby it alone, but not any other, was permitted, and promptly thereafter it began, and until and during this litigation continued, to manufacture and transport, on and over such adjoining land, the timber in Rattlesnake and Lick drafts. Plaintiffs' action was brought in July, 1913; and the declaration alleged, as cause therefor, failure of defendant to furnish them the necessary rights of way as agreed, and further averred that defendant, after securing for itself the rights of way mentioned, had proceeded, without notice to them and in disregard of its contract, to manufacture and remove the remainder of its timber covered thereby.

Defendant seeks to exonerate itself from liability by construing the language quoted as not imposing an absolute duty to furnish the requisite rights of way, but only the duty

to use reasonable efforts to obtain access to the timber on the other branches, and that, having diligently endeavored so to do, it is under no liability to reimburse plaintiffs for any loss suffered by them. It is admitted by plaintiffs that such efforts were used and continued until 1913, and by defendant that the rights of way required by the contract were never secured. The trial court, over objection, instructed the jury that, under the contract, "defendant was bound to furnish the rights of way," and that the fact that it had been unable to procure them "would constitute no defense to this action." The giving of this instruction is relied on for reversal. Hence the necessity of determining the true purport and meaning of the clause in controversy.

Clearly it seems to "grant necessary rights of way" over lands belonging to others than the parties to the agreement—lands not owned or controlled by either of them. Defendant undertook, without limitation or qualification, to provide access to Rattlesnake and Lick branches. It was a positive engagement. The difficulty or impossibility of securing the rights of way was a contingency not provided for, as manifestly it ought to have been in view of the proprietorship of the intervening lands. Delay in obtaining access to the two branches was the only qualification by defendant deemed necessary against its positive agreement; the only provision being that plaintiffs "will not demand any damages for such delay," should it occur. Fairly construed, the contract required defendant to secure the necessary rights of way for plaintiffs' use over such interjacent lands. These it covenanted to secure; and on such covenant plaintiffs evidently relied, because, without performance by defendant, they could not keep their engagement.

[1, 2] It is not claimed by defendant that the subsequent impossibility of obtaining the promised rights of way discharged the contract. Indeed, this contention could not be made. 3 Elliott on Contracts, § 1916; 6 Rul. Cas. Law, 997, 1014; 9 Cyc. 624-629. Though the performance of a duty or charge imposed by law may be excused where, by reason of some legal disability, performance cannot be made, and the party failing is without fault and has no remedy over; yet, "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Paradise v. Jane*, Aleyn, 26; *Water Co. v. Knappmann*, 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467; *Vale v. Suiter*, 58 W. Va. 353, 52 S. E. 313; *Bryan v. Spurgin*, 37 Tenn. (5 Sneed) 681. In the *Knappmann* Case, but three exceptions to the rule are noted: First, where the subsequent impossibility is imposed by law; second, where the continued existence of the subject-matter is an implied condition of the con-

tract; third, in contracts for personal services, "in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness." 6 Rul. Cas. Law, 998.

Though the obligation of a contract does not inhere or subsist in the agreement *proprio vigore*, the law so regards contracts and attaches to them such sanctity that, when fairly entered into by parties *sui juris* for purposes not immoral, unlawful, or impossible of performance, it will not excuse non-compliance with the unconditional and unqualified terms of the undertaking. While it may not compel either party to keep his engagements and literally perform his covenants, it will not, on account of any hardship or impediments not contemplated by them at the inception of their agreement, and for which they made no exception or provision, relieve the party in default from the liability incurred by him. It requires both parties to be faithful to their covenants, or respond in damages for their violation. If they have made no provision for a dispensation, the law gives none. 6 Rul. Cas. Law, 997.

[3] So where two persons entered into a contract, one of them agreeing to erect on the lands of the other, and, when erected, to superintend the operation of, certain mills, the owner to furnish the men, appliances, material, and means necessary and requisite for the purpose, among which was the construction of a canal as a conduit for water over lands not owned or controlled by either party to the agreement, and over which the promisor had not theretofore acquired or sought to acquire the necessary rights of way, the latter was held liable on his covenant; the court saying:

"It is the duty of contracting parties to provide against contingencies," as "they are presumed to know whether the completion of the duty they undertake be within their power;" and, further, that "there is nothing illegal, immoral, or impossible, so far as appears, to prevent it. It does not appear that there was any refusal, by the proprietors, or application to them, for the purchase of the land, or of right of way; and, even if it did appear that the performance of this contract had become impossible from this cause, it would not absolve the promisor from his contract. He had undertaken to furnish means to build those mills, and a supply of water was a necessary ingredient in this contract. He knew of this necessity, and deliberately contracted to accomplish it, and if it should subsequently appear that he was prevented, by the refusal of the proprietors of the land, to grant the privilege, he must abide by the consequences, and is answerable, in damages, for his failure." "He could not set up this kind of impossibility in avoidance of his liability." *Stone v. Dennis*, 3 Port. (Ala.) 231; 6 Rul. Cas. Law, 1014.

"It is usual and lawful to covenant for the acts of others; and, if the party covenanting cannot secure the performance of those acts, he must make recompense in damages," as where one member of a copartnership, who agreed without the consent of his associates to introduce a new member into the firm and thereafter failed to obtain such consent, was

held liable for the breach of his agreement. *McNeil v. Reid*, 9 Bing. 68.

So in *Reid v. Edwards*, 7 Port. (Ala.) 508, 31 Am. Dec. 720, it was held:

"The rules for the construction of contracts, whether verbal, written, or under seal, are the same. All contracts are to be performed according to their legal interpretation; and where one undertakes expressly for the performance of some act, the positive engagement casts upon him a duty, the discharge of which cannot be excused, by showing his inability, by reason of the lawful interference of some third person."

If he neglects "to qualify his contract, so as to make such an excuse available, he waives it as a defense against a recovery of damages for nonperformance." All contracts fairly and honestly made for a legitimate and lawful purpose, upon a valuable consideration, by persons not under disability, and not inherently impossible of performance, are enforceable. So that, if one engages apartments at a hotel, promising that another person will occupy and utilize them, he thereby becomes personally liable in case the latter refuses to fulfill the engagement.

"This is simply a case of the appellant's undertaking to do a thing perfectly lawful, which he was unable to perform." *Danenhower v. Hayes*, 35 App. D. C. 65, 33 L. R. A. (N. S.) 698.

In *Water Co. v. Knappmann*, *supra*, it was held:

"Where a water company expressly contracts to supply water to a factory for fire purposes, and, by reason of a failure to do so, the factory is destroyed by fire, the water company is liable for the resulting loss, notwithstanding the failure to supply the water was due to the breaking of pipes without any fault on the part of the water company."

"If the performance becomes impossible by contingencies which should have been foreseen, and provided against in the contract, the party will not be excused, for it was his own folly that he did not, by his contract, exempt himself from responsibility in such contingencies. * * * In omitting to do so, he took the risk upon himself, and must abide the consequences." *Bryan v. Spurgin*, *supra*; *Bank v. Burt*, 87 Mass. 113; *Railroad Co. v. Hoyt*, 149 U. S. 1, 13 Sup. Ct. 779, 37 L. Ed. 625; *Van Etten v. Newton* (Com. Pl.) 8 N. Y. Supp. 478.

"The rule is well established that, where a party by his own contract creates a duty or charge upon himself, his undertaking must be substantially complied with, under any and all circumstances. To excuse a performance, his contract must provide for it." *Vale v. Suiter*, *supra*.

Defendant was required, under the contract, to obtain the rights of way within a reasonable time. While the contract itself did not expressly specify a period for performance, the legal implication arising therefrom was that the thing contracted to be done should be performed within a reasonable time after the date of the agreement. 9 Cyc. 611, 613; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Poling v. Boom & Lumber Co.*, 55 W. Va. 539, 47 S. E. 279; *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817; *Duke v. Railway Co.*, 106 Va. 152, 55 S. E. 548. Whether or not such reasonable time had

here elapsed was a jury question. 6 Rul. Cas. Law, 896; 9 Cyc. 614.

Plaintiffs have a further ground of action. Properly interpreted, the declaration avers two breaches of the contract sued on: First, failure to obtain the necessary rights of way; second, the action of defendant in assuming charge and control of the timber in Rattlesnake and Lick drafts and in proceeding itself to manufacture it into lumber, with entire indifference to the rights of plaintiffs. Such conduct by defendant amounted to a renunciation and repudiation of its contractual obligations, and constituted an actionable breach, entitling plaintiffs to sue at once for the damages sustained. *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338.

The question of waiver or abandonment by plaintiffs of their contract, at the time of the payment to them of the 10 per cent. of the money coming due for work already done, was one of fact for the jury, upon which the instructions properly given were full and explicit. *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998; *Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815, 131 Am. St. Rep. 903, 18 Ann. Cas. 715.

The judgment will be affirmed.

(76 W. Va. 276)

SMITH et al. v. GREENE et al. (No. 2645.)
(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

PARTITION §77 — RIGHT — AFFIRMATIVE
SHOWING—NECESSITY.

The right to a partition of real estate in kind, as required at the common law, cannot be denied, where demanded, unless it affirmatively appears upon the record that such partition cannot conveniently be made and that the interests of the co-owners will be promoted by a sale of the property.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 211-223; Dec. Dig. §77.]

Appeal from Circuit Court, Harrison County.

Suit by John B. Smith and others against Charles Greene and others. From the decree, defendants Nannie Fisher and others appeal. Reversed and remanded.

F. O. Sutton, of Clarksburg, for appellants.
La Fayette C. Crile, of Clarksburg, for appellees.

LYNCH, J. As owners of one-eighth of the coal within a tract of 18.74 acres of land, plaintiffs sought partition against defendants as owners of the other interests, six of them an eighth each and four of them a thirty-second each. From a decree directing partition by sale and distribution of the proceeds, five defendants have appealed. The propriety of this mode of partition is the sole question presented for review.

The bill avers the title and interests of the parties, that the coal is not susceptible of

partition in kind, and prays for the relief granted by the decree. Plaintiffs also allege their ownership of the coal under adjoining lands, that they are engaged in mining the coal thereunder, and that the removal thereof will cause a material depreciation in the value of the coal under the 18.74 acres, assigning as a reason therefor lack of adaptability for the economical mining and shipping facilities except through plaintiffs' mines on lands exclusively owned by them, and, further, that they have been unable to effect an agreement with defendants as to the coal jointly owned by them, upon any basis alike profitable to all such owners.

Defendants concede plaintiffs' interest in the coal involved and their right to a partition, and raise no question as to title, quantity, or proportional shares averred. They also admit plaintiffs' ownership of adjoining coal lands and their mining operations thereon. While some of the defendants concede it would be to their mutual advantage to operate the 18 acres of coal in conjunction with plaintiffs or on a royalty basis, they aver an unwillingness so to do on the part of others jointly interested with them; and all the defendants agree that, by reason of the proximity of the coal to an available profitable local market, it is prospectively more valuable for the purpose of supplying that market than for operation in the manner urged by plaintiffs. They therefore resist a sale, and demand a partition in kind; the four owning an eighth each asking that their shares be allotted to them in one body, and those owning a thirty-second each that their one-eighth be allotted to them in one parcel.

Without proof or further pleading, the court, by interlocutory order, properly adjudicated the respective shares and interests of the parties, and appointed commissioners, with directions to make partition in kind among the several claimants pursuant to such order, if partition in kind be found convenient and equitable, and, if so, to consolidate the interests of the defendants as requested by them. To this end the commissioners were also directed to consider "such relevant and competent testimony touching the partition or sale of said coal as may be adduced by any party in interest," such evidence to be returned with their report.

In their report, the commissioners say they went upon the land, "at which time all parties were represented either in person or by their attorneys, and after hearing all parties to said action, and all parties being willing, and without prejudice or injury to the interests of any of the parties hereto, we did proceed to partition said coal" in kind, assigning to plaintiffs lot No. 1, containing 2.25 acres, next to the coal owned by them on adjoining land; lot No. 2, containing 2.35 acres, to the owners of the four thirty-seconds; lot No. 3, containing 2.35 acres, to Charles H. Greene, owner of a one-eighth in-

terest; and lot No. 4, containing 11.8 acres, to the other defendants as their five-eighths interest. They conclude by saying:

"We believe this partition to be to the best interest of all parties, and we find that partition in kind can be conveniently and equitably made as above set forth."

To this report none of the defendants objected. But plaintiffs, denying the statement therein as to assent by them, excepted to the report on the ground that "partition of said coal in kind is inequitable and cannot be conveniently had." This exception, the court, by the decree appealed from, sustained, and, holding the coal not susceptible of partition in kind, ordered a sale thereof. Hence the inquiry whether the court pursued the proper method of effecting partition among the several joint tenants of the coal.

At common law, no sale was permissible in a suit of this character; and the statute applicable (section 3, c. 79, Code [sec. 3916]) authorizes a sale only where the interests of the owners will be promoted thereby and where partition in kind cannot conveniently be made. The law favors actual partition, and but for the statute none other can be decreed. The common owners cannot be subjected to a compulsory sale of their tangible property unless their interests manifestly require it, or, differently stated, unless actual division would be plainly injurious. *Roberts v. Coleman*, 37 W. Va. 144, 16 S. E. 482; *Herold v. Craig*, 59 W. Va. 353, 53 S. E. 466; *Dall v. Mining Co.*, 3 Nev. 531, 93 Am. Dec. 419. "This statute is an innovation upon fundamental principles of the common law and of American jurisprudence, and cannot become a license to the courts to take from the citizen, for light or trivial causes, his freehold on payment of compensation, though full and adequate." *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918.

As prerequisite to a decree of sale, the court must ascertain two things: First, that partition cannot be conveniently made; and, second, that the interests of the parties will be promoted by a sale of the property. *Roberts v. Coleman*, supra; *Croston v. Male*, supra. Prima facie, each party is entitled to actual partition; and it is incumbent on him who seeks a sale to show that his advantage will be promoted by it, and that no loss will be worked to any other party. *Davis v. Davis*, 37 N. C. 607; *Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164. There must be both averment and proof of facts sufficient to sustain that burden, and there must be an affirmative showing of the propriety of a sale. *Roberts v. Coleman*, supra; *Oneal v. Stimson*, 61 W. Va. 552, 56 S. E. 869; *Conrad v. Crouch*, 68 W. Va. 385, 69 S. E. 888; *Ryan v. Egan*, 26 Utah, 241, 72 Pac. 933; *Davis v. Davis*, supra. "It is settled by a long line of decisions, in this state and in Virginia, that the common-law right of partition in kind cannot be refused because of the provisions of our statute, * * * unless it af-

firmatively appears that partition cannot be conveniently made, and that the interests of the parties will be promoted by a sale of the property. * * * These two essential facts must affirmatively appear in the record, before a decree of sale can be entered." Herold v. Craig, *supra*.

Applying these principles here, the decree is erroneous for want of proof. The bill states no particular reason for a sale, save only the difficulty of mining the coal in the 18 acres otherwise than through openings on lands operated by plaintiffs or their lessees, and its consequent depreciation in value upon the completion or abandonment of these operations. This allegation defendants traverse by answers, and aver that the coal is more valuable for the local custom than for operation on a royalty basis, thus imposing upon plaintiffs the burden of proof in support of their contention to the contrary. But they offered no proof. The location of the coal, its quantity, quality, and value, do not in any wise appear. Apparently the sole consideration properly influencing a determination of the mode of partition adopted was the smallness of the tract involved and of the respective interests therein. That alone did not justify a decree of sale. The particular character and situation of the property and the surrounding circumstances affecting its value and indicating the pecuniary and other consequences to ensue from one or the other mode of partition appear only from the bill. Its averments are denied by answers, and negatively by the report of partition. In *Croston v. Male*, *supra*, it was said:

"Inconvenience of partition, as one of the circumstances authorizing such sale, does not contemplate physical impossibility of division; but the requirement is not satisfied by anything short of a real and substantial obstacle of some kind to division in kind, such as would make it injurious to the owners. Meagerness of area in some or all of the shares, due to the necessity of dividing a small tract of land among a number of people and the existence of dower and curtesy estates in the land, do not per se make partition inconvenient within the meaning of the statute."

See, also, *Davis v. Davis*, *Herold v. Craig*, and *Ryan v. Egan*, *supra*.

Whether actual partition of such mineral property can be made without great prejudice to the owners is a question of fact, the decision of which is not to be aided by judicial notice of any fact or circumstance not proved. *Mitchell v. Cline*, *supra*.

Again, in addition to such lack of evidence, the court had before it the unanimous report of three commissioners making partition in kind. Therein the commissioners say they heard all the parties, partitioned the property without prejudice or injury to any of the owners, and that the division made is convenient and equitable and to the best interests of all the parties. To that report no one objects, except the plaintiffs, although their portion of the 18 acres of coal was laid off by metes and bounds next to the coal

owned by them on adjoining land, and notwithstanding the allegation in their bill that it can be most economically removed through openings on such adjoining land. This was the most equitable allotment the commissioners could make, and how it can work injury to the plaintiffs does not appear. Their exception to the report is simply, in general terms, a denial of the conclusion expressed by the commissioners as to the convenience and equity of the partition reported. In support of that exception or denial the record is wholly destitute of proof.

Where a report of partition is proper on its face, every reasonable presumption is in favor of its fairness. *Cross v. Cross*, 56 W. Va. 185, 49 S. E. 129; *Solesberry v. Railway Co.*, 81 S. E. 985; *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. 516. Hence the report ought not to be set aside, upon exception, unless it is clearly shown that the partition is based on wrong principles, or that the commissioners have plainly made an unfair or unequal allotment. *Henrie v. Johnson*, 28 W. Va. 190; *Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67; *Carper v. Chenoweth*, 69 W. Va. 729, 72 S. E. 1031; *Wamsley v. Coal & Lumber Co.*, 56 W. Va. 297, 306, 49 S. E. 141. In the case last cited, it is held that it is not essential that commissioners, in partitioning coal and timber lands, should report the extent of coal deposits, and the acreage, quality, and quantity of the timber, considered by them in arriving at their conclusion as to the relative value of the several parcels assigned by them, nor the money value of the lands partitioned or of any share or lot assigned.

The report was essential to a final decree of partition. Without it such decree would be invalid. And, certainly, the court cannot wholly disregard the finding, and, in the absence of any affirmative showing against it, order a sale. In *Cunningham v. Johnson*, 116 Va. 610, 82 S. E. 690, two of the five commissioners appointed did not act. The other three reported the land not susceptible of partition in kind; but two of them made affidavits that they had not seen or personally examined the premises, but derived their information from others. The court overruled the exceptions based on these circumstances, and, in accordance with the report, decreed a sale. Upon appeal, it was held that "there was no evidence before the court upon which to base a decree for the sale of the land * * * as the report of the commissioners was discredited by the circumstances under which it was made," and that "a court has no authority to decree a sale of land for partition unless it is made to appear by an inquiry before a commissioner in chancery, or in some other way, that partition cannot be made." See, also, *Roberts v. Coleman*, *supra*.

We therefore reverse the decree complained of, and remand the cause for further proceedings in accordance with the principles

herein announced, and further according to the rules and principles governing courts of equity.

(76 W. Va. 227)

STATE v. WRIGHT.

(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §400—BEST AND SECONDARY EVIDENCE—RECORD OF INTERNAL REVENUE COLLECTOR—INTOXICATING LIQUORS.

Parol testimony is not admissible to prove the contents of a record kept in the office of the internal revenue collector, showing that a government license was issued on a certain date to a certain person authorizing him to sell intoxicating liquors in a certain building, in the absence of proof of loss or destruction of such record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. §400.]

2. INTOXICATING LIQUORS §236—UNLAWFUL SALE—PRIMA FACIE CASE—GOVERNMENT LICENSE.

Under section 31, c. 32, Code 1913 (sec. 1147), prior to the passage of chapter 13, Acts 1913 (Code 1913, c. 32a [secs. 1280-1305]), known as the prohibition statute, proof of finding intoxicating liquors in a building occupied by defendant and issuance of a government license to him does not make out a prima facie case of unlawful sale, in the absence of proof that such license was posted in said building.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. §236.]

Error to Circuit Court, Mason County.

J. E. Wright was convicted of unlawfully selling spirituous liquors without a license, and brings error. Reversed, and new trial awarded.

Rankin Wiley and John L. Whitten, both of Point Pleasant, for plaintiff in error. A. A. Lilly, Atty. Gen., John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

WILLIAMS, J. At the June term, 1913, of the circuit court of Mason county defendant was convicted of unlawfully selling spirituous liquor without a state license, and sentenced to serve 60 days in jail and pay a fine of \$25, and he brings error.

There is no proof of an actual sale. The building occupied by defendant in Point Pleasant was searched under a search warrant issued by a justice of the peace. Defendant was not then found in the building, but two or three gallons of whisky and about two-thirds of a barrel of beer were found therein. No government license was seen posted in the building, or found in defendant's possession. Two witnesses were permitted to testify, over the objections of defendant, that they examined the records in the office of the internal revenue collector in Parkersburg, and found therefrom that a license to sell spirituous liquors in the building occupied by defendant had been issued to him, commencing on the 1st day of Jan-

uary, 1913, and ending on the 30th of June, 1913. The indictment was returned at the February term, 1913, and charges the sale to have been made on the 13th of January, 1913. Defendant did not testify, and there is no conflict in the evidence.

The court overruled defendant's motions (1) to exclude the state's evidence and direct the jury to find in his favor, and (2) to set aside the verdict and grant him a new trial, and this action of the court is assigned as error.

[1] Two questions are presented for determination: First, was the testimony to prove defendant had a government license admissible? and second, if so, is that evidence, taken in connection with the finding of whisky and beer in the building occupied by defendant sufficient, under section 31, c. 32, Code 1913 (sec. 1147), to warrant a conviction? Defendant objected, and excepted to the introduction of the testimony. Under the rule invoked by defendant's counsel, requiring the best evidence, it was necessary to produce a certified copy of the memorandum on record in the revenue collector's office showing the fact that a license had been issued to defendant. However brief the memorandum, it was nevertheless a matter of public record, and the best evidence of what it contained, in the absence of proof that it had been lost or destroyed, is the record itself, or a certified copy thereof, as provided by section 20, c. 130, Code 1913 (sec. 4876), authenticated in the manner therein provided. *Hubbard v. Kelley*, 8 W. Va. 46. The testimony relating to the contents of the record was secondary, and was improperly admitted.

[2] Defendant's counsel insist that a prima facie case of unlawful sale is not established by proof that liquors were found in his building and a government license was issued to him, in the absence of proof that the license was posted in the building where the liquors are found; that the possession of the liquor and the posted license are both essential to make out a prima facie case of guilt under the statute. That part of the statute defining the offense reads as follows:

"Whenever intoxicating liquors, as aforesaid shall be seized in any room, building or place, which has been searched under the provisions of this chapter, the finding of such liquors in such room shall be prima facie evidence of the unlawful sale of the same by the person named in the government license posted in such room, or his agent or employé therein, and the proprietor or other person in charge of the premises where such liquor was found shall be subject to trial by due process of law on the charge * * * of selling or offering * * * liquors unlawfully."

The statute is penal, requiring a strict construction, and a majority of the court are of the opinion, and so decide, that the posting of the license in the building in which the liquors are found, in the absence of other

evidence tending to prove an actual sale, is essential to make out a prima facie case under the statute; that it is not enough to prove the finding of liquors in a building occupied by a person to whom a government license to sell intoxicating liquors has been issued, unless such license is posted. In this view Judge LYNCH and I do not concur. We do not think the posting of the license is material. But, as the statute in question is materially altered by the more recent prohibition statute, the question is not likely to arise again, and is therefore of little public importance.

The judgment is reversed, the verdict set aside, and a new trial awarded.

(76 W. Va. 356)

FIRST NAT. BANK OF MANNINGTON v. BANK OF MANNINGTON et al.

(Supreme Court of Appeals of West Virginia. May 25, 1915.)

(Syllabus by the Court.)

**1. PLEADING — 205 — DECLARATION — DEMUR-
RER TO COUNT — EFFECT.**

Where a count in a declaration contains matter making a case and also matter divisible therefrom upon which no recovery can be had, a demurrer general to the count as a whole will not reach the latter. To reach it there must be a demurrer distinctly directed thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. — 205.]

**2. NEW TRIAL — 81 — EXCESSIVE VERDICT —
MOTION TO SET ASIDE.**

An illegal excess in a verdict, plainly apparent from the record, may be challenged by a motion to set aside the verdict as contrary to law and the evidence, though no demurrer was taken to a bad portion of a count, out of which such illegal excess grew, no objection was made to evidence admitted thereunder, and no instruction was asked to disregard such evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 131; Dec. Dig. — 81.]

**3. NEW TRIAL — 162 — EXCESSIVE VERDICT —
MOTION TO SET ASIDE.**

Where, on a motion to set aside a verdict as contrary to law and the evidence, it is plainly apparent from the record that the verdict is illegally excessive in a particular amount, the court should set aside the verdict, unless the successful party chooses to enter a remittitur as to the illegal excess.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. — 162.]

**4. APPEAL AND ERROR — 1171 — EXCESSIVE
JUDGMENT — DISPOSITION OF CAUSE.**

In the appellate court, a judgment will be reversed when the record plainly shows that a particular amount for which no recovery can be had is embraced therein, and the action will be remanded with directions to the trial court to allow the amount to be remitted if the party in whose favor it is chooses so to do, upon such remittitur to enter judgment on the verdict for the residue, and if no remittitur is entered, to set aside the verdict and grant a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. — 1171.]

Miller and Williams, JJ., dissenting.

Error to Circuit Court, Marion County.

Action in assumpsit on a negotiable note by First National Bank of Mannington against Bank of Mannington and others. Judgment for plaintiff, and the defendant named brings error. Reversed and remanded with directions.

L. S. Schwenck, of Mannington, M. M. Neely, of Fairmont, and John A. Howard, of Wheeling, for plaintiff in error. Harry Shaw, of Fairmont, for defendant in error.

ROBINSON, P. This is an action in assumpsit on a \$5,000 negotiable note made by Bartlett to Hendrickson, endorsed by the payee to Bank of Mannington, and by the latter to plaintiff, First National Bank of Mannington. The note was duly protested, and the action is one jointly against the maker and endorsers. Plaintiff has recovered a judgment against defendants for the amount of the note, interest, protest charges, and the cost of collection. Defendant Bank of Mannington alone prosecutes error.

Some of the points raised are so plainly unsubstantial as to demand no comment. A case like this may be disposed of most properly by looking to it in practical light. It is quite clear that defendants are liable to plaintiff on the note and that the action is a meritorious one. The proceedings in the case involve no error except in one particular, the entering of judgment on a plainly excessive verdict.

[1] The original declaration contained only the common counts. When the case first came to trial, plaintiff saw fit to amend its declaration, and leave was given it to do so. Defendant Bank of Mannington obtained a continuance. At a later term, plaintiff filed an amended declaration, one containing the common counts and also a special count directly pleading liability on the note. A demurrer to this special count was overruled. It is said that this was error. But we find the count good as a whole. It sufficiently states a cause of action for recovery of the principal sum named in the note, together with interest and protest charges. True, the count also seeks, by reason of a stipulation in the note, additional recovery of an attorney fee, or the cost of collection. We have held that the law does not warrant recovery on this score. *Raleigh County Bank v. Poteet*, 74 W. Va. 521, 82 S. E. 332. But a general demurrer to the count can not reach this insufficient phase of the pleading, since a good cause of action is stated therein. The count is good, though it contains matter not good. It makes a case for the recovery of the principal, interest, and protest fees. It is not good wherein it seeks recovery of an attorney fee, or the cost of collection. This latter matter is distinct and divisible from the other. Where a count in a declaration contains matter making a case and also matter di-

visible therefrom upon which no recovery can be had, a demurrer general to the count as a whole will not reach the latter. To reach it there must be a demurrer distinctly directed thereto. *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827.

Defendants offered no evidence. Their motion to exclude all of plaintiff's evidence was properly overruled. The evidence proved liability on the note. By no means should all of plaintiff's evidence have been excluded. The evidence in relation to an attorney fee, or the cost of collection, should not have been admitted, but no motion to exclude was specially directed thereto. Indeed no initial objection to the admissibility of such evidence was specifically made and saved.

[2] The motion to set aside the verdict on the ground that the same was contrary to law and the evidence, was well taken. While upon the evidence there ought to have been a verdict for plaintiff, still the verdict found is illegally excessive. Under the law no verdict greater in amount than the principal of the note, with interest and protest charges, could be sustained. The verdict returned included an excess of \$263.16 over these, for the cost of collection. This excess is unquestionably illegal, under our holding in *Raleigh County Bank v. Poteet*, supra. Plaintiff says, however, that the evidence supporting the inclusion of this attorney fee was allowed to go in without objection, that defendant did not make the admission of this evidence ground for a new trial, and has therefore waived the error in admitting the same. But the motion to set aside the verdict as contrary to law and the evidence challenged the legality of the amount of the verdict. The record plainly disclosed that the verdict was illegally excessive. We have observed how this illegal excess in the verdict grew out of bad matter in a count in the declaration. True, defendants did not demur thereto, did not specifically move to exclude the evidence introduced under it, nor ask an instruction that the evidence so introduced be disregarded. But, though defendants took none of these courses, their motion to set aside the verdict avails in the premises—reaches the illegality. Point 3 of the syllabus in *Robrecht v. Marling*, supra, is here applicable:

"If no demurrer be taken to such bad portion of the count, the defendant may object to any evidence as to such matter, or he may move to exclude such evidence, or he may ask an instruction to the jury to disregard such evidence. If he takes neither of these courses, and there should be a general verdict against him, he may move to set aside the verdict; and, if it clearly appear to the court, that the verdict was made excessive by the admission of such illegal evidence, the court should set aside the verdict and grant a new trial; and, if the evidence or facts are certified on writ of error, and the verdict clearly appears to the appellate court to be excessive because of the admission of such illegal evidence, said court will disregard such evidence, reverse the judgment and set aside the verdict."

[3] The evidence in this case shows definitely the amount of a verdict that the law would sanction. Yet the verdict returned was \$263.16 more than that. On the motion to set aside the verdict, what should the trial court have done? It was called thereby to observe that the verdict was greater than the law warranted. Properly, it could do nothing but set aside the same because of the illegality appearing on it, unless a remittitur of the excess was entered by plaintiff. There was definite data in the evidence upon which such excess was ascertainable. Though the court could not force a remittitur of this excess, its duty was to set aside the verdict in case plaintiff did not see fit to remit the illegal part. 11 Enc. Digest, Va. & W. Va. Rep. 862. In view of all this, the entering of judgment on the verdict as a whole was error.

[4] The judgment being illegally excessive, we must reverse it. Though only one of the defendants has complained on appeal, yet the judgment being joint and all of the defendants standing on the same ground as to it, it must fall as to all. We shall not, however, set aside the verdict, since plaintiff may desire voluntarily to remit the excess. The appellate practice in such instance is well defined. 11 Enc. Digest, Va. & W. Va. Rep. 863. The judgment will be reversed and the action remanded with directions to the trial court to allow the amount of the illegal excess to be remitted if plaintiff chooses so to do, otherwise to set aside the verdict and grant a new trial. Should plaintiff voluntarily remit the excess of the verdict over the amount legally recoverable, let the court below enter judgment for the residue.

MILLER, J. (dissenting). I dissent from the majority opinion in this case, in so far as it denies plaintiff right of recovery for a reasonable attorney's fee, provided for in the note sued on. I am compelled to adhere to the views expressed in my dissenting note in *Raleigh County Bank v. Poteet*, 74 W. Va. 521, 82 S. E. 332. And I am authorized to say that Judge WILLIAMS concurs with me herein.

(76 W. Va. 353)

MILLER v. MILLER et al.

(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. MARRIAGE §50—PROOF—MATRIMONIAL HABIT AND REPUTE—SUIT FOR DOWER.

In a suit for dower, wherein it is denied that the claimant is widow, direct evidence of the marriage is not necessarily requisite. Proof of matrimonial habit and repute may suffice to raise a presumption sufficiently establishing, in the absence of rebuttal, that the parties were lawfully married.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 79-89; Dec. Dig. §50.]

2. MARRIAGE \Leftrightarrow 3—RECOGNITION OF VALIDITY—DOWER.

As a general rule, a marriage contracted in another state pursuant to the law thereof, though not according to our law, will be recognized so as to entitle a widow to dower in lands in this state.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 3, 23; Dec. Dig. \Leftrightarrow 3.]

3. WILLS \Leftrightarrow 782—FAILURE TO RENOUNCE—WAIVER OF RIGHT OF DOWER.

A widow is not barred of her dower right for failure to renounce a will of her husband which makes provision for her, unless from the will the intention clearly appears that the provision is in lieu of dower.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. \Leftrightarrow 782.]

Appeal from Circuit Court, Mason County. Suit by Lavinia Miller against Harry T. Miller and others. From a decree for plaintiff, defendants appeal. Affirmed.

T. J. Bryan, of Huntington, C. E. Copen, of Winfield, and E. S. Doolittle, of Huntington, for appellants. Cherington & Cromley, of Gallipolis, Ohio, and Somerville & Somerville, of Point Pleasant, for appellee.

ROBINSON, P. Is Lavinia Miller, the plaintiff, entitled to dower in land of which Henry L. Miller died seized and possessed? This is the sole question presented by the appeal. As against those to whom Henry L. Miller devised the land, the plaintiff prays an assignment to her of dower therein, alleging that she is his widow. The defendants answer and deny that the plaintiff is his widow. They assert that the plaintiff and Henry L. Miller were at no time married. Upon this issue and the depositions of witnesses submitted by the plaintiff to maintain the same on her part, the defendants offering no evidence, the court has decreed in accordance with the prayer of the bill.

[1] By this appeal the defendants say that the evidence does not prove a marriage. It is true that a marriage is not directly proved. But circumstances, conduct of the parties, cohabitation apparently matrimonial, and general marital repute, so establish a presumption that a legal marriage existed between the parties, that it must be taken as true since there is not a word to rebut it. The marriage is proved by the matrimonial habit of the parties, their long cohabitation and mutual recognition of one another as husband and wife, and their pronounced reputation as such. Neither the production of a registry or certificate of the marriage, nor the evidence of witnesses present at its celebration, was absolutely necessary. Wigmore on Evidence, secs. 268, 1602, 2083, 2505; 2 Greenleaf on Evidence, secs. 460-464; 1 Bishop on Marriage, Divorce, and Separation, sec. 928 et seq.

It appears that through a long course of years Henry L. Miller lived with and recognized Lavinia Miller as his wife in every way that a man ordinarily recognizes a wo-

man as his wife. In his last will and testament he called her that and provided for her as his wife. The habit of the parties was that of lawful husband and wife. Each at all times admitted and recognized the other to be lawful consort, even in the deliberate execution of conveyances. The general repute was that they had been lawfully married. Nothing appeared that was inconsistent with such relation. Shall we then say that all this was false and immoral, simply because proof of the exact place, manner, and details of the marriage were not proved by the plaintiff? The evidence establishes a presumption which must stand in the absence of anything to overthrow it. The principle of our holding in a former case is in point:

"A marriage may be proved by circumstances, reputation, conduct of parties and cohabitation, and a presumption of marriage arising from cohabitation apparently matrimonial, especially where the legitimacy of a child is involved, is so strong that it may be overcome only by cogent proof on the part of him who alleges the illegitimacy." *Suter v. Suter*, 68 W. Va. 690, 70 S. E. 705, Ann. Cas. 1912B, 405.

The evidence is plainly sufficient to prove that somewhere and at some time the parties were legally married, whether the marriage was a common-law or a ceremonial one. Whatever the form of marriage may have been, the subsequent admissions and conduct of the parties, together with their local repute, create a presumption that the marriage was legal by the law of the place where the marital union began. It may be, as is argued, that it is not proved that the parties consummated a common-law marriage, such as is recognized by the laws of Ohio, where they resided. Nevertheless, the evidence is sufficiently presumptive to establish that somewhere and somehow the parties were legally united, either by consent or by ceremony, as the local laws required. Wigmore on Evidence, sec. 2505.

The mere fact that the plaintiff did not testify, does not affect the weight of the evidence offered. Even if under our statute she was competent as a witness to the fact of the marriage as against the devisees of the land, a question we need not decide, her testimony was not requisite. For, "in proceedings for dower, the proof of marriage by the register, or by the testimony of witnesses, is not considered the only best evidence within the rule which requires such evidence to be produced, or its non-production accounted for. Notwithstanding the existence of this evidence, marriage may be proved by reputation and declarations, and may also be presumed from circumstances." 2 *Scribner on Dower* (2d Ed.) 206.

[2] Both by the law of Ohio, where the parties maintained their matrimonial domicile, and by the law generally, the evidence in this case affords presumptive proof of a valid marriage. No matter where the marriage was contracted, or what its form, presump-

tively from the facts and circumstances proved, it was done legally by the law of the place. As a general rule, marriage contracted in another state pursuant to the law thereof, though not according to our law, will be recognized so as to entitle a widow to dower in lands in this state. It is not unusual to award dower to a widow who was legally married elsewhere by very different form and requirements than those prescribed by our law. This is only recognition of the general rule that "a marriage, valid or void by the law of the place where it is celebrated, is valid or void everywhere." 2 Kent's Commentaries, 92.

[3] The will of Henry L. Miller, as we have remarked, made provision therein for his wife. Though she did not renounce the will, this did not bar her dower right. The will contains not a word about the provision to the wife being in lieu of dower. No such intention can be ascertained from it. Her claim of dower is in no way inconsistent with any provision of the will. She is entitled both to the testamentary provision made for her and to dower in the land. *Douglas v. Feay*, 1 W. Va. 26; *Shuman v. Shuman*, 9 W. Va. 50; *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139; *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 125.

The decree is in every way warranted by the record. It will be affirmed.

(76 W. Va. 300)

CASTLE BROOK CARBON BLACK CO. v. FERRELL et al.

(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. MINES AND MINERALS — 74 — OIL AND GAS LEASE — QUIETING TITLE — PARTIES — SUIT BY ASSIGNEE.

In a suit by the assignee of an ordinary oil and gas lease, brought to quiet his title and to enjoin the lessors from executing a second lease on the same land, it is not necessary to make the assignor a party, if it appears that the assignment is absolute and unconditional.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 202; Dec. Dig. — 74.]

2. MINES AND MINERALS — 77 — OIL AND GAS LEASE — FORFEITURE CLAUSE — APPLICATION.

A clause in an oil and gas lease, stipulating "that the failure to complete a well upon the said premises within the time herein specified or to pay the rentals at the time and in the manner herein provided shall ipso facto work a forfeiture of this lease without notice," held to relate only to rentals provided to be paid for delay in drilling, and not to rentals or royalties to be paid for a producing gas well.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. — 77.]

3. QUIETING TITLE — 34 — PLEADING AND RELIEF — FORFEITURE.

A bill, although brought primarily to obtain relief from a forfeiture, may, if no forfeiture has occurred, be treated as a bill to quiet title, if it contain sufficient averments to

entitle plaintiff to such relief, and there is a prayer for general relief.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. — 34.]

4. INJUNCTION — 34 — OIL AND GAS LEASE — CLOUD ON HOLDER'S TITLE.

Equity may, at the suit of the holder of a valid oil and gas lease, whose rights have become vested by the production of oil or gas, enjoin the lessor from creating a cloud on his title by executing to a stranger another lease on the same property, if it is made to appear with reasonably certainty such cloud will be created, unless judicially prohibited.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 74-81; Dec. Dig. — 34.]

5. QUIETING TITLE — 35 — POSSESSION BY PLAINTIFF — PLEADING.

In a suit to quiet title, possession by plaintiff is indispensable, but it need not be averred in terms; it is sufficient if the facts averred show plaintiff to be in possession.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 73, 74; Dec. Dig. — 35.]

Appeal from Circuit Court, Logan County.

Suit by the Castle Brook Carbon Black Company against O. F. Ferrell and others. From decree for defendants, plaintiff appeals. Reversed and remanded.

Chafin & Bland, of Logan, and Williams, Scott & Lovett, of Huntington, for appellant. Pendleton L. Williams and Daugherty & Riggs, all of Huntington, for appellees.

WILLIAMS, J. On the 5th of August, 1907, O. F. Ferrell and wife executed to the Brammer Oil & Gas Company an oil and gas lease upon 214 acres of land in Logan county. That company made an absolute assignment of the lease to the Castle Brook Carbon Black Company, the plaintiff, on the 19th of May, 1913. A paying gas well was drilled on the land in the year 1910, and plaintiff has been using the product therefrom in the manufacture of carbon black, and has paid regularly the gas royalties therefor, which the lease stipulates shall be \$50 for each three months in advance, for each and every gas well from which the product is marketed and used off the premises, until the payment which became due on February 5, 1914. That payment plaintiff admits it failed to pay for a period of 16 days, and alleges that its failure to make prompt payment, in that instance, was due to the serious illness and subsequent death of its president and to the illness of its secretary-treasurer, who were its active managers charged with the duty of paying the royalties. Plaintiff deposited the \$50, due on the 5th of February, on the 21st of the same month, in the Guyan Valley Bank, to the credit of the lessors, as the lease provided might be done, but the lessors refused to accept it, claiming that, by failure to pay promptly on the day it was due, a forfeiture of the lease had occurred. Shortly thereafter the lessors executed an option for a lease upon the same land to one William Shipe; the said Shipe agreeing with

them that, in case of litigation between them and this plaintiff, he would assume the charge and burden thereof. On the 8th of April, 1914, the lessors instituted an action of unlawful detainer, in a justice's court, to recover possession from plaintiff, and it thereupon brought this suit in equity, praying to be relieved from the forfeiture, if such there is, and that the lessors be enjoined from further prosecuting their action to recover possession, and also for general relief. A temporary injunction was awarded, which was later dissolved by decree entered on the 23d of July, 1914, reciting that the cause was heard upon the bill and exhibits filed therewith, the motion of defendants to dissolve the injunction, and upon demurrer to the bill and joinder therein by plaintiff. The decree also sustained the demurrer and, the plaintiff declining to amend, dismissed its bill; and it has appealed.

The foregoing facts, averred in the bill and shown by the exhibits, are taken as true; there being no denial of them.

[1] Counsel for appellees insist that the bill was properly dismissed for a number of reasons, one of which is the failure to make plaintiff's assignor, the Brammer Oil & Gas Company, a party. It appears that the assignment to plaintiff was of all the interest and right the Brammer Oil & Gas Company had acquired under the lease, and that it was absolute and unconditional. No relief was asked for against it, and none could have been given. It could have had no interest in, nor could it have been affected by any decree that could properly have been made in the cause. Hence there was no reason why it should have been made a party to the bill, and it was properly omitted therefrom. While, as a general rule, it is necessary to make the assignor a party to a suit in which the rights of the assignee are to be adjudicated, the present case falls under a well-recognized exception to that rule.

"When the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is neither doubted nor denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the assignor a party." *Vance v. Evans et al.*, 11 W. Va. 342.

To the same effect are the following decisions: *James River & Kanawha Co. v. Littlejohn*, 18 Grat. (Va.) 53, which qualifies and limits the application of the broad rule asserted in the earlier case of *Corbin v. Emerson*, 10 Leigh (Va.) 663; *Omohundro v. Henson et al.*, 26 Grat. (Va.) 511; and *Scott v. Ludington*, 14 W. Va. 387.

[2] The lease was to be in force for a term of ten years and as long thereafter as either oil or gas was produced. The lessee covenanted to deliver in the pipe line, to the credit of the lessor, one-eighth of the oil, and to pay \$50 each three months, in advance, for each gas well, the product from which is marketed or used off the premises, and also

covenanted to complete a well within 90 days from the date of the lease, or pay at the rate of \$1 per acre per annum, quarterly in advance, for each additional three months such completion is delayed. The lease contained this stipulation:

"It is expressly understood and agreed that the failure to complete a well upon the said premises within the time herein specified or to pay the rentals at the time and in the manner herein provided shall ipso facto work a forfeiture of this lease without notice, proceeding or action, and in event of such forfeiture the party of the second part binds itself, its successors and assigns, to execute a proper release of this instrument at its own cost and expense."

Under that clause appellees claim the failure, for 16 days, to pay the royalty on the producing well, due on the 5th of February, 1914, produced a forfeiture of the lease. This is true, if the clause quoted applies to the royalty payable for a producing well, as well as to rentals for delay in drilling. But we do not think the contracting parties intended it to be so applied. The principal thing contemplated was development, and the forfeiture clause was intended as a protection to the lessor against the lessee's holding the property and refusing to drill a well, or to pay the delay rental, which is the only compensation provided for failure to drill; and, in order to insure compliance with one or the other of those alternative provisions, a forfeiture of the lessee's right to make further exploration was provided. That provision is for the sole benefit of the lessor, and is an offset to another provision, made for the benefit of the lessee, permitting him to surrender the lease at any time on payment to the lessor of \$1. The term "rental," used in the forfeiture clause, does not embrace royalty provided to be paid quarterly on a producing well. After discovery of oil or gas, the lessee's interest in the mineral becomes vested; and although, technically, it may not be an estate in the mineral in place, it is an interest of equal dignity therewith, for it gives the lessee the right to extract all of it from the ground and dispose of it; and the lessor's right of action for unpaid royalty on a producing well affords him a more certain remedy than he has for delay rentals, payment of which was optional. The terms of the forfeiture clause and their arrangement and relation to each other show that the contracting parties intended it to apply only in case of failure to pay delay rentals. It couples the term "rentals" with the provision respecting the completion of a well within the time agreed on, and provides that the failure to do either one of those things shall work a forfeiture. That the \$1 per acre, to be paid quarterly for delay in drilling, was treated by the parties as rental, is shown by another clause in the lease, preceding the one quoted, in which it is stipulated that the completion of a well shall operate "as a full liquidation of all rental under this provision during the remainder

of the term of this lease." Royalty is the term usually applied to money paid for a producing gas well. There is no forfeiture of the lease for failure to pay the royalty on the gas well, strictly within the time provided; hence the bill fails to show a cause entitling plaintiff to relief in equity on the ground that its lease is forfeited.

[3, 4] But may not the bill be maintained as one to quiet title? It avers that the lessors have, in disregard of plaintiff's right, executed an option for a lease to one William Shipe, and have also instituted an action of unlawful detainer before a justice of the peace to recover possession. This shows that the lessors are asserting a claim adverse to plaintiff's leasehold estate, or vested right to convert and dispose of a material part of the realty; and that they manifest a determined purpose to execute another lease on the same land which, when executed, will unmistakably constitute a cloud on plaintiff's title. Why, therefore, may not a court of equity exercise its power to prevent such a wrong? We see no good reason why it may not. That equity has jurisdiction to determine the rights of conflicting claimants claiming the same property under separate leases from the same lessor is well settled by previous decisions of this court. *Peterson v. Hall*, 57 W. Va. 535, 50 S. E. 603; *Mustard v. Development Co.*, 69 W. Va. 713, 72 S. E. 1021; *Pyle v. Henderson*, 55 W. Va. 122, 46 S. E. 791. There is therefore no doubt of equity jurisdiction to cancel an oil and gas lease, as a cloud on the title of the holder of a superior oil and gas lease on the same land, made by the same lessor or his privy in estate. Having jurisdiction for that purpose, we think it likewise can enjoin the commission of an act which, when committed, will constitute a cloud, if it is made to appear with reasonable certainty that such act will be committed if not prevented. This court has twice before held, first, in *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682, and again in *Iguano Land & Mining Co. v. Jones*, 65 W. Va. 59, 64 S. E. 640, that:

"Equity will grant relief by way of enjoining the commission of such acts as will constitute, when completed, a cloud upon title, in all cases where it would have jurisdiction to remove the cloud created by the completion of the acts which are sought to be enjoined."

Although the mere option executed to Shipe by the lessors may not of itself amount to a cloud on plaintiff's title, yet it may ripen into one, and that fact, taken in connection with the pendency of the action of unlawful detainer brought by the lessors, shows they are claiming adverse to plaintiff's lease, and it is entitled to be quieted in the enjoyment of its right, and to have the lessors enjoined from carrying out their purpose to execute another lease and thereby create a cloud upon its title.

[5] But it is claimed that the bill is not

good as one to quiet title because of failure to aver possession by plaintiff. It does not in terms do so, but the fact of plaintiff's possession appears from other averments, and that is sufficient. Plaintiff avers that, ever since it acquired the lease from the Brammer Oil & Gas Company, it has been making use of the gas from the Ferrell well in the manufacture of carbon black, and has paid promptly, in advance, all the quarterly royalties, except in the one particular instance. It also avers that the lessors had brought an action of unlawful detainer against it to recover the possession. These averments, undenied, are sufficient to show plaintiff's possession.

Having determined that no forfeiture of the lease had occurred, it becomes unnecessary to decide the question presented in brief of counsel for defendants, whether the plaintiff in its bill should have admitted the forfeiture in order to obtain relief therefrom.

The decree is reversed, and an order will be entered here overruling the demurrer to the bill and remanding the cause with leave to defendants to answer, and for further proceedings.

(76 W. Va. 287)

WILLIAMS v. SMITH et al. (No. 2637.)

(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. PUBLIC LANDS ⇨186—CONFLICTING GRANTS—BURDEN OF PROOF—INSTRUCTIONS.

Where, in ejectment, plaintiff claims under a junior, and defendants under a senior inclusive, patent, the former, to recover, must show location of his land within some of the excepted areas; and an instruction imposing on defendants the burden to locate all the exceptions in the senior grant, and to show that they do not embrace the land in controversy, is erroneous.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 593; Dec. Dig. ⇨186.]

2. TRIAL ⇨423—INSTRUCTIONS—BURDEN OF PROOF—WAIVER.

Nor do defendants, by assuming and attempting to sustain in the trial court such burden of proof, waive their right to object to the giving of the erroneous instruction, or to assign it as error in the appellate court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 984, 986; Dec. Dig. ⇨423.]

3. ADVERSE POSSESSION ⇨103—EXTENT OF POSSESSION—CONFLICTING PATENTS—EXCEPTIONS FROM SENIOR PATENT.

While plaintiff, under deed for 174 acres wholly within the junior, but interlocking to the extent of 25 acres with the senior, patent, is entitled to recover the interlock if it falls within the exceptions in the older grant and he has been in actual possession for ten years of any portion of the 174 acres, yet, if the area in controversy is not covered by any of the exceptions, he cannot recover it without showing actual and adverse possession for the requisite period of some part of the interlock.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590-594; Dec. Dig. ⇨103.]

Error to Circuit Court, Raleigh County.

Ejectment by W. L. Williams against George H. Smith and others. Judgment for plaintiff, and defendants bring error. Reversed, and new trial awarded.

McGinnis & Hatcher, of Beckley, and Price, Smith, Spilman & Clay, of Charleston, for plaintiffs in error. Farley & Ward, of Beckley, for defendant in error.

LYNCH, J. Defendants complain of a judgment against them, in an action of ejectment for recovery of 174 acres of land. They rely for reversal on alleged insufficiency of the evidence to sustain the verdict, and the giving of certain instructions for plaintiff.

[1, 2] Upon the second assignment, the case is clearly controlled, in its disposition here, by *Cook v. Lumber Co.*, 82 S. E. 327. There and here were involved in part the same titles and questions. Defendants in this action claimed title by deed under the inclusive Moore and Beckley patent of 1795 for 170,038 acres, which contained one general and numerous specific exceptions; plaintiff, under a junior grant of 1847 to W. H. French for 500 acres lying wholly within the exterior bounds of the older patent. A disclaimer limited the controversy to 25.9 acres, which, as the evidence tends strongly to show, forms an interlock with defendants' boundaries. Much evidence, in part materially conflicting, was taken for the purpose of locating the 174 acres; the chief object of each party being to show such location with reference to two exceptions in the senior grant, denominated as the Banks and the Yancey exceptions. At the conclusion of the evidence, and over objection by defendants, the court, by instruction No. 3, charged the jury that by proof of title under the French patent plaintiff had made a prima facie case for recovery, unless defendants had shown a valid and superior title, to do which the burden was upon them to locate all the exclusions in the Moore and Beckley patent and to show by a preponderance of the evidence that the exceptions mentioned did not embrace the land in controversy; and, by instruction No. 4, that the jury should award a recovery, if plaintiff had shown adverse possession for ten years of any portion of the interlock, unless defendants, among other things, had proved by a preponderance of evidence that the interlock in controversy was not covered by such exceptions. By the case cited, these instructions were erroneous. Under the law, as so established, the burden was upon plaintiff to locate the exceptions, and to show that the land claimed by him was within one or more of them.

Nor did defendants, as claimed, waive their right, upon writ of error, to complain of the ruling of the trial court, because they assumed, and offered much evidence to sustain, the burden imposed by the instructions. The argument made, applicable only to objections first made in the appellate court, does not

apply. The question is not raised here for the first time. Defendants objected and excepted to the giving of the erroneous instructions, raised the same question by motion for a new trial, and later assigned the ruling as ground for writ of error. It cannot seriously be contended that, because defendants undertook during the course of the trial to do more than the law required of them in the way of proof, they thereby waived their right to have the jury properly instructed, or to have it adhere to the established rules of evidence in the determination of the issues in the case. Furthermore, there were two trials of the action prior to the one now under review. It is not unreasonable to assume that the trial court consistently followed and applied in the former trials the rule as to burden of proof announced in the instructions under consideration, and that, therefore, defendants did not upon the last trial voluntarily assume the task of locating the exceptions, but performed it in obedience to the view announced in prior rulings of the court.

[3] But plaintiff, practically conceding the superiority of defendants' paper title to the interlock, and as justifying these instructions, invokes as a correct principle of law the proposition, but as we perceive it not applicable to the issues involved, that a showing of adverse possession by him of the 174 acres outside of but not within the interlock would shift from him to defendants the burden of proof as to the exceptions. But instruction No. 3 entirely omits the theory of adverse possession. It would authorize a finding for plaintiff by virtue alone of his deed under the junior grant, unless defendants had supported their conveyance under the senior patent by locating the exceptions therein and showing that the land in controversy was not within any of them. Manifestly, the evidence of possession by plaintiff elsewhere than within the interlock could not authorize or cure the giving of this instruction. And instruction No. 4 confuses the matter of burden of proof with the question of adverse possession. The instruction is obscure, and in part misleading. If it was intended to inform the jury that upon defendants rested the burden of proving that the interlock was not covered by the two exceptions, it is amenable to the same criticism as No. 3. If susceptible of that interpretation, as we think it reasonably is, the clause virtually saying if the interlock is by the evidence shown to be within the two exceptions, and plaintiff has been in actual and hostile possession for ten years of the "lands described in his deed and the deeds under which he claims," the jury should find for him, may have induced the jury to believe that upon defendants devolved the burden of proving the facts upon which the entire instruction was predicated.

Because upon a new trial a different state of facts may be made to appear, we are constrained to decline defendants' urgent demand for judgment in their favor upon the

facts as they now appear. But, for the reasons given, we reverse the judgment, set aside the verdict, and remand the case for further proceedings therein.

(76 W. Va. 111)

McILWAIN KNIGHT & CO. v. FIELDER
et al.

KANAWHA VALLEY BANK v. SAME.
(Supreme Court of Appeals of West Virginia.
March 30, 1915. Rehearing Denied
June 25, 1915.)

(Syllabus by the Court.)

1. JUDGMENT §17—PROCESS TO SUSTAIN—NECESSITY.

Proceedings in a cause can not bind parties who have been merely named as defendants therein, but as to whom the bill has not been matured for a hearing by the service of process to answer the same or by appearance thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. §17.]

2. EQUITY §464—BILL OF REVIEW — RE-OPENING CASE.

A bill seeking to review a cause for errors apparent on the record, can not re-open the case for general rehearing. The procedure brings about an appeal for error, not a re-opening for a continuation of the cause.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1129-1140; Dec. Dig. §464.]

3. EQUITY §464—BILL OF REVIEW — DECREE.

Upon a bill of review for errors apparent on the record, the court should review the cause and in one order or decree, like procedure on appeal, adjudicate so as to correct the errors.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1129-1140; Dec. Dig. §464.]

4. APPEAL AND ERROR §1166—PROCEDURE—REVERSAL.

This court may of its own motion reverse decrees which have been entered in the absence of necessary parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4527-4530; Dec. Dig. §1166.]

Appeal from Circuit Court, Kanawha County.

Suits by McIlwaine Knight & Co. and by the Kanawha Valley Bank against William Fielder and others. From adverse orders and decrees entered on a bill of review, defendants appeal. Reversed and remanded.

J. W. Kennedy and Jones, Murphy & Ballard, all of Charleston, for appellants. L. E. McWhorter, Brown, Jackson & Knight, and Price, Smith, Spilman & Clay, all of Charleston, for appellees.

ROBINSON, P. This is a lien creditors' suit. It is made up by the consolidation of two causes, separately instituted. The decrees subject real estate to sale for the payment of liens adjudged to exist thereon. Incidental to the enforcement of the liens, certain conveyances made by the appellants William Fielder and wife to their three sons, also appellants, were set aside as voluntary and fraudulent.

We need only set forth those matters

which tend to proper decision. There are many ins and outs to be eliminated. They are in no wise material to a true view of the disposition which we find must be made of the case.

None of the defendants who are now appealing appeared to the original bill in either of the causes, nor to the amended and supplemental bill filed in one of them, which latter bill attacked the conveyances to the sons as being in fraud of the plaintiffs and other creditors. The bills were taken for confessed as to all these parties. They did not answer, take exceptions to the report of the commissioner, or appear in any manner. So in the natural course of events, decrees appropriate to the case so confessed were entered against them. One decree set aside the alleged fraudulent conveyances. A subsequent decree adjudged certain liens to exist on the real estate thereby conveyed, as well as on remaining lands of the grantors, and ordered a sale of all the property for the payment and satisfaction of the liens.

When the property was advertised for sale pursuant to the decree, these appellants filed a bill of review and obtained a stay of the proceedings. They asked a review for errors. The errors alleged by them were such as would be apparent from the face of the record. They were those for which a bill of review would lie. The proper parties were named as defendants to this bill of review, but not all of them were summoned to answer it. When it was heard, only some of the parties to be affected by the proceedings therein were before the court by process or appearance. The cause had not been completely matured for a hearing. Why the appellees allowed it to be proceeded with in this shape, we do not know.

Nevertheless, the court, upon the bill of review, entered a decree totally vacating, annulling, and setting aside the former decrees. At the term at which it did this, it did no more. At a later term, a lien creditor, the City of Charleston, which had failed to present its case theretofore, was permitted to file its answer setting up its lien. The appellants were permitted to demur to the amended and supplemental bill in the original cause, which demurrer being overruled, they were permitted to file their answers to that bill. In this answer they denied the fraud alleged against them. At this time the court seems to have considered the original cause as re-opened by the decree made on the bill of review so that the same might be reheard in all particulars. Even if it could have properly done so, it failed to observe that it could not affect the rights of those parties to the original cause who were not before the court when it set aside the decrees adjudicating their rights. But at a still later term the court, ignoring the answers which it had permitted to be filed, entered a new decree of sale, embracing the matters of

the original decrees, but in some particulars modifying the former decree of sale. In the decree which it then made, it ordered that the decree vacating the original decrees should be set aside. The appellants complain that the court erred in denying them a hearing on their answer, and further in not correcting certain errors apparent on the record of the original cause.

[1] Now, let us see what a jumble has been made of this case. How stands it? Upon the bill filed by the appellants for a review of the original decrees, those decrees have been reviewed and changed so that the new decree binds some of the parties, while as to others the former decrees have not been affected. The plaintiffs in the original causes which were consolidated, together with some of the lien holding defendants therein who were served with process or appeared, are affected by the proceedings on the bill of review. Those proceedings, however, can not bind the several judgment lien holders whose claims were reported by the commissioner and were decreed in the cause, but who were not brought before the court in the bill of review proceedings. The original decrees, even if erroneous, are as to them still standing. The proceedings by way of review are abortive as to such parties. Proceedings in a cause can not bind parties who have been merely named as defendants therein, but as to whom the bill has not been matured for a hearing by the service of process to answer the same or by appearance thereto. As well would it be not at all to make them defendants in the cause, as not to summon them or to proceed without them. Chief Justice Marshall once said that it is only a principle of natural justice, of universal obligation, that the rights of an individual can not be bound unless he have notice of the proceedings against him. *The Mary*, 9 Cranch, 120, 3 L. Ed. 678.

[2] The answer tendered by the appellants was erroneously received. On the bill of review the original cause could not be re-opened to give them an opportunity to deny the fraud which they had confessed by their default, and to rehear the question of fact as to the fraud alleged. A bill seeking to review a cause for errors apparent on the record, can not re-open the case for general rehearing. The procedure brings about an appeal for error, not a re-opening for a continuation of the cause. 1 Hogg's Equity Procedure, sec. 211. Only errors apparent on the face of the record could be corrected and eliminated by the bill of review which appellants filed.

[3] Even if all proper parties had been before the court, it would have been erroneous to set aside totally the decrees in the original cause, and then to allow the cause to stand for further decree, as the court did herein. When a bill of review for errors apparent on the record has been properly matured for a hearing, the court should review

the cause for error, and in one order or decree, like procedure on appeal, adjudicate the whole matter. *Goolsby v. St. John*, 25 Grat. 146. In this case the court was not only unmindful when it so proceeded without proper parties before it that confusion of rights instead of certainty would result, but it seems also to have been unmindful of the proper office of a bill of review and the scope of the practice and procedure thereunder.

[4] Manifestly, in the interest of justice we must straighten out the affair. We can not rightly take up the assignments of the appellants while the case is in such shape. Underlying the assigned errors, is the gross error of orders and decrees having been entered on the bill of review in the absence of parties who should have been brought before the court. Without them, the decrees which were attacked for errors could not properly be reviewed. Though this error is not complained of, we must notice it. Surely we can not, for the errors alleged in the bill of review, allow the original decrees to be reviewed and changed in the absence of some of the lien claimants whose rights were fixed therein. Such a course, in a cause of the character of this one, would leave the original decrees to stand as to some and to be changed as to others. That would mean two different decrees of sale as to the same property, and produce confusion or conflict of the liens or rights established in the same cause. We must strike at the error underlying such irregularity—the error of not bringing before the court, before proceeding on the bill of review, all the parties whose rights are sought to be affected thereby. The appeal brings that error before us, in any view within the period of limitation. This court may of its own motion reverse decrees which have been entered in the absence of necessary parties. *Roger v. Gall*, 54 W. Va. 373, 46 S. E. 147; *Gallatin Land Co. v. Davis*, 44 W. Va. 109, 28 S. E. 747; *Hitchcox v. Hitchcox*, 39 W. Va. 607, 20 S. E. 595; *Morgan v. Blatchley*, 33 W. Va. 155, 10 S. E. 282.

The orders and decrees entered on the bill of review will be reversed. The cause must go back to the circuit court with direction that the bill of review be remanded to rules for a maturing by process served on all the defendants. When it is regularly matured and set for hearing, it should be proceeded with according to the established practice in relation to the hearing of bills of review.

(76 W. Va. 306)

VICK v. FERRELL et al. (No. 2508.)
(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD §182—LIABILITY ON BOND—PARTIES—SURETIES ON DIFFERENT BONDS.

Where there are several accounts and several sets of sureties of the same fiduciary, and

the accounts have been commingled and involved, it is proper in a suit to surcharge and falsify his accounts to implead with such fiduciary the sureties on all his bonds.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 423, 623-636, 638-652, 664-668; Dec. Dig. § 182.]

2. REFERENCE §101 — ACCOUNTS OF FIDUCIARY—WANT OF REPLICATION—RECOMMITMENT.

When on bill and answer in such suit and before replication to the answer the cause is referred to a master to state and settle the accounts of the fiduciary, the court, on return of the master's report, discovering the omission of such replication, may, on motion of plaintiff, before decree, set aside the order of reference and the report of the master thereon, and receive the replication, and thereupon re-commit the cause to the master to report upon the matters referred to him.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 169-180; Dec. Dig. § 101.]

3. GUARDIAN AND WARD §176 — SUIT TO SURCHARGE AND FALSIFY GUARDIAN'S ACCOUNT—ESTOPPEL—PROVISION OF RECEIPT.

A ward is not estopped or precluded from prosecuting such suit, promptly instituted, to surcharge and falsify his guardian's accounts, by a provision inserted by the latter in a receipt given him by his ward, on reaching his majority, for money paid to him or on his account, purporting to affirm and ratify all prior transactions and settlements of the guardian, such ward being ignorant of any such settlements, and the same not then being exhibited or presented to him for affirmance or ratification.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 176.]

Appeal from Circuit Court, Logan County.

Suit by Ella B. Vick against G. F. Ferrell, guardian, etc., and others. From a decree for plaintiff, defendants appeal. Affirmed.

E. H. Greene and Robert Bland, both of Logan, for appellants. Lilly & Shrewsbury and John Chafin, all of Logan, for appellee.

MILLER, J. Plaintiff's suit, brought shortly after reaching her majority, was to surcharge and falsify the ex parte settlements of her guardian. Her father died in 1903, leaving a small personal estate, and real estate of considerable value, consisting of a hotel property in the City of Logan, renting at forty dollars per month, and a tract of one hundred and fifty acres of land.

Ferrell qualified as plaintiff's guardian August 17, 1903, by giving a bond in the penalty of ten thousand dollars, with defendant, the Citizens' Trust & Guaranty Company of West Virginia as surety. The whole amount of the personal property, not including some of the rentals from the hotel property, collected by the guardian, amounted to only \$69.50; including the rentals it amounted to \$705.60.

On August 5, 1904, in summary proceedings instituted by the guardian in the circuit court of Logan County, a portion of said hotel lot was sold, yielding, after paying costs, the sum of \$930.00. On December 1, 1904, on like petition, and order of said court, the timber on said tract of land was sold, defendant realizing therefrom \$275.00.

In each of these proceedings the guardian was required to execute a special bond, as required by the statute, for the proper application of the proceeds of these sales, but no bond was executed by him.

On March 22, 1905, upon a like petition of said guardian, and the decree of said court thereon, the guardian sold said tract of land, realizing therefrom, and from the interest accruing on the deferred payments, the sum of \$7,268.70. In this proceeding he was required to and did execute a bond in the penalty of \$12,500.00, with certain sureties, for the faithful application of this money.

The first of the ex parte settlements was made in July, 1905, the second in June, 1907, and the third in May, 1910. In these settlements the personal estate and the money realized from the sales of the timber and the real estate were treated as a common fund.

Plaintiff reached her majority on March 11, 1910, and brought this suit September 2d, following, making the defendant, Ferrell, her guardian, and the sureties in the several fiduciary bonds, defendants thereto.

The balance in favor of plaintiff, as shown by the last ex parte settlement, was \$2,866.94. On a reference to the commissioner and exceptions thereto in this cause the balance found and decreed in favor of plaintiff and against Ferrell and the sureties on the last bond executed by him, was \$4,065.00, with interest and costs. And it is from this decree that the guardian and these sureties have appealed.

[1] The first point of error is that the court should have sustained appellants' demurrer to plaintiff's original and amended bills. The point on the demurrer is that the bill is multifarious for impleading in the same suit the two sets of sureties in the several fiduciary bonds, and as involving the settlement of several and distinct accounts.

There is no merit in this point. Where accounts of fiduciaries have become so commingled and involved by the guardian it is proper to implead both sets of sureties in the same suit. Both are interested in a proper settlement of the accounts. *Talbott v. Curtis*, 65 W. Va. 132, 63 S. E. 877; *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775; *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433; *Kester v. Hill*, 42 W. Va. 611, 26 S. E. 376. The authorities cited by the appellants for the contrary proposition are inapt.

[2] The second point of error made by appellants is that for want of replication to their answer at the time the cause was first brought on for hearing, on the pleadings and the master's first report, the court should have dismissed the bills. No proof had been taken by either party at this time. The master's first report was based on pleadings and exhibits. While the case was being argued it was discovered that the record did not show a replication to the answers, and on

motion of the plaintiff, the order of reference and the report of the master thereon were set aside, a replication to said answers entered, and issue joined thereon, and the cause was then re-committed to the master to report as required by the decree of reference. Both parties were thereafter heard and took evidence before the master on the issues joined, and the master made up and filed a new and complete report, which was excepted to, a full hearing had thereon, and upon which the final decree appealed from was pronounced.

We find no error in the decree for failure, on the original hearing, to dismiss the cause. It would indeed be a strange and harsh rule of practice, that would deprive the parties of their just rights, because of the mistake of the parties, or a misprision of the clerk, perhaps, to enter a general replication. The mistake was discovered before decree, and the court below then did what this court would have reasonably done on appeal, reversed it for the error and re-committed the cause to the commissioner for further proceedings. Hogg's Eq. Proc. p. 530; *Kirchner v. Smith*, 61 W. Va. 435, 451, 58 S. E. 614, 11 Ann. Cas. 870; Code 1913, chapter 134, section 4, serial section 4973.

[3] The third and last point of error is, that plaintiff was concluded and estopped from obtaining the relief decreed her by an alleged receipt executed by her to her guardian on March 23, 1910, twelve days after reaching her majority; and pleaded in bar of this suit. The paper is of the following purport: "G. F. Ferrell, in account with Ella Justice Vick." Then follows a statement of dates, most of them in February, 1910, of amounts paid for or disbursed to plaintiff in cash, aggregating \$1,168.15. One of the items, "paid Ella Vick, check for cash, \$75.00," is dated November 24, 1910, a date subsequent to the date of the paper itself. Subjoined is the following:

"Received the above amounts from G. F. Ferrell, my Guardian, and I hereby affirm and ratify all prior transactions and settlements by him. This 23d day of March, 1910.

"[Signed] Ella Vick."

Plaintiff and her husband who was present at the time both swear positively, that when she signed the paper it did not contain the words "and I hereby affirm and ratify all prior transactions and settlements by him"; that these words had been added after she signed the paper; that no settlements were then or at any time presented by Ferrell, and she swears that she did not know that he had ever attempted to make any ex parte settlements.

Though Ferrell swore in chief that Mrs. Vick signed the paper referred to, he never returned to the stand after she and her husband had testified to contradict them. The decree appealed from must be construed as adjudicating the issue on this paper against

Ferrell, and we cannot say that the court erred. That such a provision should have been put into a paper of that kind gives room for suspicion at least.

But even if the paper had been executed as it appears in the record, we do not think plaintiff would be bound by the alleged settlements and transactions. The paper was a mere receipt for items of money paid. It could not operate as a release of Ferrell from his mistakes or omissions, or false charges, if any, in his accounts. As to any such there was no consideration therefor. The case does not fall within the rule of *Plant v. Fittro*, 65 W. Va. 147, 63 S. E. 763. That case involved a receipt by ward to guardian, something like the one here involved. It was held valid on two grounds, first, that the ward was cognizant of all settlements, was present and acquiesced in them, and at the time of execution of the receipt was fully informed and advised in the premises; second, that he had slept upon his rights for nearly ten years before bringing his suit. The decision in that case was controlled by these considerations, none of which are pertinent to the case here.

We have examined all the appellants' exceptions to the commissioner's report, overruled by the court below. In our opinion there is no error in the decree relating to them. The report was made up and confirmed upon the most liberal application of the rules and principles controlling the settlement of fiduciary accounts, and we see nothing in the decree of which appellants can reasonably complain.

For these reasons the decree appealed from must be affirmed, with costs to appellee.

(76 W. Va. 311)

GRAY v. POCAHONTAS CONSOL. COLLIERIES CO.

(No. 2810.)

(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §286 — EMPLOYMENT OF INFANTS—NEGLIGENCE PER SE.

It is not negligence per se to employ an infant over fourteen years of age in a coal mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1008, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. §286.]

2. MASTER AND SERVANT §103, 118—INJURY TO COAL MINE EMPLOYE—SAFE APPLIANCES—DUTY OF OWNER OR OPERATOR.

It is the non-assignable duty of the owner or operator of a coal mine, not of his mine foreman, to maintain his motor track, motor and other appliances with which his servants are required to work in a reasonably safe condition, and failing therein, the resulting injury to an employé constitutes actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 175, 177, 202, 209; Dec. Dig. §103, 118.]

3. MASTER AND SERVANT — 286, 289—DEATH OF COAL MINE EMPLOYE — NEGLIGENCE — QUESTIONS FOR JURY.

The facts proven by the evidence in this case were such as to entitle the plaintiff to have the evidence go to the jury on the fact of negligence, and the issue of contributory negligence relied on by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. —286, 289.]

Error to Circuit Court, McDowell County.

Action by B. Hampton Gray, administrator, etc., against the Pocahontas Consolidated Collieries Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial awarded.

Cook, Litz & Harman and Joseph M. Crockett, all of Welch, and Sanders & Crockett, of Bluefield, for plaintiff in error. Anderson, Strother, Hughes & Curd, of Welch, for defendant in error.

MILLER, J. This is an action on the case for the alleged wrongful death of Chester Cook, a boy seventeen years of age, while employed in defendant's coal mine, in McDowell County.

On the trial, after the plaintiff had introduced his evidence, the court, on motion of the defendant, struck out all of the plaintiff's evidence, and directed a verdict for defendant, which was accordingly returned by the jury, and from the judgment of nil capiat thereon plaintiff brings error.

The only question presented for decision, therefore, is, was the plaintiff's evidence sufficient to carry the case to the jury on the issues joined on the plea of not guilty.

The acts of negligence alleged and relied on as grounds of the action were, first, the employment of the deceased, a youthful servant, at a dangerous and hazardous work of braking on an electric motor train; second, in permitting defendant's track and switches in its mine, over which its electric motor and train were run, to become so defective and out of repair, as to cause derailment of the car, which resulted in the injury and death of decedent; third, failure to instruct and warn decedent of the dangers and hazards of his employment, due to the alleged defective and dangerous condition of said tracks and switches.

[1] On the first proposition, the evidence tended to show that deceased had falsely represented his age at the time of his employment. It was conceded, however, and the proof establishes the fact, that he was but seventeen years of age. But our decisions say, construing the statute, that it is not negligence per se to employ a boy over fourteen years of age in a coal mine. Indeed, the statute permits such employment. See *Griffith v. American Coal Co.*, 84 S. E. 621, and cases cited.

[2] On the second proposition, Crockett,

Adm'r, v. Black Wolf Coal & Coke Co., 83 S. E. 987, *Crockett v. Keystone Coal & Coke Co.*, 84 S. E. 948, and *Jaggie v. Davis Colliery Co.*, 84 S. E. 941, decide, construing the statute, that it is the duty of the mine operator and not of the mine foreman to maintain his motor tracks, motors, and appliances in a reasonably safe condition, and that negligence therein resulting in injury to an employe constitutes good ground of action for such injury.

[3] The question then remains was the evidence in this case, relating to the fact of negligence, sufficient to have carried the case to the jury? In our opinion it was. We cannot detail all the evidence here, but some of the uncontroverted facts, which we think plaintiff was entitled to have submitted to the jury, along with other facts in the case, were, that the switch at the second left entry, about one hundred and fifty feet from the opening of the mine and known as "empty branch," and the track for some distance was practically immersed in water; that at this point the track on the main entry was on a curve and that the outside rail was elevated some four inches above the rail on the inside of the curve, when it should not have exceeded two inches; that the throw-bar by which the switch was thrown open to let the empty cars in on the empty branch was not provided with a ball or weight, or other appliance to hold the switch in place; that the track at this point was in a swale or low place in the mine, some fourteen inches below the regular grade of the track, and that the track from this point ran up a steep or abrupt grade; that the deceased, who had been employed on the day of his injury and death as a brakeman, and on his third trip into the mine was found about two o'clock in the afternoon of that day lying on the ground some thirty feet from the switch, and between the main track and the track on the empty branch and near the rib of the mine, with a heavy mine prop lying across his back or neck, and in an unconscious condition, the same prop which had been standing in the mine near where he laid, to hold up the roof, and the prop at which brakemen were required to stand, after throwing the switch, until the empty cars being pushed on to the empty branch had cleared the main track, when he was required to go upon the cars and set the brakes; that just a few moments before deceased was found dying at his post, a motorman outside of the mine heard a rumbling in the mine as if caused by a wrecking of cars, and after sending his brakeman in the mine a short distance and receiving a signal to back the train and doing so, he then went into the mine where he found deceased in a dying condition. The cars were then back on the track. But there was evidence on the ground that one of the cars had been off the track and had struck the prop and caused it to fall on deceased.

It was also shown that some twenty-five or thirty minutes afterwards, and after the motorman had pulled the empty train back on the track and past the switch at empty branch, the switch was found about half thrown; that when fully opened the needle point would stand away from the rail about three inches, but that when so examined it stood open about an inch and a half, and the evidence tended to show that this condition of the switch might have been caused by pulling the derailed car back over the switch, or that its then condition was due to the alleged defective throw bar, and the alleged defective condition of the track at that point. And one of the witnesses, who had been night foreman in the same mine, swore, that several wrecks had occurred at that point while he was working there. While on cross-examination this witness said that this track was in as good condition as tracks of this kind are usually found in coal mines, yet he qualifies this statement with this exception, namely, that there was water over the rail and that there should have been some way to fasten that switch down, and that there was a sag in the track.

While the force of the testimony of plaintiff's witnesses, given in chief, was considerably modified on cross-examination, the facts above detailed were not materially changed or affected thereby, and while we must not be understood as expressing any opinion, on what conclusion should be drawn from the evidence by the jury, we are nevertheless of the opinion that the evidence was of that character that it should have been submitted to the jury on that fact of negligence; whether the negligence of defendant, if any, was the proximate cause of the death of decedent, or whether decedent's own negligence contributed thereto, so as to defeat the action.

We are of opinion, therefore, to reverse the judgment, and award the plaintiff a new trial.

(76 W. Va. 314)

RYAN v. CASTO. (No. 2684.)

(Supreme Court of Appeals of West Virginia.
May 25, 1915. Rehearing Denied
June 25, 1915.)

(Syllabus by the Court.)

1. PAYMENTS \S 38, 39—APPLICATION—DIRECTION.

A debtor, at the time of making payments, has the absolute right to direct to which of his debts payments shall be applied, but if he then omits to exercise the right, the creditor to whom the payments are made may thereafter make application thereof according to his pleasure.

[Ed. Note.—For other cases, see Payment, Cent. Dig. \S 161-179; Dec. Dig. \S 38, 39.]

2. BANKS AND BANKING \S 134—DEPOSITS—APPLICATION TO OVERDRAFTS—ESTOPPEL.

Where an account between a bank and its customer has covered a series of years, and numerous deposits have been made by the lat-

ter without direction as to their application, and checks have also been drawn by him upon his account, but there has been no balancing of the account, with notice to him, the bank is not precluded from afterwards exercising its right to apply such deposits to the oldest overdrafts of its customer, by the fact that in a third column of its ledger account with such customer, and for its own convenience, the daily debit and credit balances of such customer are there noted.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 353-374; Dec. Dig. \S 134.]

Error to Circuit Court, Roane County.

Action by Thomas P. Ryan, special receiver, etc., against J. B. Casto. Judgment for plaintiff, and defendant brings error. Affirmed.

Hogg & Hogg, of Point Pleasant, for plaintiff in error. Pendleton, Mathews & Bell, of Point Pleasant, and S. E. Boggess, of Spencer, for defendant in error.

MILLER, J. Plaintiff, as special receiver of the Bank of Spencer, on July 25, 1913, sued in assumpsit to recover of defendant seven hundred and forty-six dollars and seventy-six cents, the amount of an overdraft as shown on the bank book of defendant, balanced and returned to him by the auditor, March 2, 1912, after the failure of the bank.

The only plea interposed by defendant was the plea of the statute of limitations of five years, and the case was by agreement of the parties submitted to the court in lieu of a jury on issues joined on this plea.

The bill of particulars filed with the declaration, a copy from individual ledgers number 7 and number 8, of said bank, and in which the account with defendant was kept, begins June 9, 1906, with a credit balance of \$262.83, and, with the exception of a break in the debits and credits from May 8, 1907, to May 22, 1911, runs to February 29, 1912, just before the failure of the bank. And the ledger account, as introduced in evidence by defendant in support of his plea, shows the same condition of the account, with the exception of a third column, showing the daily balances standing to the debit or credit of defendant. There is no evidence on the face of the ledger, nor is there any evidence showing that defendant's account was ever otherwise balanced, or that his bank book was balanced and returned with checks until March 2, 1912. Nor is there any evidence that the bank or any of its officers ever exhibited to defendant its ledger account with him, or that he had any knowledge that the ledger showed such daily or periodical balances. Nor is there any evidence that the bank ever otherwise made application of the deposits, until defendant's pass book was balanced and returned to him with the balance of overdraft shown, and for which this suit was brought.

On May 8, 1907, just before the apparent break in the ledger account, the amount of

the overdraft, or the red ink balance, is shown as \$876.76, and on May 22, following, is the entry of a deposit of \$876.76; but such was not the correct balance on that date, and defendant swears that he knew at that time that he was indebted to the bank on account of overdraft in about the sum of \$746.76.

Defendant swears that at no time before or since May 22, 1911, the time he resumed his transactions with the bank, after the apparent interim, when making his deposits, did he ever make any application of payments to any particular balance or overdraft. He says he just passed in the money to the cashier and never made any arrangement with him as to what disposition should be made of it.

In support of his plea of the statute of limitations defendant relies solely on the fact that the bank did not bring forward in red ink in ledger number 8 the overdraft existing in ledger number 7, and allowed him to check on his account, after May 22, 1911, and that the bank commissioner, after the failure of the bank, accepted his check for \$43.85, which he swears was to settle the overdraft shown in the third column of the account on that ledger. The claim of defendant's counsel is that this method of keeping the account amounted to an election by the bank to let the overdraft existing May 22, 1907, stand as a loan, and to apply the deposits made subsequently to the checks drawn on the bank after that time, and that it could not afterwards make a new election. Wherefore action on the old overdraft is now barred.

[1] A number of legal propositions are advanced and elaborately argued by counsel, all in some degree related to the subject of the plea, but in our view of the case it is unnecessary to consider all of them. One of controlling force is that while it is the absolute right of the debtor at the time of making payments to direct to which of his debts the payments shall be applied, yet, if he omits to exercise that right, then the creditor may make the appropriation according to his will and pleasure. *Chapman v. Commonwealth*, 25 Grat. (Va.) 721; *Jones v. United States*, 7 How. 682, 12 L. Ed. 870.

And of some pertinency also is the well settled equitable rule that when neither debtor nor creditor makes application of the payments, they will be applied, first to the discharge of the oldest debt, and so on in order until all are paid. *Smith v. Loyd*, 11 Leigh (38 Va.) 512, 37 Am. Dec. 621; *Howard v. McCall*, 21 Grat. (Va.) 205; *Chapman v. Com.*, supra; *Genin v. Ingersoll*, 11 W. Va. 549.

And as having some bearing on the case at bar is another well settled rule, that where no appropriation of payments has been made by debtor or creditor the court will apply them according to the principles of justice and equity in the particular case. *Norris v. Beaty*, 6 W. Va. 477; *Smith v. Loyd*, supra; *Buster v. Holland*, 27 W. Va. 510.

And this court has affirmed the proposition that if an account sued upon contains credits, either in money or anything else, they will be applied, in the absence of any special application by the parties themselves, to such portions of the account, if any there be, as would otherwise be barred by the statute of limitations. *Hanly v. Potts*, 52 W. Va. 263, 43 S. E. 218; *Genin v. Ingersoll*, supra; *Wood on Limitations*, section 110.

[2] As noted, however, the contention of the defendant is that as the bank carried in its ledgers this daily balance column, as stated, for its own information and convenience, it thereby made application of the deposits to the payment of the checks as drawn, and that it could not afterwards make a different application thereof, and is forever concluded by the entries in its books. We cannot accede to this proposition. In *Jones v. United States*, supra, the suit was upon a postmaster's bond, and the defense was rested on the federal statute, controlling the subject, requiring the Postmaster-General upon the appointment of a postmaster to take from him a bond, conditioned for the faithful discharge of all his duties, etc., the statute providing, however, that if default should be made by the postmaster at any time, and the Postmaster-General should fail to institute suit against such postmaster and said sureties for two years from and after such default, then and in that case the sureties should not be liable to the United States, nor should suit be brought against them. *Jones* was postmaster from 1830 to August, 1839, during which time a running account was kept up with him at the Postoffice Department, with only one rest, namely, in August, 1836, when the account was added up and a balance transferred to a new account. The account, barring the balance column, was very like the account sued on in this case. The defendant contended there, however, that though no quarterly balances were struck, yet an analysis of the account would show that the postmaster was in default continuously.

Affirming the trial court, and the proposition of the district attorney, and denying the counter proposition of the defendant's counsel in instructions given and refused, the federal Supreme Court held, that all payments made by the postmaster to the general post-office, after the execution of his official bond, and subsequently to any default at the end of a quarter, without any direction by him or by the Postmaster-General as to the application of said payments, should be applied in the first instance to extinguish each successive default in the order in which it fell due; and if, by such application of said payments, the jury should believe from the evidence that all of the defaults which occurred two years before the institution of the suit were extinguished within two years after the same were respectively committed, that the federal statute limiting suits against

sureties to two years after the default of the principal had no application to the case, and could not affect in any degree the right of the government to recover in the action.

But assuming that the entries in the balance column of the bank's ledger evinced some intention to apply the deposits as claimed by defendant, is the bank, or its special receiver, concluded thereby? As already noted, no balances seem ever to have been struck in the account, or in defendant's pass book, until after the failure of the bank, when the account was audited, balance struck, and the book returned showing the overdraft sued for. In *Jones v. United States*, supra, the court reviews the early English cases, in which the decisions were conflicting, as to whether the creditor's right of election was confined to the exact time of payment, or whether, in the absence of direction of the debtor, he might afterwards make such application, and if so at what time. The decision of Sir William Grant, in *Clayton's Case*, 1 Merivale, 604 et seq., is referred to, quoted from, and a remark in the opinion noted, sometimes relied on as authority, that the creditor is limited in his right of application thereof to the time of the payment.

Combating that suggestion, however, the court, in terms applicable to the case here, says:

"Later decisions in the English courts would seem to be wholly irreconcilable with the remarks of Sir William Grant in *Clayton's Case*. Thus, in *Simpson v. Ingham*, decided in 1823, and reported in 2 Barn. & Cress. 65 Bayley, Justice, speaking of the right of creditors to appropriate payments, uses this language: 'It has been insisted, that, at that period of time, they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering the account; but entries made by a man for his own private purposes are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time, he has the right to apply the payments as he thinks fit.' Holroyd, Justice, in the same case, says: 'The persons paying the money not having made any direct application of it, the right of making such application devolved on the receivers; and if they have done no act which can be considered as such an application, it is equally clear, that, although they did not apply it at the moment of payment, they would have the right to make the application at a subsequent period. The question therefore is, whether, from any entry in the books, there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now, these entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books shows only that the idea of so applying the payment had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect.' Still later (in 1834), in the

case of *Philpot v. Jones* (2 Adolph. & Ellis, 41), Denman, Chief Justice, says: 'The defendant made no application of that payment; the plaintiff therefore may elect at any time to appropriate it to this part of his demand.' And so Taunton, Justice, in the same case: 'Here the £17 were paid without any application to the particular items of the account. The plaintiff then might apply that payment to the items in question; and he was not bound to tell the defendant at the time that he made such application; he might make it at any time before the case came under the consideration of the jury.' In *Smith v. Wigler & Turncliffe* (8 Moore & Scott, 175), Tindall, Chief Justice, said that the creditor must make the appropriation at the time the money comes into his hands. Yet, in *Mills v. Fowkes* (5 Bingham's New Cases, 455), the same Chief Justice said, that, in conformity with the rule in *Simpson v. Ingham*, the creditor may make the application at any time before action brought. Bosanquet, Justice, said, in the same case, that the receiver might appropriate the payment, if the debtor had not, at any time before action commenced; and Colman, Justice, that, notwithstanding the doubt expressed by the Master of the Rolls in *Clayton's Case*, the more correct view seemed to be, 'that the creditor is not limited in point of time.'

"In the case of *The Mayor of Alexandria v. Patten*, reported in 4 Cranch, 320 [2 L. Ed. 633], Chief Justice Marshall said, in pronouncing the decision: 'It is a clear principle of law, that a person owing money on two several accounts, as upon a bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make the election immediately. After having made it, he is bound by it; but until he makes it, he is free to credit either the bond or the simple contract.'"

See, also, 1 Am. Lead. Cases (Hare & Wallace, 5th Ed.) 844 et seq., for a full review of the English and American cases on the subject, and affirming the right of a creditor, unless he has been concluded or estopped by his acts and conduct, as pointed out in *Jones v. United States*, supra, to make the application at any time before suit brought.

Clayton's Case, like the case at bar, involved transactions between banker and customer. The actual point decided, and applicable to banker and customer, was, that where a current account is kept by a bank, and communicated to the customer, in the absence of any specific appropriation by the parties, the payments are appropriated according to the priority in order of the entries on one side and on the other of the account, and that until the account is communicated to the customer the bank continues to have the option of applying the several payments as it sees fit, but after communication by means of a pass-book or otherwise, the bank cannot recede from its mode of stating the account to its customers.

In the recent case of *Deeley v. Lloyd's Bank* [1912] A. C. 756, a case involving similar transactions between banker and customer, the customer had executed a mortgage to secure to the bank an overdraft on his current account limited to twenty-five hundred pounds, and afterwards a second mortgage was executed to a third person, subject to

the first, to secure another sum of money, notice of which was given to the bank on the day of its execution. Thereafter they continued the account as one unbroken account, instead of opening a fresh account. The customer continued to make deposits or payments into his account, which, if applied according to the rule in Clayton's Case, would have paid off the moneys due to the bank, at the date of the second mortgage, by a certain time. On these and other facts involved in the case it was decided, that the payments made by the customer had fully discharged the debt or overdraft existing at the time of the second mortgage. In *Stone Co. v. Rich*, 160 N. C. 161, 75 S. E. 1077, Ann. Cas. 1914C, 244, it was held, among other things, that the mere entry on the books of the debtor, owing both a secured and unsecured debt to the creditor, to whom he makes payment, is not sufficient, at law, to require the application of such payment to either debt in particular. See, also, note to this case, citing numerous decisions. In *Van Rensselaer's Ex'r v. Roberts*, 5 Denio (N. Y.) 470, it is decided that if one be indebted individually and also jointly with another to the same creditor, and make a general payment, the creditor may apply it to either account which he chooses and that he might apply it to the joint account though he has given the party making the payment a receipt as for money paid him, and in which the name of the other joint debtor is not mentioned.

On these and many other authorities that might be cited we are of opinion that defendant has failed to sustain his plea, and our conclusion is to affirm the judgment.

(76 W. Va. 322)

BAILEY v. GOLLEHON (No. 2815.)

(Supreme Court of Appeals of West Virginia.
May 25, 1915.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION ⇨71—PROOF OF PROBABLE CAUSE — PROVINCE OF COURT—VERDICT.

If, in an action for malicious prosecution, sufficient facts to constitute probable cause for institution of the criminal proceedings are clearly established by admissions or uncontradicted evidence, or both, it is the province of the court to deny right of recovery by direction of a verdict for the defendant, or the setting aside of a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 160-167; Dec. Dig. ⇨71.]

2. MALICIOUS PROSECUTION ⇨16 — BURDEN OF PROOF—MALICE—LACK OF PROBABLE CAUSE.

To warrant recovery in such an action, the plaintiff must establish both malice and lack of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 19-22, 59; Dec. Dig. ⇨16.]

3. MALICIOUS PROSECUTION ⇨26—DEFENSE —PROBABLE CAUSE—EXISTENCE OF EXPRESS MALICE.

If there was probable cause, the existence of express malice is immaterial.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 59; Dec. Dig. ⇨26.]

4. TRIAL ⇨296—INSTRUCTIONS—CURE OF ERROR.

An erroneous instruction relating to an indecisive phase of the main issue in a case, not binding as to such issue and accompanied by others fully and clearly advising the jury of the rights of the party against whom such error was committed, is not prejudicial, and does not warrant allowance of a new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ⇨296.]

Williams, J., dissenting.

(Additional Syllabus by Editorial Staff.)

5. MALICIOUS PROSECUTION ⇨15—DEFENSE —"PROBABLE CAUSE."

"Probable cause" for instituting a prosecution is such a state of facts actually existing and known to the prosecutor personally or by information derived from others, as would in law justify the setting on foot of the prosecution, that is, such as in the judgment of the court would lead a man of ordinary caution acting conscientiously upon these actual facts to believe the person guilty.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 18; Dec. Dig. ⇨15.

For other definitions, see *Words and Phrases*, First and Second Series, *Probable Cause*.]

Error to Circuit Court, Mercer County.

Action by Charles A. Bailey against James H. Gollehon. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Harold A. Ritz, of Bluefield, for plaintiff in error. Sanders & Crockett and John Kee, all of Bluefield, for defendant in error.

POFFENBARGER, J. The judgment of which complaint is made on this writ of error rests on a verdict affirming the charge of malicious prosecution and assessing the damages at the sum of \$250. Rulings on instructions, the motion to set aside the verdict, and the admission and rejection of evidence constitute the grounds of the principal assignments of error.

The plaintiff in error, a justice of the peace, accused Bailey of having abstracted from the pocket of Harman, a constable, a package of papers, consisting of executions and other writs, and put it in a stove and caused it to be consumed by fire, while they and others were assembled in the justice's office. Soon afterward, he signed and swore to a complaint upon which a warrant for Bailey's arrest was issued. On the hearing following his arrest, Bailey was discharged by the justice before whom he was taken. Then Gollehon appeared before the grand jury and caused him to be indicted for the alleged abstraction and burning of the pa-

pers. The court having quashed this indictment, the issue of fact tendered by it never was consummated or determined.

Nevertheless, the particular prosecution terminated with this action of the court. No further steps could thereafter be taken in it. Any further proceeding would have involved the finding of a new indictment. Not a vestige of the prosecution in which the judgment took place remained. As the purpose of the rule requiring termination of the prosecution as a condition precedent to the action for damages is avoidance of the pendency of two inconsistent and contradictory proceedings at the same time, not a test of the guilt of the accused, it is obvious that this action was not prematurely instituted. *Waldron v. Sperry*, 53 W. Va. 116, 44 S. E. 283; *Harper v. Harper*, 49 W. Va. 661, 39 S. E. 661; *Jones v. Finch*, 84 Va. 207, 4 S. E. 342.

As to many of the facts out of which the criminal prosecution and this action arose, there is no controversy. Gollehon, Harman, and H. C. Peery, an execution debtor, were all together in Gollehon's office when Bailey came in to see Harman about some matter. Finding him engaged with Peery in the settlement of the amount due on two executions, Harman sitting at a table and Peery standing just to his right, he took a seat behind them. On the opposite side of the table from Harman and Peery sat Gollehon. Peery paid off one of the executions with his check, but some question arose as to the other one, which necessitated the calling in of C. A. Bradshaw, manager of a company in whose favor the execution was. Near the time of the arrival of Bradshaw, Bailey went out, calling Harman to the door or just outside, for a conversation, consisting of a question and an answer. Immediately afterwards, one Robert E. Moore came into the office. For the purposes of his settlement with Peery, Harman had taken out of the bunch of papers he had the two executions against him and replaced the package in his pocket. When he went to the door or just outside with Bailey, he left the unsatisfied execution against Peery lying on the table. On his return he picked it up and reached for the package of papers in which he intended to replace it and found it was gone. Thereupon he announced the loss and Gollehon told him he had seen Bailey take the papers from his pocket and place them in his own, but that he had said nothing about it, supposing they had been taken in a spirit of playfulness and as a prank and would be returned. Harman immediately sought Bailey and communicated to him Gollehon's statement. Thereupon he denied the charge, and Harman returned to the office and informed Gollehon of the denial. Gollehon repeated his assertion, adding that he had seen Bailey open the stove door, and suggested that he might have put the papers in the stove. Opening the stove, he found the embers of the bunch of papers

and pointed them out to Harman, Bradshaw, and Moore, after which he removed and preserved them. Harman having gone out again and communicated to Bailey Gollehon's repetition of the charge, Bailey returned to the office and emphatically denied it. Gollehon reiterated it, telling Bailey he had seen him take the papers from Harman's pocket. After a somewhat heated altercation between them, Gollehon called up the assistant prosecuting attorney to whom he made a statement of the transaction by telephone. Later this official came to Gollehon's office, and, after having discussed the matter with him prepared a warrant for the arrest of Bailey, and directed Gollehon to go to Chambers, another justice of the county, and have it issued and placed in the hands of a constable, after having made a complaint in accordance with the charge set forth in it. This having been done and Bailey notified of the issuance of the warrant, he voluntarily came to the office of the justice, where, on a hearing, he was discharged. This occurred on Saturday afternoon, and on the following Monday a grand jury of the county sat at Princeton, the county seat, situate several miles from the city of Bluefield in which Gollehon's office was. Near the adjournment of the grand jury, Gollehon, without having been summoned as witness, but with the permission and consent of the assistant prosecuting attorney, appeared and testified against Bailey and so caused an indictment to be made.

Both proceedings, the one before the justice and the one before the grand jury, had the sanction of the assistant prosecuting attorney. After having heard Gollehon's statement, he with another attorney examined the statutes for the purpose of ascertaining whether or not, if the statement was true, an offense had been committed, came to the conclusion that it had and so advised him. On Bailey's arraignment before the justice, he appeared on behalf of the state, examined the witnesses, and insisted upon a commitment. Just before the adjournment of the grand jury, he met Gollehon and informed him it was about to adjourn and said, "Let's go up now and give your evidence in before the grand jury." After they reached the court house, he directed the clerk to issue a ticket for Gollehon's admission to the grand jury room, explaining that he was appearing without a summons. The summons or subpoena was omitted on account of lack of time. Though the prosecuting witness thus proceeded with the assent of the prosecuting attorney, and under his opinion as to the legal effect of the evidence, he was not specifically directed or required to make the complaint or to present the matter to the grand jury. After Bailey's discharge by the justice, Gollehon took away from the justice's office the embers of the package of papers, for use in the presentation of the case to the grand jury. Nevertheless he says he was at

Princeton on the occasion of his visit to the grand jury, for the purpose of making abstracts of title and not merely to indict Bailey.

Bailey and Peery say there were two or more other men in the office when they entered, but that they left in a few minutes. Peery says they were there on some business relating to a deed. Their testimony as to the positions they occupied while in the room varies slightly from that of Gollehon and Harman. Bailey says Peery stood between him and Harman so that, to get the papers, it would have been necessary for him to reach around Peery, but he admits they were within his reach. Peery says Bailey could not have taken them without his knowledge. Both Gollehon and Harman say Peery stood by the side of Harman and rested his hands on the table, while Harman computed the amount due on the executions and then turned from it and placed one foot on a bench at the wall so as to enable him to hold his checkbook on his knee while writing the check. This he denies, saying he remained in his original standing position while writing the check.

[4] Notwithstanding slight inaccuracies in some of the instructions, they cannot be regarded as having been prejudicial to the defendant, when considered collectively and read as a whole. Though plaintiff's instruction No. 2 erroneously told the jury the consultation with the assistant prosecuting attorney was no defense, unless they believed from the evidence the plaintiff had taken the executions, thus seemingly making the issue turn upon the guilt or innocence of Bailey, it is to be observed that it dealt only with a single phase of the case, the legal effect of the consultation, not the entire issue. In its general and more vital aspects, the case was submitted by plaintiff's instructions Nos. 1 and 4, defining probable cause and malice, and telling the jury his right of recovery depended upon the lack of probable cause and existence of malice. In addition to these, the court gave the jury, at the instance of the defendant, numerous instructions, advising them fully and specifically of all his rights, and, in some instances, conceding to him much more than was due him, particularly in respect of the effect of his consultation with the prosecuting attorney, which is not a complete defense, but only a circumstance bearing on the question of motive, entitled to such weight as the jury may see fit to give it. In view of their liberality and the correct presentation of the issue found in plaintiff's instruction No. 1, the jury could not have been misled by the inaccuracy of his instruction No. 2. What the court likely intended to say was that, in so far as consultation with the law officer constituted a defense, its probative force was destroyed by the innocence of the accused, not that his innocence justified a verdict for him, and the jury no

doubt so understood it. Plaintiff's instruction No. 3, telling the jury malice could be inferred from want of probable cause is severely criticized in the argument, but it is sustained by the weight of authority as well as our decision in *Vinal v. Core*, 18 W. Va. 1, a very thoroughly and ably considered case.

Though perhaps not prejudicial, the portions of Moore's testimony, to which objection was made, should have been excluded. While introduced for the purpose of showing a possible motive on the part of Gollehon himself, for the destruction of the papers, it has no such tendency. In response to a question as to whether he had had any trouble in getting settlements of collections on executions issued by Gollehon and placed in Harman's hands, he said Gollehon's service had been very satisfactory, and that, though some of the claims had dragged along slowly, the delay had been due to the nature of the claims. This proved nothing against the defendant and was irrelevant and immaterial matter.

[1, 2] The remaining inquiry is whether the admitted and established facts make out a case of probable cause as a matter of law. In cases of this class, as in others, the province of the jury has its peculiar, established, and necessary limitations. What constitutes probable cause is a question of law for the court, when the facts, or enough of them to make it out, are undisputed or clearly established.

"To determine such a question, no matter how numerous and complicated the supposed facts may be, the court is peculiarly fitted, as it must largely depend on correct views of the law. A jury would be peculiarly unfitted to determine wisely such a question. In its nature it is a question of law and not of fact. That is, if negligence be the question, the deduction to be drawn from supposed or admitted facts is generally a question of fact for the jury; but if want of probable cause is the question, this deduction to be drawn from supposed or admitted facts is always a question of law for the court to decide." *Vinal v. Core*, 18 W. Va. 1, 37.

The public policy upon which this limitation, upon the power of the jury, in actions for malicious prosecution, rests, is forcibly and well stated by Judge Marshall, in *Farris v. Starke*, 3 B. Mon. (Ky.) 4, as follows:

"If every man who suffers by the perpetration of crime, were bound under the penalty of heavy damages, to ascertain before he commences a prosecution, that he has such evidence as will insure a conviction, few prosecutions would be set on foot, the guilty would escape while conclusive evidence was being sought for; offenses of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter. The law, therefore, protects the prosecutor * * * that is, if he has such ground as would induce a man of ordinary prudence and discretion, to believe in the guilt and to expect the conviction of the person suspected, and if he acts in good faith on such belief and expectation. The question * * * is, not whether the party was * * * guilty, * * * but whether the plaintiff had reasonable ground, from the facts known to him and" those com-

municated to him "to believe, and actually did believe" the plaintiff guilty.

[5] Probable cause for instituting a prosecution is such a state of facts actually existing and known to the prosecutor personally or by information derived from others, as would in law justify the setting on foot of the prosecution, that is, such as in the judgment of the court would lead a man of ordinary caution acting conscientiously upon these actual facts to believe the person guilty. *Vinal v. Core*, cited. Since justification of the prosecution must rest upon actual facts, the court cannot found its action, in determining whether there was probable cause, upon any that are in dispute, wherefore the province of the jury is to ascertain what the facts are, when they are dependent upon conflicting evidence. If they are all in dispute, the case is one for jury determination, and likewise if some of the facts essential to the establishment of probable cause depend upon conflicting evidence. But, if sufficient facts to constitute it are admitted or clearly established, the case is one for court determination. A verdict for the defendant may be directed, or, if a verdict for the plaintiff is found, it should be set aside.

The guilt of Bailey is not essential to the existence of probable cause. If he had been tried upon the indictment and acquitted by a jury, the verdict would raise only a rebuttable presumption of lack of justification in the prosecution, not a legal or conclusive one, and it would have been admissible only for that purpose. Nor would his innocence, in the opinion of the jury trying this case, have necessitated a verdict in his favor, for the jury might nevertheless have found the prosecutor had acted under circumstances sufficient to induce belief, on the part of a reasonable and prudent man, in the guilt of the accused. For reasons already stated, their verdict importing a finding to the contrary is not binding upon the court, if, as matter of law, such was the character of the established facts.

The batch of papers were burned in the stove. On some of the charred papers taken from it, Gollehon's handwriting, the word "execution" and the identity of one execution by the names of the parties were plainly discernible, when the coals, embers, or ashes were removed. Gollehon, Harman, Bradshaw, and Moore all testify to the fact and it is uncontradicted, unless by mere inference arising from inability to discern them at the time of the trial, after they had been necessarily disturbed more or less by handling. When Bailey came into the room, the batch of papers was in Harman's right-hand coat pocket. Gollehon and Harman swear to the fact and nobody denies it. For the purposes of his settlement with Peery, Harman took from it the two executions against the former and then placed the bunch in his pocket. Gollehon, being on the opposite side of the

table, was not within reach of the papers not in use in the settlement. Nobody pretends to have seen Harman destroy them. He took the bunch of papers from his pocket, and, having taken the two out, replaced it in his pocket, after Peery came in. When he went to the door with Bailey, he left one of the executions against Peery on the table or desk, the other one having been placed in the file of satisfied executions. Nobody says he put the package on the table within Gollehon's reach. On his return from the door, he missed it. As the charred remains thereof were subsequently found in the stove, he could not have disposed of it at the door or out of the room. If Peery could have taken the package, without Harman's knowledge, he had no motive for doing so, because he knew the executions against him were not in it. Moreover his attention was almost necessarily engaged in the settlement he was making. Bailey was the only person in the room who was clearly and undoubtedly in a position from which the package could have been taken and put in the stove, without Harman's knowledge, at the time at which it seems clearly to have been taken and burned, and, while there, he was not transacting any business.

Though a jury might have acquitted Bailey, notwithstanding all these circumstances, in view of the lack of any disclosed motive on his part for commission of the offense, they were amply sufficient, without any positive knowledge on Gollehon's part, to induce him to believe Bailey had committed it, wherefore legally he had probable cause for instituting the criminal prosecution, whether he saw the papers taken or not.

[3] This being true, it is wholly immaterial that, after the altercation between him and Bailey, animosity, bitterness, or hatred may have characterized and influenced his conduct to some extent. Proof of malice alone does not warrant recovery. To it, there must be added lack of probable cause.

Our conclusion is, therefore, that the motion to set aside the verdict should have been sustained, and a new trial awarded. Agreeably to this conclusion, the judgment will be reversed, the verdict set aside, and the case remanded.

WILLIAMS, J., dissents. See 85 S. E. 723.

(76 W. Va. 214)

KYLE v. GRIFFIN et al. (Nos. 2213, 2297.)

(Supreme Court of Appeals of West Virginia.
April 20, 1915. Rehearing Denied
June 25, 1915.)

(Syllabus by the Court.)

1. PARTNERSHIP — § 65 — DETERMINATION OF SCOPE—EXTENT OF JOINT UNDERTAKING.

The scope of a partnership is determinable by the extent of the joint enterprise or undertaking, not by the limitations the partnership

agreement imposes upon the agency of the members of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 92, 93½; Dec. Dig. ¶65.]

2. PARTNERSHIP ¶68—SCOPE—DEALINGS IN REALTY.

A partnership, having for its purpose the purchase and sale of real estate for profit, extends to such parcels not actually purchased, as were contemplated as a part of the joint undertaking, even though it was within the power of any member of the firm to prevent the purchase thereof, by withholding his approval of their character or price or terms.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101-111; Dec. Dig. ¶68.]

3. PARTNERSHIP ¶68, 96—SCOPE—DEALINGS IN LAND—SECRET PROFITS—LIABILITY OF PARTNER.

In such case, occasional expressions of unwillingness of members to purchase a given parcel, when conditions are unfavorable, do not eliminate it from the scope of the enterprise, and a member secretly purchasing and selling it, when conditions are favorable, in violation of the general agreement, may be held to an accounting for the profits, by his associates.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101-111, 144; Dec. Dig. ¶68, 96.]

4. PARTNERSHIP ¶83—COMPENSATION FOR SERVICES—RIGHTS OF PARTNER.

A member of a partnership, all the members of which are active and give time and service, is not entitled to compensation for his services, in the absence of clear proof of a special agreement therefor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 131; Dec. Dig. ¶83.]

Appeal from Circuit Court, Harrison County.

Suit by Jasper S. Kyle against Sheridan R. Griffin and others. From a decree for plaintiff, the defendant named appeals. Affirmed in part, and reversed in part, and remanded.

Davis & Davis, Smith & Jackson, John Bassel, and Homer Strosnider, all of Clarksburg, for appellant. James Edward Law and Geo. M. Hoffheimer, both of Clarksburg, for appellee.

POFFENBARGER, J. Griffin has appealed from a decree enforcing Kyle's claim to right of participation in the profits arising from the sale of certain areas of coal, on the theory of a partnership relation between them, and Kyle cross-assigns error in a later decree in the cause, allowing Griffin a commission of \$5 an acre for his services and expenses in and about the sale of other areas of coal in which both were equally interested.

Sheridan R. Griffin, Jasper S. Kyle, and A. B. Van Osten were equal and joint owners of numerous tracts of coal, making a consolidated area of 4,823.66 acres in the counties of Doddridge and Wetzel, which they had purchased for resale. These purchases began in June or July, 1902, and continued until late in the year 1905. On the 27th day of November, 1905, they owned about 4,000 acres, and then executed an option thereon to L. C. Wyer, which seems to have included an addi-

tional 500 acres they had not yet acquired. On the 12th day of December, 1905, this option was renewed or extended and enlarged so as to cover 5,000 acres; the parties agreeing to obtain and convey additional coal, in case the option should result in a sale. With the assistance of Wyer, these tracts were sold to William F. Baird in January, March, and May, 1906, at a large profit.

Being men of limited means, these parties carried on their operations under considerable embarrassment. For the most part, the money with which they paid for the coal was borrowed in various forms, and they had some difficulty in finding enough to take all their enterprise contemplated. This circumstance seems to have brought about the peculiar relations respecting other coal out of which the present controversy has arisen. There were coal areas known as the Dewhurst, Hardman, and Daniel Bates tracts, containing, respectively, 3,066.25, 1,122.15, and 347.9 acres, which, by reason of their location, could have been included in the enterprise and handled advantageously with the 4,823.66 acres Griffin, Kyle, and Van Osten succeeded in consolidating and selling as aforesaid. The Dewhurst, Hardman, and Bates coal, with some additional tracts, making in the aggregate about 5,500 acres, were purchased by Griffin and one Michael A. Brast. On the same day on which Griffin, Kyle, and Van Osten gave Wyer their first option, Griffin and Brast optioned to him 5,500 acres of coal, including the Dewhurst, Hardman, and Bates tracts. Three days later, Griffin and Brast bought the Dewhurst coal, and near that date the Hardman and Bates coal, all of which, together with additional tracts, they sold, in the year 1906, to William F. Baird, at a very considerable profit, and executed conveyances thereof. Claiming the purchase of the Dewhurst, Hardman, and Bates coal had been contemplated by the alleged copartnership, and that Griffin's purchases thereof, in connection with Brast, were secret and legally fraudulent as to him and Van Osten, Kyle claims right of participation in one-half of the profits he realized from these areas and demands an accounting respecting the same, as well as the profits arising from the sale of the 4,823.66 acres.

Griffin denies the existence of any partnership relation among the parties, saying they were mere tenants in common of the numerous tracts of coal, constituting the boundary of 4,823.66 acres. If this contention cannot be sustained, he insists there was no general partnership for the purchase and resale of coal, but only a limited one embracing the land actually purchased and resold by them. These positions are based largely upon the terms of the following instrument:

"This memorandum of agreement, by and between Sheridan R. Griffin, Jasper S. Kyle, and A. B. Van Osten, all of Clarksburg, W. Va.,

certifies that all of a certain lot of coal and coal privileges, bought in Doddridge county, W. Va., through the agency of J. F. Dye, Luther E. Kyle, and a few pieces from Chas. S. Hornor: the deeds for the said several tracts, and for individual tracts, are being taken in the name of Sheridan R. Griffin, trustee, for the use and benefit of said Sheridan R. Griffin, Jasper S. Kyle, and A. B. Van Osten; and it is agreed by each of them that they will bear equally the cost of purchasing said coal and the contingent expenses incurred in taking up said coal and taking deeds, etc., for same, and that they, each of them, and after them their heirs and assigns, are to hold an equal interest in the property so purchased, or any profits arising from any sale of said coal property. The aggregate amount of said coal properties, so bought and so deeded, is about three thousand acres (3,000).

"Witness the following signatures and seals this 20th day of December, 1902.

"Sheridan R. Griffin. [Seal.]
 "Jasper S. Kyle. [Seal.]
 "A. B. Van Osten. [Seal.]"

Reading this paper in connection with extraneous evidence disclosing the circumstances under which it was executed, the previous and subsequent situation and conduct of the parties and their purposes, the appellee insists that it does not define the relation of the parties so as to limit it to a tenancy in common or a limited partnership, excluding the Dewhurst and other tracts. It was executed, as its date shows, December 20, 1902, several months after the commencement of the operations to which it relates. At that time the parties had acquired about 3,000 acres of coal. Between that date and the date of the option given to Wyer, they obtained an additional 1,000 acres, which confessedly went in with the 3,000 and was disposed of upon the same basis. Still later there was an addition of more than 800 acres. Kyle's right to participate in the profits from these additional tracts is not denied. The circumstances constituting the inducement to the preparation and the execution of the memorandum are also relied upon. Conveyances of the 3,000 acres mentioned in the agreement had been taken generally in the name of Griffin, trustee, and he had become critically ill of typhoid fever. As the conveyances did not disclose the names of the beneficiaries of the trust, Griffin's associates naturally became solicitous about the result of his illness. His death without written evidence of the status of the property they had jointly acquired might have seriously embarrassed them, since the law would have closed their mouths as to personal transactions with him. Therefore they deemed it highly important to have an agreement or memorandum in writing, setting forth their interests in the coal. This memorandum was prepared by Kyle, a layman; and, read in the light of the circumstances under which it was drafted and its purpose, his counsel think it is to be regarded as an agreement within the alleged copartnership, rather than a writing defining, in all respects, the relation of the parties and its scope.

Support of the view of a mere tenancy in common and limited partnership is sought in

the method by which purchases of coal were made. None of the parties possessed or exercised the right individually to make binding purchases for the association. No tract of coal was taken in otherwise than upon the unanimous approval by the parties, of its location, character, and price. The association maintained no office known as a firm office. Mr. Kyle had an office in which the most of their business was transacted, but it seems to have been known as his. They maintained no firm bank account. No firm books were kept. Each party kept a memorandum of the money advanced by him and of his own transactions pertaining to purchases. Considerable amounts of cash were advanced to the farmers from whom the coal was purchased, but much of it was obtained from banks on the individual and joint notes of the parties. The purchase money was only partially paid in cash. Large indebtedness for deferred payments was carried. In the consummation of the sale to Baird, an effort was made to obtain sufficient cash to pay the original purchase prices of the coal, but this was not accomplished. In lieu thereof, Baird's notes were taken and used at the banks as collateral in the procurement of the greater part of the money necessary to discharge the obligations to the landowners. The profits on the sales were represented by Baird's notes, secured by vendor's liens, which seem to have been divided among the parties. At the time of the institution of this suit, there had been no settlement or adjustment of the interests and rights of the parties, and all admit the necessity of a settlement. In other words, full and complete adjustment of expenses and distribution of profits had not been made during the progress of the business or on the completion of the sales.

The inception of this enterprise was the association of Griffin and Kyle in the procurement of certain coal interests held in the names of J. F. Dye, Luther E. Kyle, and Chas. S. Hornor, in Doddridge county. Immediately after they became so interested, Van Osten was induced to join them. The interests so obtained embraced the coal in numerous tracts of land, either lying contiguous to one another or so related as to be susceptible of easy consolidation into what is denominated a coal field. From the date of this beginning (June or July, 1902) until the latter part of the year 1905, the work of acquiring and perfecting the titles to these parcels of coal and some others was diligently and successfully carried on. As shown by the agreement herein quoted, they had acquired, on the 20th day of December, 1902, about 3,000 acres. At the date of the execution of the option to Wyer, they had gotten in about 4,000 acres. From that time until the closing of the option and consummation of the sale, they had gotten together an additional 800 acres.

During this period, Griffin was interested

in a number of other coal transactions, in which Kyle and Van Osten do not claim to have been concerned, but most of these were in other locations and the lands unrelated in any way to the consolidation enterprise in Doddridge county. All three, however, were interested in the purchase and sale to C. W. Lynch and others of 419.89 acres, lying east of the lands they sold to Baird. The options on these lands had been acquired by Kyle and one Elliott. These holdings were turned over to the alleged partnership, and a profit of \$500 thereon allowed to Elliott. Griffin relies upon this circumstance as proof of Kyle's separate transactions in coal within the life of the copartnership. Kyle got \$50 from Elliott out of this transaction, which he claims was a mere allowance for expenses in the procurement of the options, and denies his association with Elliott in the transaction as a separate or hostile one. Elliott is indefinite as to their exact relation and Kyle's motive, but says he and Kyle procured and held the options together. Whatever their true relation was, all of Kyle's interest, except the \$50, went into the joint enterprise. Before the association of these parties, Griffin had consolidated a considerable area of coal which he sold to McDonald and Cray. Portions of this coal had been obtained from H. L. Smith, and, in that transaction, he claims to have purchased 139 acres, which was subsequently conveyed to him and offered to the alleged copartnership. He says Kyle and Van Osten both declined to take this tract in. It was subsequently sold and conveyed to Pritchard. Kyle assisted in the sale thereof and received \$369.67 out of the proceeds, which he says was on account of his share of the profits. Griffin says he employed Kyle to make the sale, and this payment was made to him by way of compensation for services only. This tract, though in Doddridge or Wetzel county, and not far from the Dye, Luther Kyle, and Hornor lands, did not adjoin them. Griffin also obtained some other small tracts still farther away from the association nucleus, the title to which he still holds. Kyle insists that these tracts were partnership property and produces some memoranda in which they are so designated. At one time a charter for a corporation through which the parties expected to handle all of these coal lands was procured, and the draft of a deed for the conveyance thereof to the corporation, showing the inclusion of some of these outside tracts, is produced by Kyle. Griffin admits the preparation of such a deed, but denies any direction on his part to include said tracts. The corporation was never organized nor the deed executed.

The area which Kyle seems to have considered as the nucleus of the coal field contemplated by the enterprise lay a short distance from a branch of the Short Line Railroad, and between it and said branch railroad were the Dewhurst lands and two small

tracts known as the Carrell and Carlin lands. The locations of the several tracts known as the Hardman group and the Bates tract are not very well defined, but they seem to have been contiguous to the Dewhurst tract or very near it. All of these lands seem to be in Wetzel county. In a suit pending in the circuit court of the county, a sale of the Dewhurst coal had been decreed and S. Bruce Hall appointed a commissioner to make it. Early in the year 1903 or 1904, as to which the evidence is somewhat conflicting, Griffin, Kyle, and Van Osten went to New Martinsville and made inquiries concerning the Dewhurst coal. If this visit was made in 1904, Kyle had had some previous correspondence with Mr. Hall about the coal. On January 11, 1904, he wrote Hall a letter concerning it, and on January 18, 1904, received a reply. Kyle says a bid of \$8 an acre was made on the coal at that time, but this is denied by Griffin, and Van Osten does not remember it, if it occurred. On this occasion, they came in contact with Mr. Brast, and, according to the testimony of Kyle, an arrangement was made with him to keep the alleged partners advised concerning the status of the Dewhurst coal. Griffin says the primary object of the visit to New Martinsville was a loan from one of the banks at that place, but Kyle and Van Osten say they had in view the coal as well as the loan. Brast says they inquired about the coal and wanted an option on it, but were advised by Hall that it could not be optioned. All the parties to this controversy were undoubtedly impressed with the advantage of this property in connection with their holdings, but they seem to have been financially embarrassed. The loan sought at New Martinsville failed. There is evidence tending to show that, on a tracing and blueprint of the coal purchased and regarded as desirable, the Dewhurst, Hardman, and Bates tracts were included within a red line drawn around these holdings on the tracing and blueprint. Some of these papers were put in evidence in this cause. After the visit to New Martinsville, Kyle and Van Osten do not seem to have made any further inquiry concerning the Dewhurst coal, until about the time of the execution of the option to Wyer, or later. In the fall of 1904, Griffin, Kyle, and Van Osten had the Hardman group of coal under discussion, and later Kyle says he talked with Hardman about it and made a tentative verbal agreement with him respecting it. The Bates tract had been under discussion; but, when Kyle endeavored to obtain it, he found Brast had it under option.

Griffin and Brast purchased the Dewhurst tract November 30, 1905, and obtained a deed for it December 21, 1905. The Hardman group and the Bates tract seem to have been purchased later. Brast purchased these lands in his name, but Griffin contributed to the purchase money, and an undivided half interest therein was afterward conveyed to

him by Brast. Griffin says he first resolved to purchase the Dewhurst tract some time in the summer of 1905, and denies any intention on his part, at any previous time, to buy it. He insists that, on numerous occasions, Kyle and Van Osten were requested to join him in the purchase thereof, and that they declined to do so. This is emphatically denied by Kyle. Van Osten considered the Dewhurst coal desirable, but felt that his holdings were as large as he cared to make them, in the absence of any prospect of immediate sale. Virgil L. Highland, testifies that Van Osten on one or more occasions expressed his unwillingness to enter upon the purchase of the Dewhurst coal, when advised by him to do so. Van Osten admits that, at the time of the execution of the option to Wyer, he had given up the idea of buying more coal, but he says he has no recollection of any request on the part of Griffin, after the visit to New Martinsville, to take any interest in the Dewhurst coal. He says Griffin was anxious to obtain more coal, and had so expressed himself, and that he (Van Osten) had been unwilling to take more, but he does not recall any mention of the Dewhurst coal, in that connection. He further says, however, that at the time of the execution of the option to Wyer, or immediately afterwards, he did want an interest in the Dewhurst tract, and so expressed himself to Kyle and induced him to write Hall a letter of inquiry. He also states very positively that Griffin never intimated to him, at any time, his purpose to purchase that coal, and denies knowledge of his association with Brast in the ownership thereof, until some time after it had been accomplished. Brast, on cross-examination, was unwilling to swear he had told Kyle or Van Osten that he and Griffin intended to purchase the Dewhurst tract, but he insists that he informed Kyle some time after the purchase was made, and while the sales to Baird were in process of consummation. Neither Wyer nor Baird had any conversation with Kyle until about the date of the execution of the option to Wyer, and Baird likely had none for some time after that date. Both say Kyle admitted to them his knowledge of Griffin's relation with Brast, and expressed himself as being pleased with the result of the entire transaction. All of this Kyle most emphatically denies.

According to the testimony of Kyle and Van Osten, measurably corroborated by documentary evidence and admissions of Griffin, some of the tracts of coal obtained by Brast and conveyed to Baird by him and Griffin would have been acquired and put in under the 5,000-acre option, but for Brast's activity in the field, after the execution of that option. Griffin denies this, saying an imaginary line of separation between Brast's operations and those of Kyle and Van Osten was established, but the evidence of this is rather

slight. Kyle and Van Osten both testify to their effort to obtain tracts Brast acquired. While they had no option on the Hardman group, Kyle says he had a tentative verbal agreement with Hardman under which they were to be taken over, upon the presentation of an opportunity for sale thereof.

That Kyle and Van Osten desired all the coal they could safely handle is beyond doubt, and it is equally certain they wanted the Dewhurst, Hardman, and Bates coal, if they could handle it. The embarrassments were lack of money to obtain and carry these tracts and improbability of an early sale thereof at a profit. Nor can their special interest in the locality in which these tracts were be denied. In conjunction with Griffin, they were pursuing the method usually adopted for profitable dealing in coal in place, consolidation of as large an area as can be carried and sold. Any contiguous marketable coal is ordinarily treated as being within the scope of such an undertaking, provided the financial ability of the purchaser is sufficient to carry it, or his opportunity for a quick sale of it justifies the purchase. Not until the execution of the Wyer option did these parties see any prospect of a sale, and, until that time, they were carrying about as much coal as their money and credit justified, and perhaps more. Under such circumstances, the disinclination of Kyle and Van Osten to enter upon a \$25,000 to \$45,000 undertaking, such as the purchase of the Dewhurst coal, was perfectly natural and accordant with the usual practice. None of the parties thought it safe to buy the Dewhurst coal at \$8 in 1903 or 1904. Neither Brast nor Griffin ventured then. Through those years and down to the latter part of 1905, Griffin, Kyle, and Van Osten were carrying a heavy load. Purchase-money notes were falling due and could not be paid. Obligations in the banks were embarrassing also. The interest charge was becoming burdensome. The silver lining to this dark cloud was the Wyer option. It immediately aroused Brast and Griffin to action. On the third day after its execution, they bought the Dewhurst coal, and Brast became active in the procurement of the Hardman, Bates, and other tracts. Kyle and Van Osten, on the appearance of Wyer, were willing to option 500 acres more coal than they had, and so conditionally bind themselves to obtain and convey it. On the extension thereof, they willingly added another 500 acres they did not then have. Had they been advised that Wyer wanted or would take an option for 5,500 acres more, including the Dewhurst, Hardman, and Bates tracts, they might have joined in that. There is no pretense that any such a proposition was then and there made to them. That 5,500-acre option bore the same date as the 4,500-acre one, but was not executed in the presence of Kyle or Van Osten, and nobody says either of them had notice of it. Just

when they obtained knowledge of it is not disclosed. Though neither Griffin nor Brast then owned the Dewhurst coal, this 5,500-acre option was executed by Brast alone. He then had an option of some sort on it, and, on the same day, assigned a one-half interest therein to Griffin. Three days later, they bought it. Then Brast took over the other tracts and subsequently assigned or conveyed one-half thereof to Griffin. Van Osten says he was anxious to put in all the coal he could, but later became fearful that Baird would not be able to pay for all of it. Evidently this fear does not relate to the date of the option. He knew nothing of Baird at that time. They were then dealing with Wyer only. It relates to the subsequent delivery of coal after acceptance of the option. This is obviously true also of the testimony concerning the trepidation caused by Baird's inability to pay the amount of cash contemplated and to pay some of the purchase-money notes at maturity.

The option was accepted December 12, 1905, and then the time for completion was extended to March 25, 1906. Griffin, Kyle, and Van Osten executed their first deed January 20, 1906, the next March 20, 1906, another May 21, 1906, and another May 25, 1906. Brast and Griffin conveyed the Dewhurst tract to Baird January 25, 1906, only five days after the first conveyance by Griffin, Kyle, and Van Osten. No doubt the silver lining began to fade on the failure of Baird to produce the much desired and long hoped for cash when deeds were tendered, and the clouds lowered again on the receipt of notices of the protest of his unsecured notes, some months later. Naturally Kyle then figuratively "sweat blood" agreeably to his imputed admissions, and Griffin's sleep failed him. The truth of the testimony to these admissions of discomfort and gloom is directly in the line of probability. But they were periodical. Optimism and pessimism alternated throughout the greater portion of the operations involved.

The established periods of adversity in which discouragement overtook Kyle and Van Osten detract very much from the probative force of the declarations imputed to them. Though made, as claimed, they do not prove these two men would have objected to the purchase of the tracts in question at the time Griffin joined Brast in taking them over, if they had possessed all the knowledge and information Griffin had. Wyer was his brother-in-law. He likely knew whether Wyer had a purchaser in view when he took the options. They spent most of the evening of the crucial December 12, 1905, together at a hotel in Clarksburg, while Kyle and Van Osten remained at the office in suspense and comparative ignorance. Wyer, for some reason, did not want to visit the office. He thinks Baird was with him at the hotel that night, and no doubt he was. He had, on or

about December 1st, given Baird a single option on 10,000 acres to be filled from his two options, one from Griffin, Kyle, and Van Osten for 4,500 acres, and the other from Griffin and Brast for 5,500 acres. Kyle says Griffin and Brast came to his office that evening, and he spoke to the latter about putting in the Dewhurst coal, and, on Brast's intimation of willingness to do so, Griffin reminded him of an engagement at the hotel, and they immediately left. Both deny this, but it seems to accord with their established disinclination to let Kyle and Van Osten know what was transpiring at the hotel. No reason for Wyer's alleged unwillingness to visit the office is perceived, and none has been assigned. His refusal to do so constitutes Griffin's sole justification for remaining at the hotel during the greater part of the evening.

Griffin's alleged invitations to Kyle and Van Osten to join him in the purchase of the coal in question are lacking in specifications of time, place, and circumstances. They are general and indefinite. If given, they may have been timed with reference to the moods of his associates. There is no pretense that they were given in December, 1905, or January, 1906, when conditions favored their acceptance. Nor, indeed, are any specific times given. His protestation of lack of a partnership relation, imposing duty to give his associates an opportunity to participate with him in the purchase of these tracts, does not harmonize with his tender of the detached Smith tract of 139 acres and some others which he says they declined to accept. Though not contiguous to the Dye, Kyle, and Hornor nucleus, they were in the same locality, wherefore he seems to have felt it his duty to offer to put them into the joint undertaking. The Dewhurst land was more directly in the line of the joint effort and more desirable territory, but he deemed himself under no obligation, at the time of his purchase thereof, to give his associates an opportunity to join in it.

[1-3] This analysis of the evidence brings the case clearly within the well-settled principles declared and applied in *Krebs v. Blankenship*, 80 S. E. 948, *Thorne v. Brown*, 63 W. Va. 603, 60 S. E. 614, and *McKinley v. Lynch*, 58 W. Va. 44, 51 S. E. 4, provided the joint enterprise was not limited to coal actually purchased, and did not extend to or include coal contemplated but not purchased, nor establish a relation of confidence among the parties, imposing duty to make full disclosure of advantageous information and opportunities.

That the purchase and sale of real estate is proper subject-matter for a copartnership is not an open question. It is well settled in this state as elsewhere. But it is said there could have been no partnership here, because the members of the association had no power separately and individually to make binding contracts of purchase or sale for and

on its behalf. In other words, the contention is that no coal became partnership coal, until after it was bought by the joint and unanimous action of the members, wherefore no duty could have been imposed upon any member, toward his associates, respecting any coal not actually purchased; and *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169, is cited and relied upon as sustaining the proposition. The facts in that case were vitally different from those involved here. *Latta* was a member of a firm of brokers, not at all engaged in the purchase and sale of real estate on their own account. He engaged with *Stearns* in some purchases and sales of real estate which the firm handled for them as agents, and on which it took its commissions. Afterwards the other members of the firm endeavored to compel him to account for the profits he had derived from these transactions. In the bill they alleged an agreement among the members of the firm, forbidding any of them from engaging in the business of buying and selling any real estate, on their own account or with any other person or persons, without first having explained the proposed transaction to the firm and given it an opportunity to take part in it. This allegation was denied and not established by proof. Nevertheless the court treated it as having been established, for the purpose of a test of the rights of the parties under it, if it had been. Defining it as being only an agreement to furnish information, the court held it did not enlarge the scope of the partnership. Mr. Justice Jackson, delivering the opinion, said:

"It would be a perversion of language and a confusion of ideas to treat such a stipulation, if it were clearly established, as creating a partnership in future options to buy what did not already, by the terms of the copartnership, come within the scope and character of the partnership business."

He further said the stipulation "at most could only be regarded as an agreement for a future partnership in respect to such properties as might be specially selected for speculation." But all of this must be read in the light of the facts. The firm had never bought and sold any real estate on its own account, and there was no agreement among the members that it should do so. The stipulation set up provided no more than that any member desiring to engage in that business should bring his opportunity or scheme to the attention of the firm to enable it to say whether it desired to take a new line of business, not additional business of the kind in which it was engaged. Prosecution by a member of the firm of a business in which the firm was not at all engaged did not amount to competition with the firm nor work an abstraction of any of its profits, actual or potential. It was not in any way inimical to the firm. Here the parties had no business in common other than the purchase and sale of coal. The taking of additional tracts wrought no change in the char-

acter of their business nor a departure in any sense. As indicated by their situation and purposes and all the circumstances, their enterprise was limited to a certain locality, rather than to certain purchases. It was not an agreement to buy and sell coal everywhere, but only in and around the territory indicated by the *Dye*, *Kyle*, and *Honor* holdings. Supposing the parties to have agreed among themselves to purchase these and other adjoining tracts, to the extent of their ability to procure and dispose of them at a profit, all such tracts would clearly come within the scope of the agreement and undertaking. Does the imposition of restraint or a limitation upon the agency of each member narrow the scope of the enterprise? Not at all. The agency is not the partnership, nor the dominant factor in it. It is a mere incident of the relation established by the agreement defining the character and scope of the undertaking, and may be enlarged or diminished according to the judgment or wishes of the parties, without destruction of the partnership relation. *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120; *Mining Co. v. Laverty*, 159 Pa. 237, 23 Atl. 207; *Radcliffe v. Varner*, 55 Ga. 427; *Frost v. Hanford*, 1 E. D. Smith (N. Y.) 540. An agreement to buy and sell on conditions is nevertheless an agreement. The introduction of conditions does not destroy it. If these parties expressly or impliedly agreed to take all of such bodies of coal in a given locality as they should unanimously approve as fit subjects of purchase, the general agreement would clearly embrace all of them. The condition for approval would not affect the scope of the enterprise any more than such a limitation in a copartnership for the handling of live stock, merchandise, securities, or any other commodity would affect its scope. It merely determines the method of execution of the scheme. All the tracts would be potentially within the agreement, not within the power of one member, but within the power of all. The scope of the partnership would be determined by the breadth of the general agreement.

The coal in question was obviously in the line of the aims and purposes of the parties. As a whole, it was contiguous to their nucleus and lay between it and the railroad. In such enterprises, an outlet is generally essential. An advantageous sale cannot be made without it. *Baird's* option affords some evidence of the advantageous connection of these properties, and *Wyer* took his two options so as to enable him to consolidate the tracts, with access to means of transportation. Whether *Baird* would have taken the 4,823.66 acres without the coal lying between it and the railroad does not appear, but his 10,000-acre option, taken so as to include it, discloses his view of the situation as a coal dealer, as the action of *Brast*, *Griffin*, and *Wyer* in covering all these tracts with two options in the hands of one man indicates theirs. Manifestly their conception of the

relation of the tracts, respecting their standing in the market, coincided with that of Kyle and Van Osten, and lends support to Kyle's contention as to the scope of the partnership agreement.

The written memorandum of agreement must be read in the light of all the circumstances, and, being so read, it does not define the territorial limits of the enterprise. No express limitation of that kind is found in its terms. Nor are its terms inconsistent with the partnership relation. On the contrary, they disclose some of the elements of that relation, joint burden of costs and expenses and equal division of profits. They impliedly express purpose to sell as well as to buy. In case of a loss, equal contribution to costs and expenses would necessitate equality in loss. As these elements of a co-partnership agreement appear in the terms of the instrument, it cannot destroy the force of the extraneous evidence of partnership.

Upon these views and conclusions, we think the finding of the trial court on this issue is right.

[4] The allowance of a commission to Griffin is clearly wrong. He proves no special agreement for compensation. Kyle and Van Osten both positively deny its existence. Aside from the testimony of Griffin and his wife, neither of whom specifies any rate or basis of compensation, the claim is founded upon inferences and vague expressions of willingness to compensate. Van Osten says the only offer of compensation to Griffin he ever made was a remark that, on Griffin's sale of the coal, he would give him a trip to Atlantic City. There is evidence tending to prove Kyle offered certain persons a one-fourth interest in the holdings, if they would indorse \$30,000 of the firm's paper, but that was no offer to Griffin. Offers of commission to third persons are established, but these do not inure to Griffin. Willingness to pay commissions to strangers and generally to any person who would make the sale and expressions thereof constitute no evidence of a special agreement to allow a commission to a member of the firm. He stands on a different footing from that of a stranger. Prima facie his services belong to the firm and are paid for by his membership. Griffin rendered very generous and efficient service. His ability seems to have been far greater than that of his associates, but no provision was made in the partnership agreement for a larger share of profits to him on that account. All agree they were to bear the expenses and losses and share the profits equally, and services of members are not regarded as expenses, when all the parties are active.

The decree of February 16, 1912, will be affirmed, that of August 13, 1912, reversed, and the cause remanded.

LYNCH, J., absent.

(117 Va. 506)

JOHNSTON et al. v. COMMONWEALTH
ex rel. PERRY.

(Supreme Court of Appeals of Virginia. June 10, 1915. On Petition to Rehear, June 24, 1915.)

1. INSANE PERSONS ~~§ 42~~—COMMITTEE—SETTLEMENT OF ACCOUNTS—CONCLUSIVENESS.

Under Code 1904, § 2699, providing that accounts of committees of insane persons before the commissioner of accounts shall, after confirmation, be taken to be correct, except so far as it might be surcharged and falsified in a suit in proper time, in a suit to recover from the committee and his surety the amount charged against him on settlement of his account before the commissioner of accounts, it cannot be shown that the amount had been legitimately expended at the time of the settlement.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 64-67; Dec. Dig. ~~§ 42~~.]

2. INSANE PERSONS ~~§ 42~~—COMMITTEE—SETTLEMENT OF ACCOUNTS—GROUNDS FOR OPENING.

A bill, merely seeking to correct an error which it was alleged the commissioner of accounts made in his settlement of the accounts of a committee of an insane person, but stating no grounds of fraud, accident, or mistake, is not sufficient to reopen the settlement.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 64-67; Dec. Dig. ~~§ 42~~.]

Error to Court of Law and Chancery of City of Norfolk.

Action by Lillian Perry, administratrix, against R. M. Johnston, committee, and another. From a judgment for plaintiff, defendant brings error. Affirmed.

R. R. Hicks, of Norfolk, for plaintiffs in error. Jas. G. Martin, of Norfolk, for defendants in error.

KELLY, J. On the 7th day of February, 1902, by a competent order of court, R. M. Johnston was appointed as committee of John Sales, and gave bond with the United States Fidelity & Guaranty Company as his surety. By the same order Sarah Sales, the mother of John Sales, who had theretofore qualified as such committee, was permitted to resign and was discharged from further liability.

By a report of T. T. Hubbard, commissioner of accounts, filed in the proper clerk's office on the 15th of May, 1908, the said R. M. Johnston, committee, was charged with \$491.28, principal, and \$100.80 interest, being a total charge of \$592.08. Johnston excepted to this report, but the exceptions were overruled and the report was confirmed by the court and duly recorded.

John Sales died in 1913. On February 28, 1914, Lillian Perry qualified as his administratrix, and shortly thereafter brought this action of debt against Johnston and his surety to recover the amount charged against Johnston in the above-mentioned report.

At the trial, after the foregoing facts had been made to appear by evidence for the

plaintiff, the defendants offered to prove the following facts: That John Sales enlisted in the United States Navy in 1898; that in 1902 he became insane and was confined in a hospital at Washington, where he was cared for by the government; that at the time of his insanity there was due him by the government the money that was turned over to R. M. Johnston, committee; that Johnston qualified as committee in February, 1902, and served as committee until 1905; that on that date Sarah Sales was appointed by the circuit court of Norfolk county committee of John Sales, and upon her qualification as such I. W. Eason, as attorney for her as committee, demanded from Johnston the amount of money in his hands, amounting to \$523 and some cents; that Johnston gave the money to Eason, as attorney for Sarah Sales, committee, taking his receipt for it, and at the same time Johnston turned over to him the check, he turned over his voucher, etc., with the request that Eason should attend to the settlement of his accounts, which Eason promised to do; Johnston heard no more of this matter until 1908, when he ascertained the account had not been settled, and then he made up the statement exhibited in evidence; that Eason held the money and gave it to Sarah Sales from time to time, for her support and maintenance, until the whole sum was in that way expended; that she was an old and feeble woman, and was the mother of John Sales; that Sarah Sales was a resident of Norfolk county at the time she qualified as committee in 1905; that John Sales was a resident of the county of Norfolk at the time of his enlistment; that the family of John Sales consisted of his mother, Sarah Sales, and two sisters, Lilly Perry and Henrietta Howard; that both lived with their mother until 1907; that Henrietta Howard was married in 1905, and is 39 years old, and Lilly Perry is 36 years old; and that John Sales had no children.

But the court refused to admit the evidence offered as aforesaid—

"on the ground that the settlement of account before the commissioner of accounts, as set out in the evidence of the plaintiff, was conclusive."

The defendants then offered, and the court allowed, in evidence a certain bill for an injunction and order refusing the same, which will be hereafter briefly noticed.

There was a verdict and judgment for the plaintiff, and the sole question to be determined upon this writ of error, which was awarded to that judgment, is as to the correctness of the action of the court in holding that the settlement of account was conclusive, and in refusing the aforesaid evidence on that ground. As is correctly stated in the reply brief for the plaintiffs in error, "no other question is discussed in the petition" for the writ of error.

[1] We do not think this can be regarded as an open question in Virginia. Section

2699 of the Code provides that all accounts of this character, after confirmation—"shall be taken to be correct, except so far as the same may, in a suit in proper time, be surcharged and falsified."

In the case of *Carter v. Skillman*, 108 Va. 204, 60 S. E. 775, this court, in an opinion delivered by Judge Keith, went fully into the finality of settlements made by fiduciaries under the provisions of the chapter of the Code of Virginia to which section 2699 belongs, and held such settlements to be final and conclusive as to all matters therein directly adjudicated. The opinion in that case must be taken as expressing the views of this court in the instant case, and we deem it unnecessary to make any further reference to the authorities upon this question.

[2] Considerable stress was laid in the oral argument and in the brief upon the fact that the plaintiff in error had applied, first to the circuit court, and then to one of the judges of this court, for an injunction to stay the present action until in a court of equity the account of Johnston, committee, could be corrected, and that the injunction in each instance was denied. The grounds upon which the injunction was refused are not indicated. Whether the application was rightly or wrongly refused is hardly a pertinent question in this case, but if the application for an injunction were now before us for action, we would have no hesitancy in refusing it. The bill states no ground of fraud, accident, or mistake, but merely seeks to correct an error which it alleges the commissioner of accounts made in his settlement. This is not sufficient to entitle the complainant to reopen the settlement by bill in equity. See 19 Ency. Pl. & Pr. 1066, 1067; *Boulton v. Scott*, 3 N. J. Eq. 231; *Clyce v. Anderson*, 49 Mo. 37.

There was no error in the judgment complained of, and it must be affirmed.

Affirmed.

On Petition to Rehear.

We are asked to rehear this case upon the ground that the alleged contributions by Eason to the support of Sarah Sales would, if proved, have been proper credits upon Johnston's liability as fixed by the commissioner of accounts and confirmed by the court.

This contention cannot be maintained for the reason, not affirmatively appearing in the opinion, but conclusively shown by the record, that, according to Johnston's claim, the entire fund had been thus applied before his accounts were settled. This being true, the defendants are precluded by the effect of the statute (section 2699) from setting up in this action alleged credits and offsets arising prior to the settlement.

Whether Johnston offered to prove such offsets or credits before the commissioner, and, if not, why not, and why, in either event, he waited until after the death of

both John and Sarah Sales, and until this action was brought, nearly six years, before he made any attempt to correct the alleged errors in the settlement, are therefore immaterial questions, except as illustrative of the wisdom of the statute. And the same may be said as to why Eason should have taken, if he did, the unusual and improbable course of paying the fund in small sums to Sarah Sales for her support when she was entitled to the whole sum at once as committee of John Sales.

The rehearing is denied.

(117 Va. 452)

BLACKSTONE MFG. CO. v. ALLEN.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. LOGS AND LOGGING ⇐3—SALE OF STANDING TIMBER—TITLE—FORFEITURE.

A contract of sale of standing timber to cut and remove does not pass absolute title to the timber until the purchaser cuts and removes the same within the time allowed by the contract.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ⇐3.]

2. LOGS AND LOGGING ⇐3—SALE OF STANDING TIMBER—CONTRACTS—CONSTRUCTION—"THE YEARLY INTEREST ON THE PURCHASE PRICE."

A contract of sale of standing timber, which gives the purchaser seven years within which to cut and remove the timber, and which gives him an additional three years, or so much as he may desire, provided he pays "the yearly interest on the purchase price" of the timber, provides for an extension period; but the phrase, "the yearly interest on the purchase price" means the interest for one year on the price and to obtain an extension the purchaser must pay interest for one year.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ⇐3.]

3. LOGS AND LOGGING ⇐3—SALE OF STANDING TIMBER—EXTENSION OF TIME—CONDITIONS—WAIVER.

A grantor in a contract of sale of standing timber to be cut and removed within a specified time, and an additional time given on the purchaser paying yearly interest on the price, may waive payment of the yearly interest both as to time and amount; but a waiver must be established by evidence which is not done by proof of correspondence between the parties wherein the purchaser insisted on payment of the yearly interest to extend the time for a year.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ⇐3.]

4. LOGS AND LOGGING ⇐3—SALE OF STANDING TIMBER—CONTRACTS—CONSTRUCTION.

A contract of sale of standing timber, which provides that the timber shall be cut and removed within a specified period, and which gives to the purchaser an additional period of three years, provided he pays the yearly interest on the price of the timber, requires the purchaser to apply for an extension of the time for the cutting and removal of timber if he desires, and to pay or tender the interest, and the grantor may not demand the consideration for an extension of the period until the original period has ended.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ⇐3.]

5. LOGS AND LOGGING ⇐3—SALE OF STANDING TIMBER—REMOVAL AFTER TERMINATION OF PERIOD—DAMAGES—EXTENSION—INSTRUCTIONS.

Where a purchaser of standing timber to be cut and removed within a specified period, or an extended period on compliance with conditions, did not comply with the conditions, but after the termination of the specified period removed timber or logs, or the manufactured products thereof, and the grantor, seeking to recover damages therefor, established the stumpage value of standing timber, and the value of logs cut down and in place, or hauled to mills, and when manufactured into merchantable forms, an instruction that all of the timber not removed within the specified period remained the property of the grantor, and that the measure of damages was the value of the lumber at the time of the taking and carrying away not exceeding the damages demanded, was sufficient.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ⇐3.]

Error to Circuit Court, Lunenburg County. Action by L. E. Allen against the Blackstone Manufacturing Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The court gave the jury the following instructions:

1. The court instructs the jury that its duty is to determine all questions of fact, but that it is the exclusive duty of the court to construe the legal effect of instruments in writing; and that the court construes the deed offered in evidence in this case and made by and between the plaintiff and defendant, as follows:

(a) That said instrument is a conditional sale of such standing timber on the tract of land described in said instrument as is cut and removed before the expiration of seven years from the date of said instrument.

(b) That the foregoing section of this instruction is subject to the qualification as to whether or not the defendant obtained an extension beyond the period aforesaid in said instrument.

(c) The court instructs the jury that the plaintiff in this case may, if he so wishes, waive the payment of said yearly interest, both as to time and amount, but that said waiver must be established by the evidence in this case, and the only evidence submitted in this case with respect thereto upon which the court must pass consists of certain written letters which passed between the plaintiff and the defendant, and the court construes those letters as insufficient to establish a waiver either of the time of the payment of said yearly interest or of the amount thereof.

2. The court instructs the jury that if they believe from the evidence that there was any standing timber remaining on the tract of land in question at the expiration of the seven years period mentioned, and the extension period had not been acquired, such standing timber was on the 3d day of February, 1913, and thereafter, the property of the plaintiff.

3. The court instructs the jury that it construes the said instrument with respect to the extension to be in the nature of a condition precedent, and that it was the duty of the defendant in order to avail itself of the said extension period, or any part thereof, to have tendered to the plaintiff the yearly interest provided for in said instrument, on or before the 2d day of February, 1913.

4. The court instructs the jury that such timber as was cut down and either lying in place or hauled to the mill on the same premises, but remained in the form of logs, prior to February 3, 1913, was and remained the property of the plaintiff.

5. The court instructs the jury that as to such timber as was cut after February 3, 1913, it is immaterial whether it was hauled to the mill, whether it was sawed into lumber, or whether it was removed from the premises; for in either event the court instructs the jury that said timber was and remained the property of the plaintiff.

6. The court instructs the jury that it was the duty of the defendant to have cut and removed the timber from the premises described in the deed here in question, before acquiring absolute title thereto; and if the jury believe from the evidence in this case that the defendant cut down, sawed, or manufactured timber into lumber, which lumber was sawed or manufactured, although cut prior to February 3, 1913, and remained on the premises on February 3, 1913, then in that event the defendant acquired no absolute title to such lumber, but that the same was the property of the plaintiff.

7. The court instructs the jury that under its construction of the deed in question it construes, and so determines, that the defendant acquired title to only such timber as was cut and removed from the premises prior to February 3, 1913; that the conditions "cut and removed" are imperative, and that manufacturing or sawing the said timber into lumber "fore" February 3, 1913, will not comply with, and cannot be substituted for, the condition of removal found in said deed, if the jury believe from the evidence that said sawed lumber remained upon the premises until after February 3, 1913.

8. The court instructs the jury that if they find from the evidence in this case that any timber was standing on the said premises on or after February 3, 1913, as hereinbefore instructed the said standing timber was and remained the property of the plaintiff, and that the cutting, hauling, manufacturing, or sawing of such timber will not affect the ownership of said timber, and will not put title thereto into the defendant.

9. The court instructs the jury that there is a count in the declaration of the plaintiff alleging damage to the realty caused by the cutting and hauling of the timber uncut on February 3, 1913; that the only evidence in the record concerning the amount of this damage is that it was \$25 or \$30, and this evidence is undisputed; and if the jury believe from the evidence that this statement is true they shall find for the plaintiff on this count.

10. The court instructs the jury that if they believe from the evidence that there was any manufactured lumber lying upon the premises in question on February 3, 1913, and if any timber was sawed or manufactured thereafter, the jury are reminded of instructions Nos. 2, 4, 5, 6, 7, and 8, to the effect that the said lumber was and remained the property of the plaintiff; and if the jury find from the evidence that the sawed lumber was taken and carried away by the defendant, its agents or employes, they, the jury, are instructed that the measure of damages in the event of such taking and carrying away shall be the value at the time of the said taking and carrying away.

11. The court instructs the jury that in no event are they to find damages for the plaintiff in a sum exceeding \$5,000.

W. Moncure Gravatt, of Blackstone, and E. P. Buford, of Lawrenceville, for plaintiff in error. McNeill, Hudgins & Ozlin, of Richmond, for defendant in error.

CARDWELL, J. This action grows out of a contract for the sale of standing timber, and the declaration filed by the plaintiff, L. E. Allen, against the defendant, Blackstone Manufacturing Company, contains five counts. Upon the issue joined on the plea of the

defendant of not guilty there was a trial, resulting in a judgment of the court on the verdict of a jury in favor of the plaintiff awarding damages in the sum of \$1,500. To that judgment this writ of error was allowed the defendant.

We do not deem it necessary to undertake to discuss seriatim the 18 assignments of error contained in the petition for this writ of error.

The case is as follows: On February 2, 1906, defendant in error (plaintiff below) and his wife executed to plaintiff in error (defendant below) a deed conveying to the latter, in consideration of \$3,001 (the \$1 apparently having been paid as earnest money) "all of the standing timber" on a certain tract of land owned by the grantors, containing 150 acres, situated in Lunenburg county, which deed contains the following clause:

"The said Blackstone Manufacturing Company shall have the period of seven years from date of this deed within which to cut and remove said standing timber, and after the expiration of the said years, they shall have an additional period of three years, or so much thereof as they may desire, for cutting and removing said timber: Provided they pay to the said parties of the first part * * * the yearly interest on the purchase price of the above-described timber."

The allotted period of seven years mentioned in the deed for cutting and removing the timber expired on February 2, 1913, and during that period plaintiff in error commenced, but did not complete, the cutting, manufacture, and removal, and according to the facts appearing in this case, which are practically undisputed, at the expiration of the seven-year period some of the timber was still standing, some had been cut down and was lying where felled, some had been cut down and hauled to a mill on the same premises, but not removed therefrom; some had been cut down, hauled to the same mill, there manufactured into boards, planks, posts, etc., but not removed; and all the timber standing at the expiration of the seven-year period or cut as above set forth was removed after February 3, 1913; i. e., plaintiff in error, putting its own construction upon the extension clause of said deed, and without notice or consultation with defendant in error, proceeded to complete the severance of the remaining standing timber and to manufacture it, as well as the logs which had been hauled to its sawmill, before February 3, 1913, into merchantable form, and all of this lumber when so manufactured was hauled to a lumber yard or planing mill at the railway station at Kenbridge, and there piled together and indiscriminately mixed and intermingled with other lumber of like kind and nature, which latter lumber came from other sources and belonged to plaintiff in error; and that lumber, from this commingled mass, was sold from time to time by plaintiff in error and shipped f. o. b. from Kenbridge for its own account and benefit.

After the severance and manufacture of all the timber had been completed, but before all of the manufactured products had been removed from the sawmill premises situated on defendant in error's land, he, on March 19, 1913, addressed a letter to plaintiff in error calling its attention to the fact that the seven-year period provided in the said deed or contract for the cutting and removal of the timber in question had expired on February 2, 1913, and requesting that plaintiff in error send check for \$180, which was, according to the writer's version of the contract, 6 per cent. interest for one year on the purchase price of the timber, and further expressing, in effect, the view that plaintiff in error could claim no additional time within which to cut or remove the timber or the manufactured products thereof from defendant in error's land until the amount of this one year's interest on the purchase price of the timber which he demanded had been paid.

To this letter plaintiff in error replied on March 25, 1913, saying that its vice president and general manager would be in defendant in error's neighborhood in a few days "and bring you check for what we are due you on the extension of the contract we hold with you for standing timber." The promise made in that letter was not complied with, but instead, on April 25, 1913, plaintiff in error wrote defendant in error as follows:

"The deed you made us provides that after the seven-year period we could have three years additional, 'or as much thereof as we may desire,' by paying 6 per cent. yearly interest on purchase price. We don't think that we will need over six months from February 3, 1913, and therefore hand you our check for \$90.00 to cover that period, for cutting and removing the timber bought under your deed of February 2, 1908. * * *"

On receipt of this letter and check, defendant in error, by letter of April 30, 1913, returned the check and wrote plaintiff in error to the effect that he would not accept less than \$180 which ought to have been paid before February 2, 1913, in order to keep the deed and contract from becoming null and void. Nothing further was done towards adjusting the matter between the parties, and this suit followed at the second rules of the court, held in its clerk's office the third Monday in July, 1913.

There are, as it appears to us, but two questions in the case as to the law applicable thereto, and with these questions determined adversely to the contentions of plaintiff in error it will, of course, be necessary to consider and determine whether or not the case, upon the facts, which the evidence tended to prove, has by the trial court's rulings in giving and refusing instructions asked by the respective parties been fairly submitted to the jury, and, if so, whether there is evidence sufficient to sustain their verdict.

The questions of law adverted to, briefly stated, are as follows: (1) Whether or not plaintiff in error, under the "extension

clause" in the contract, had the right to proceed to cut, manufacture, and remove after February 2, 1913, the timber and lumber in question, and "to haul the manufactured product to * * * Kenbridge * * * for sale and shipment without first obtaining from the defendant in error an extension of the seven-year period for the cutting and removing of the timber, as provided for in the contract between the parties; and (2), if plaintiff in error had no such right, has defendant in error, by his conduct or acquiescence, waived his right to regard the timber and the manufactured products thereof remaining on his land after February 2, 1913, as his own, and is thereby estopped to claim the timber, or damages by reason of its being cut, removed, and appropriated by plaintiff in error to its own use?

[1] The decisions of this court construing "timber contracts" such as is under consideration in this case, which are in perfect accord with a large majority of the decisions of the courts in other jurisdictions construing similar deeds or contracts, are to the effect that absolute title to the timber never passes out of the grantor until the grantee cuts and removes the timber within the period of time allowed by the contract for so doing; that there is no "forfeiture" of the timber remaining uncut or unremoved after the time limit, because there is nothing to forfeit; that there is no "implied condition subsequent," because there is an express condition precedent (to the passing of absolute title) in the contract itself.

The latest expression of this court construing a similar contract is in the case of *Hartley v. Neaves*, decided January 27, 1915, 117 Va. —, 84 S. E. 97, where the contract fixed the period within which the timber granted was to be cut and removed at five years, with this additional clause added:

"It is also agreed that additional time, not to exceed five years, will be granted to the parties of the second part for removal of said timber upon the payment of fifteen dollars a year for the said additional time."

[2] In the present case the contract differs from the contract in the case cited only in the length of the period fixed for the cutting and removal of the timber, and in the wording of the "extension clause." The period fixed in the present case is seven years, while in the other it was five, and here, instead of using the words "that additional time not to exceed five years will be granted * * * upon the payment of fifteen dollars a year for said additional time," the contract reads, "and, after the expiration of the said years (seven), they (grantee) shall have an additional period of three years, or so much as they may desire, for cutting and removing said timber: Provided they pay to the said parties of the first part the yearly interest on the purchase price of the above described timber."

The purchase price of the timber in the

case cited was \$250, and lawful interest on that amount for one year is \$15, while in the present case the purchase price of the timber was \$3,000, upon which the lawful yearly interest would be \$180; hence it appears that in both instances the same method of calculation of the amount to be paid for an extension of the period fixed for the cutting and removal of the timber granted was adopted. "The yearly interest on the purchase price" clearly means the interest for one year on the purchase price, and there is nothing in that language to distinguish the import and meaning thereof from that of "upon the payment of fifteen dollars a year for said additional time," used in the contract construed in the case cited, where it was held that a timber deed, which provided that the grantee should have five years in which to cut and remove the timber, and that additional time, not to exceed five years, should be granted for removal upon payment of \$15 a year for the additional time, bound the grantee to make payment and request extension before the expiration of the first five-year period, and, not having done so, his rights under the deed were lost. See, also, note to said case reported in 1 Va. Law Reg. (N. S.) 32.

The case of *Bateman v. Kramer L. Co.*, 154 N. C. 248, 70 S. E. 474, cited in *Hartley v. Neaves*; supra, is also reported in 34 L. R. A. (N. S.) 615, to which is appended an editorial note in which the authorities are collected, which note says:

"No hard and fast rule can be laid down for the construction and effect of a provision in a timber contract which extends the time for the removal of the timber. The question in each case is: What is the contract between the parties? * * * But, to claim the privilege, a notification to that effect is required to be given the owner of the property before the expiration of the period originally allotted, with a tender of the stipulated amount."

In *Hartley v. Neaves*, supra, it was said that this rule of construction of timber deeds or contracts imposes no unreasonable burden or hardship upon the grantee or vendee in such deeds or contracts, and upon the facts in the instant case there is no conceivable reason why a different rule should be applied. Here plaintiff in error, relying upon its own construction of the extension clause of the deed with respect to its rights thereunder, and without notification to defendant in error before the expiration of the period originally allotted for the cutting and removal of the timber, and hence without the tender of the stipulated amount for any extension of that period, proceeded to cut, manufacture, and remove the timber and lumber from the lands of defendant in error, and to haul the manufactured products to a railroad station for sale and shipment as though the period originally allotted for the cutting and removal of the timber had not expired.

The trial court rightly gave instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, and 10, asked by de-

fendant in error, which followed the rule of construction applicable to the contract in question, established by the line of cases to which those above mentioned belong, and did not err in refusing other instructions asked by plaintiff in error, which sought to have the exactly opposite view of the law propounded to the jury.

[3] Nor did the court err in instructing the jury to the effect that the plaintiff in the case might have, if he so wished, waived the payment of the yearly interest stipulated for in the contract, both as to time and amount, but that such waiver had to be established by the evidence in the case, and that the only evidence submitted with respect to such waiver, upon which the court should pass, consisted of certain letters between plaintiff and defendant (referred to above in this opinion), and that those letters were insufficient to establish a waiver either of the time of the payment of the yearly interest stipulated for in the contract or of the amount thereof.

[4] The contention of plaintiff in error that defendant in error construed the deed to mean that the yearly interest was not due in advance of the extension period, based solely upon his not having demanded the interest in advance, that he never demanded the proper amount at any time, and did not demand even an improper amount until "seven days after the completion of the severance and manufacturing of the timber," is wholly unsupported by anything appearing in the record. As we have seen, the law imposes upon the grantee or vendee in such a contract the duty to apply for the extension of the time agreed on for the cutting and removal of the timber, if he desires it, and to pay or tender the amount stipulated as the consideration for the granting of such extension, before the extension can begin. The grantor or vendor in such a contract has no right to demand the stipulated consideration for an extension of the period originally allotted for the cutting and removal of the timber until the original period has ended, for the all-sufficient reason that the grantee or vendee is under no absolute obligation to pay it at all, though he has the right to pay it but cannot be compelled to do so; and therefore the failure of defendant in error here to make demand for the prepayment of the yearly interest in question could not prejudice his rights in any way, much less show that he construed the contract to mean that his grantee, plaintiff in error, had the right to the extension without the prepayment of a year's interest on the purchase price of the timber stipulated for in the contract.

There is no evidence in the record that the belated removal of the timber was caused by any act, inducement, or acquiescence whatsoever on the part of defendant in error, and the most that can be made of his correspondence with plaintiff in error introduced in evidence by the latter, or of any other proof in

the case, is a willingness on his part, even though the contract had expired, to waive his right and grant an extension of one year of the period originally allotted for the removal of the timber, as expressed in his letter of March 19, 1913; but, instead of accepting and acting on this proffered waiver, plaintiff in error, under its own interpretation of the deed, went on with the cutting and removal of the timber as though its right to do so had not expired on February 2, 1913, and made no offer to pay any part of the consideration for an extension of the period originally allotted in the contract, until about five days before the removal of the timber was completed, and then only tendered to defendant in error a check for one-half of the amount required by the terms of the contract to entitle it to any extension of the original period of time which had expired more than two months before.

[5] The next assignment of error requiring consideration relates to the court's rulings in granting and refusing instructions with reference to the measure of damages. Having rightly taken the view, and so instructed the jury, that all of the timber not removed from the land of defendant in error on or before February 2, 1913, whether it consisted of standing timber or logs hauled to the mills on the premises, or the manufactured products thereof into merchantable forms, remained the property of the plaintiff, the court, with reference to the measure of damages in the case, further instructed the jury to the effect that if they believed from the evidence that there was any manufactured lumber lying upon the premises in question on February 3, 1913, that any timber was sawed or manufactured thereafter, and that such sawed lumber was taken and carried away by the defendant, then the measure of damages that they might allow the plaintiff would be the value of the lumber at the time of such taking and carrying away; but in no event were they to find for the plaintiff in a sum exceeding \$5,000 (the amount of damages claimed in his declaration).

We are of opinion that there was no error in so instructing the jury. It was shown in evidence that at the date of the expiration of the contract between the parties the timber or lumber here in suit existed actually, in different classes or forms. Some of it, as has been stated, was standing, etc., and accordingly proof was offered to establish the stumpage value of the standing timber, the market value of logs cut down and in place, the same for logs hauled to the mills, and for the same when manufactured into merchantable forms, as well as to the value of these latter forms after the removal from the premises. The testimony given by experts as to the value of the stumpage fixed it at from \$3 to \$4 per thousand feet (pine timber), while the other testimony in the case show-

ed that as much as 385,351 feet of the manufactured products of the timber were removed from the premises after February 3, 1913. There was undisputed damage to the realty, and when the evidence as to the value of the timber, etc., removed from the premises after February 3, 1913, is weighed and considered, either with reference to the stumpage value of the timber or its value when manufactured into merchantable forms, it cannot be reasonably claimed that the jury in its assessment of the plaintiff's damages at \$1,500 was misdirected or misled by the court's instructions with respect to the measure of damages in the case.

The verdict of the jury is not, as we have seen, contrary to law, and enough of the evidence in the case has been adverted to to show that it is sufficient to support their finding, approved by the court, upon the questions of fact submitted to them, and that the damages assessed in favor of defendant in error are not excessive—certainly not so grossly excessive as to warrant the court in setting aside the verdict. Having taken this view of the case, we deem it unnecessary to discuss other of the assignments of error relied on in the petition for this writ of error, or to consider the cross-errors assigned in the brief for defendant in error.

Upon the whole case, we are of opinion that the judgment of the circuit court is right, and therefore it is affirmed.

Affirmed.

KELLY, J., absent; the case having been argued before his term began.

(117 Va. 533)

NORFOLK & P. B. L. R. CO. v. STURGIS.
(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. MASTER AND SERVANT @256—PLEADING @8—INJURIES TO SERVANT—ACTIONS—COMPLAINT—SUFFICIENCY.

In view of Code 1904, arts. 3246, 3272, declaring that no action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed on the merits, and that on demurrer the court shall not regard any defect unless there be omitted something essential to the action, a complaint alleging that plaintiff was assigned to duty on a locomotive under the orders of the engineer, that the locomotive was out of repair, that plaintiff was ordered to draw water from the spigot of the water tank and pass it to the engineer to extinguish the fire, and that, while standing with one foot on the step leading to the cab, and the other on the bumper of the tender, in a position which became one of great peril if the locomotive were suddenly backed, the engineer, though he knew or should have known of plaintiff's position without warning, backed the locomotive upon the tender, injuring plaintiff, states a good cause of action; the averments as to plaintiff's position of peril not being mere conclusions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. @256; Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. @8.]

2. TRIAL — 253 — INSTRUCTIONS — IGNORING ISSUE.

In an action by a fireman who was crushed when the engine was moved against the tender from which he was drawing water, an instruction that, if plaintiff, without negligence on his part, was in a position which made injury to him a necessary consequence of backing the engine, and the engineer knew or ought to have known of plaintiff's position, it was his duty to warn plaintiff before backing the engine, unless plaintiff knew of such attempt, and that, if the engineer backed the engine without such warning, then plaintiff is entitled to recover, is not objectionable on the ground that it fails to set forth defendant's theory of the case, which was that the engineer did not know plaintiff had unnecessarily placed himself in a position of peril.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. — 253.]

3. TRIAL — 267 — INSTRUCTIONS — MODIFICATION.

It was not error for the court to modify defendant's requests which presented the defense that plaintiff voluntarily took a position of peril by explanatory averments involving the knowledge of the engineer of plaintiff's position of peril.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. — 267.]

4. APPEAL AND ERROR — 1002 — REVIEW — VERDICTS.

A verdict on conflicting evidence will be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. — 1002.]

Error to Circuit Court, Norfolk County.

Action by John R. Sturgis against the Norfolk & Portsmouth Belt Line Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The following are the instructions referred to in the opinion:

Plaintiff's Instruction No. 1:

The court instructs the jury that, if you believe from the evidence that the plaintiff, without negligence on his part, was in a position which made injury to him a necessary consequence of a movement backward of the engine, and that the engineer, knew, or by the exercise of ordinary care ought to have known, of the plaintiff's position and its danger to him, then it was the duty of the engineer to exercise ordinary care to warn the plaintiff before attempting to back his engine, unless the plaintiff knew of such attempt; and, if you believe from the evidence that the engineer negligently failed to exercise such care, and that such failure was the proximate cause of plaintiff's injury, then the plaintiff is entitled to recover.

Instructions refused to defendant:

(C) The court instructs the jury that, if they believe from the evidence that there was a safe and an unsafe position which the plaintiff could take in drawing water from the tender, the defendant's engineer had a right to assume that the plaintiff, in drawing water from the tender of the defendant's engine, would adopt the safe method, rather than the unsafe one, and it was not negligence for the defendant's engineer to act upon this assumption, and to move his engine without first ascertaining whether the plaintiff had assumed a position which made it dangerous to him (the plaintiff) for the engine to be moved.

(D) The court instructs the jury that, if they believe from the evidence that the defend-

ant's engineer requested the plaintiff to draw a bucket of water from the water tank, and that there were two ways in which the plaintiff could stand in drawing said water, one of which was safe, and the other unsafe, it was the duty of the plaintiff to have taken the safe position, and, if he failed to do so and elected to draw said water while in an unsafe position, he was guilty of contributory negligence, and cannot recover in this action.

(E) The court instructs the jury that, where there were two positions in which the plaintiff could have placed himself to have drawn water from the tender of the defendant's engine, one of which was safe, and the other unsafe, there was no obligation on the part of the defendant's engineer to anticipate or know that the plaintiff would adopt the unsafe position, and it was not negligence on his part to back the engine of the defendant company without stopping to ascertain whether the plaintiff had placed himself in a position of danger by standing in an unsafe position while drawing water from the tender.

(F) The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care to look out for his own safety, and, if there was a safe position in which he could have stood while drawing the bucket of water from the tender, even though the engine should be backed, it was his duty to have taken such a position; but, if he saw fit to take a position which rendered it unsafe to him for the engine to be backed, it was his duty to have warned the engineer of his unsafe position; and, if he failed to do so, and the engineer backed his engine, causing the injury which the plaintiff received, this was not negligence on the part of the engineer, and the jury must find for the defendant.

Modified instructions given for defendant:

(C) The court instructs the jury that, if they believe from the evidence that there was a safe and an unsafe position which the plaintiff could take in drawing water from the tender, and that the defendant's engineer did not know of the plaintiff's position, he had a right to assume that the plaintiff, in drawing water from the tender of the defendant's engine, would adopt the safe method, rather than the unsafe one, and it was not negligence for the defendant's engineer to act upon this assumption, and to move his engine without first ascertaining whether the plaintiff had assumed a position which made it dangerous to him (the plaintiff) for the engine to be moved.

(D) The court instructs the jury that, if they believe from the evidence that the defendant's engineer requested the plaintiff to draw a bucket of water from the water tank, and that there were two ways in which the plaintiff could stand in drawing said water, one of which was safe, and the other unsafe, it was the duty of the plaintiff to have taken the safe position, and, if he failed to do so, and elected to draw said water while in an unsafe position, he was guilty of contributory negligence and cannot recover in this action, unless you further believe from the evidence that the engineer knew, or by the exercise of ordinary care should have known, that the plaintiff was in such dangerous position when he backed the engine, and by the exercise of ordinary care could have avoided the injury to him.

(E) The court instructs the jury that, where there were two positions in which the plaintiff could have placed himself to have drawn water from the tender of the defendant's engine, one of which was safe, and the other unsafe, and that the engineer did not know in what position plaintiff was, there was no obligation on the part of the defendant's engineer to anticipate or know that the plaintiff would adopt the unsafe position, and it was not negligence on his

part to back the engine of the defendant company without stopping to ascertain whether the plaintiff had placed himself in a position of danger by standing in an unsafe position while drawing water from the tender.

(F) The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care to look out for his own safety, and, if there was a safe position in which he could have stood while drawing the bucket of water from the tender, even though the engine should be moved, it was his duty to have taken such a position, and, if he saw fit to take a position which rendered it unsafe to him for the engine to be moved, it was his duty to have warned the engineer of his unsafe position, *unless the engineer knew of his position*, and, if he failed to do so, and the engineer backed his engine, causing the injury which the plaintiff received, this was not negligence on the part of the engineer, and the jury must find for the defendant, *unless you further believe from the evidence that engineer knew, or by the exercise of ordinary care ought to have known, of the plaintiff's position, and by the exercise of ordinary care could have averted the accident.*

Thos. H. Willcox, of Norfolk, for plaintiff in error. W. H. Venable and R. E. Miller, both of Norfolk, for defendant in error.

WHITTLE, J. The defendant in error, Sturgis, plaintiff below, recovered a judgment against the railroad company for personal injuries sustained by him while in its employment as fireman.

There are two counts to the declaration, which in preliminary averment are substantially similar, and the action of the court in overruling the demurrer to the declaration and to each count is the first assignment of error.

[1] 1. The material allegations of the first count are: That the plaintiff was assigned to duty on the defendant's engine under the orders of the engineer; that the engine was out of repair and unsafe; that while the engineer and plaintiff, in discharge of their respective duties, were using the engine in pushing a train of cars over the defendant's track, both ejectors became choked and clogged, so that they could not force water from the tender to the boiler in sufficient quantities to prevent destruction of the boiler and engine; that to meet this emergency the engineer stopped the engine and ordered plaintiff to draw water from the spigot of the water tank in a bucket and hand it to him in order that he might extinguish the fire and save the property; that, while acting under the engineer's instructions and engaged in this work, plaintiff was standing with one foot on the step leading to the cab of the engine, and the other foot on the bumper of the tender, drawing a bucket of water to hand up to the engineer, and it became and was the duty of the defendant not to move the engine without first giving plaintiff warning in time to move from said position, which was one of safety while the engine was standing, but which became one of great peril if the engine were suddenly moved backward. Yet the defendant, acting through the engineer, although it knew, or by the exercise of proper

care ought to have known, the position of the plaintiff, negligently and without warning to him pulled the lever of the engine, and caused it to move backward upon the tender, and caught the plaintiff between the engine and tender and mashed him, etc., specifically describing the injuries inflicted.

In the second count the preliminary statement is followed by the allegations: That the plaintiff, to draw water from the spigot to be handed over to the engineer to be thrown by him into the fire box, had to bend over so as to get the bucket below the spigot, with his body between the tender and engine; that in order the better to steady himself and perform his work quickly, and thus save the defendant's property from destruction, he placed one foot down on the step, which is located on the side of the engine, and the other on the bumper of the tender, which is level or nearly so with the floor of the cab, and leaned over so as to hold the bucket under the spigot; that this is the customary position assumed by firemen in drawing water from the tender in a bucket; that, while performing his duties, the engineer, who was taking the buckets of water from him, was standing on the floor of the cab of the engine only a few feet from him, and knew of his position; that the engine was standing still, and that it was the duty of the engineer (who knew, or by the exercise of ordinary care ought to have known, that the position of the plaintiff between the tender and engine would become one of great danger to the plaintiff if the engine should be suddenly moved back) not to back the engine, and thus endanger the life and limb of the plaintiff, without first giving the plaintiff notice of his intention so to do, and allow him an opportunity to straighten up his body and limbs so as not to be caught between the engine and tender.

The ground of demurrer is that the declaration merely states a conclusion that the position of the plaintiff between the engine and tender would become dangerous if the engine should suddenly be moved backward against the tender without warning to the plaintiff, but does not aver the facts upon which the conclusion is founded.

This, we think, is not a fair interpretation of the declaration. According to the natural and ordinary import of the words used, they can only mean that when the engine was backed against the tender the space was so diminished that the plaintiff, in the position which he had to assume to discharge the duty imposed upon him, would be caught between the two and mashed; that nevertheless the engineer, with knowledge of the situation, backed the engine without warning, and caught the plaintiff between the engine and tender, inflicting upon him the injuries of which he complains.

It is not the function of a declaration to set out all the facts and circumstances in the case, but simply to give the defendant such

reasonable information of the nature of the complaint as will enable him to make his defense. Sufficiency in substance in a declaration is all that is required under our procedure.

Code, § 3246, declares that:

"No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause."

So, also, section 3272 provides that:

"On a demurrer * * * the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense, that judgment, according to law and the very right of the cause, cannot be given."

Burks' Pl. and Pr. p. 345, quotes from Gould, Pl. c. 9, § 18, as follows:

"If the matter pleaded be in itself insufficient without reference to the manner of pleading it, the defect is substantial; but, if the only fault is in the form of alleging it, the defect is but formal."

This declaration sets out the relations of the parties, the duty owing by the defendant to the plaintiff, and the breach of that duty by the defendant. It also sets out the facts and circumstances surrounding the accident "with sufficient certainty to be understood by the defendant, who is to answer them, by the jury who are to inquire into their truth, and by the court which is to render judgment." *Hortenstien v. Va.-Car. Ry.*, 102 Va. 914, 47 S. E. 996; *Va., etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

[2] 2. The next assignment of error questions the court's action in giving instruction No. 1 (as modified) for the plaintiff; and also in amending defendant's instructions C, D, E, and F. All these instructions appear in the report of the case, and need not be reproduced here, and the amendments are in italics.

(1) The criticism of instruction No. 1 is that, while it declares that the plaintiff is entitled to recover if the jury shall believe from the evidence certain conclusions of fact upon which it is predicated, it omits to set forth the testimony on which the defendant's theory of the accident is founded.

Careful inspection of the instruction shows that it is not amenable to that objection. Conversely, the instruction, by plain intentment, tells the jury that the failure of the engineer to warn the plaintiff before backing the engine would not warrant a recovery if he knew of such intention. Both theories of the case attribute the accident to the backing of the engine against the tender, and both are covered by the instruction, though the details of the evidence upon which the opposing contentions rest are not given. The instruction fairly submitted to the jury the questions of negligence and contributory negligence upon which the right of recovery was respectively affirmed and denied.

[3] (2) The amendments of instructions C,

D, E, and F all involve the knowledge of the engineer of the position of the plaintiff between the engine and tender as affecting the measure of the defendant's duty to the plaintiff and what it had the right to assume. The record presents a case where the situation of the plaintiff, which indisputably was safe while the engine was at rest, was made dangerous by unexpectedly backing it against the tender. Hence the engineer's knowledge or want of knowledge of the plaintiff's position constituted the crux of the case, a controlling factor as to the relative rights and liabilities of the parties. The amendments involved no distinct legal propositions of law, but were complementary and explanatory merely of the principles invoked.

[4] 3. The last assignment of error applies to the refusal of the court to set aside the verdict as contrary to the evidence. Of that contention it is sufficient to say that the evidence is irreconcilably conflicting, and, from the viewpoint of a demurrer to the evidence, the plaintiff's evidence fully sustains his right to recover. In these circumstances an appellate court is without authority to disturb the verdict.

For these reasons, the judgment must be affirmed.

Affirmed.

CARDWELL, J., absent.

(117 Va. 569)

RATCLIFFE et al. v. WALKER.

(Supreme Court of Appeals of Virginia. June 10, 1915.)

1. HUSBAND AND WIFE — § 324 — ALIENATION OF AFFECTIONS — LIABILITY OF RELATIVES.

Where a parent, brother, or sister acts in good faith and is prompted by worthy motives in advising a wife or husband to separate from the other spouse, even though such advice results in separation and estrangement, the advising relative is not liable as for alienation; but, if it be made to appear that such relative was actuated by malice, and willfully interfered for such reason, not for the welfare of the related spouse, an action will lie on behalf of the injured spouse for alienation.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1118; Dec. Dig. § 324.]

2. CONSPIRACY — § 19 — ALIENATION OF AFFECTIONS — LIABILITY OF RELATIVES — EVIDENCE.

In an action for alienation against the parents, brothers, and sister of a wife who had separated from her husband, evidence held sufficient to sustain a verdict against all the defendants on the ground that there was a common understanding and design to procure a separation.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.]

3. TORTS — § 21 — JOINT TORT-FEASORS — "AID-ER AND ABETTOR."

One present at the commission of a tort encouraging or inciting the same by words, gestures, looks, or signs, or by any means coun-

tenancing or approving the act, is in law an "aider and abettor," and liable as principal.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 28; Dec. Dig. ¶21.]

For other definitions, see Words and Phrases, First and Second Series, Aider and Abettor.]

4. CONSPIRACY ¶2 — CIVIL LIABILITY — ALIENATION OF AFFECTIONS—PROOF.

In an action by a husband against the relatives of his wife, who had left him, for conspiring to procure a separation, plaintiff need not prove that the defendants came together and actually agreed in terms to bring about the separation and to pursue the end by common means; it being sufficient if it was shown that the defendants pursued the same object by their acts with a view to its attainment.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 2; Dec. Dig. ¶2.]

5. TRIAL ¶295—INSTRUCTIONS—REQUESTED CHARGE SUBSTANTIALLY GIVEN.

In an action for conspiracy to alienate the affections of a wife, where the instructions as a whole emphasized and reiterated the legal presumptions in favor of defendants, the burden of proof on the plaintiff, and the clearness of the evidence necessary to sustain such burden, the refusal of the court to instruct that the jury must be guided by reasonable inferences only, not by mere conjecture, in reaching a verdict, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. ¶295.]

6. CONSPIRACY ¶21—ALIENATION OF AFFECTIONS—QUESTION FOR JURY.

In an action by a husband against the relatives of his wife for a conspiracy to alienate her affections, whether the defendants or any of them gave advice to the wife to induce a separation, indulged in solicitation, used any compulsion, or made any threats to that end, or entertained any malice toward the plaintiff, *held* for the jury under the evidence.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 28, 29; Dec. Dig. ¶21.]

7. TRIAL ¶234—INSTRUCTIONS—CONFORMITY TO THE EVIDENCE.

A requested instruction directing a verdict for defendant if the jury should find certain facts, but based on an incomplete and partial statement of the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. ¶234.]

8. CONSPIRACY ¶14 — CIVIL LIABILITY — ALIENATION OF AFFECTIONS.

In a husband's action against the relatives of his wife for conspiring to alienate her affections, a recovery might be had against two or more of the defendants if the charge of conspiracy was sustained, and against any one or more for individual responsibility if no conspiracy was proved, since the damage to the plaintiff, and not the conspiracy, was the gist of the right of action.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig. ¶14.]

9. APPEAL AND ERROR ¶1067 — HARMLESS ERROR—MISJOINDER OF DEFENDANTS—INSTRUCTIONS.

Under Code 1904, § 3258a, providing that whenever a misjoinder of parties shall appear in any action, the court may order the action and suit to abate as to any party improperly joined, and to proceed against the others, where there was a misjoinder of parties defendant in a husband's action against his wife's parents, brothers, and sister for conspiracy to alienate, a reversal could not be had because of the refusal of a requested charge that unless the plaintiff proved a conspiracy by all of the

defendants there could be no recovery: since no real difficulties from misjoinder of the defendants could arise in view of the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ¶1067.]

10. APPEAL AND ERROR ¶1067 — HARMLESS ERROR—VARIANCE—INSTRUCTIONS.

Under Code 1904, § 3384, providing that, if at the trial of any action there is a variance between proof and pleadings, the court, if substantial justice will be promoted, and the opposite party will not be prejudiced, may allow amendment of the pleadings to conform with proof, in a husband's action against the relatives of his wife for alienation of her affections, a charge that, unless the plaintiff prove conspiracy by all the defendants, there could be no recovery, was properly refused; since any variance between the parties alleged to be liable and those shown by proof to be so could be cured by amendment under the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ¶1067.]

11. TRIAL ¶261—INSTRUCTIONS—REQUESTED INCORRECT INSTRUCTIONS—DUTY OF COURT.

The court may refuse an incorrect requested instruction, and is not bound to modify it or give any other instruction in its place.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. ¶261.]

Error to Law and Equity Court of City of Richmond.

Action by Thomas Grant Walker against H. L. Ratcliffe and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Meredith & Cocke, of Richmond, for plaintiffs in error. L. O. Wendenburg and T. Gray Haddon, both of Richmond, for defendant in error.

KELLY, J. This is an action of trespass on the case brought by Thomas Grant Walker against H. L. Ratcliffe and Alice, his wife, and their children, Frank, John, and Alice Ratcliffe. The declaration charges the formation and execution of a conspiracy to alienate from the plaintiff the affections of his wife, who was a daughter of H. L. and Alice Ratcliffe, and a sister of the other defendants. To a judgment for the plaintiff in the sum of \$5,000 this writ of error was awarded.

The evidence is voluminous, and on some points conflicting, but, viewing it as on a demurrer, the following facts appear: The plaintiff at the time of his marriage was 32 years old, and resided in Richmond. His wife was 22, lived with her parents near Richmond (paying for her board), and was employed in the city as a stenographer. They had known each other for several years, and had been engaged for about 8 months. The plaintiff had for a long time been a frequent and apparently welcome visitor at her home, going there several times each week, and nearly always taking supper there on Sunday night. He had accumulated a small estate and was a man of good character. The defendants disclaim all knowledge of the engagement, but do not suggest

any valid objection, and say that their only grievance was that they were not informed of the contemplated marriage. The ceremony took place on the morning of April 25, 1913, at the home of the officiating minister in Richmond, in the presence of the minister's wife and of a sister and brother-in-law of the plaintiff. The bride and groom both seemed to believe that the wedding would be opposed if their plans were known at her home, but the record discloses no just ground upon which to charge him with having persuaded her against her will into a clandestine marriage. Every detail, in so far as not suggested by her, was arranged with her free and full approval. The plaintiff's sister advised her to tell her mother, but she thought it best not to do so. As soon as the ceremony was over she telephoned the news to her mother, and the latter was greatly affected, and at once became hysterical. The bride's father then came to the telephone and told her that she had about killed her mother, and ordered her never to put her foot in the home again. Both the father and the mother were very angry, and shortly afterwards used some very violent and threatening language with reference to the plaintiff, which need not in terms be repeated here.

After spending some hours in the city and having lunch at the Richmond Hotel with some of his relatives, the plaintiff and his wife started on the wedding trip which they had previously planned, taking an afternoon train for Washington. While on that train they received a telegram, addressed to Mrs. T. G. Walker and sent by John Ratcliffe, in these words:

"Your mother is dying. I would advise you to return to my house."

This telegram was sent at the suggestion of the sister, Alice Ratcliffe, made to John Ratcliffe over the telephone some hours after he had seen his mother and had left her to return to his business. About an hour later Frank Ratcliffe, who had just returned from a long trip, tried to reach Mrs. Walker with a telegram, which was never delivered, but which read as follows:

"Come home to-night, if possible. Mamma, I think, is dying. Everything will be all right."

At the time he sent this telegram his mother was sitting in a rocking chair on the porch. He says:

"She looked very peculiar, slightly hysterical, and I might say she was deranged, from her appearance."

He sent the telegram after his sister Alice had suggested that he "try to get Bettie," meaning plaintiff's wife.

Under the influence of the telegram from John Ratcliffe, the plaintiff and his wife left the train at a station called Doswell, and obtained by telephone some information from an aunt and from another brother of the plaintiff's wife, which indicated that the telegram was a fabrication, but they decided, largely upon his judgment and recommenda-

tion, that it would be best to return and investigate the situation. Upon their arrival in Richmond they went to his family home. While at supper there Mrs. Walker was called to the telephone to talk to her brother, Frank Ratcliffe, and their conversation resulted in an arrangement by which he was to meet her at Seventh and Broad streets, in Richmond, and take her to her father's home that night. He would not agree for her husband, the plaintiff, to bring or even accompany her, claiming that "his presence or the very mention of his name would mean instant death" to her mother. Mrs. Walker wanted her husband to accompany her, and she waved and smiled at him as she left with her brother and took the street car for her home, promising to call him up the next morning. It is significant, and is pertinent in this connection, that up to this moment of separation there had been no indication that she regretted her marriage or had any thought of giving up her husband. She was distressed about the attitude of her parents, but after she knew of that she willingly started on the wedding trip, and would have continued the journey after the telegram was received if her husband had insisted upon that course; in fact, the more probable conclusion from the evidence is that, but for his positive advice to the contrary, they would have gone on to Washington. On the train that afternoon, and also after she had returned to Richmond that evening, she was making a list of the names of friends for whom she intended announcements of her marriage. It is beyond question that the courtship of this couple had been a long and happy one, and that they had been devoted to each other. Another fact worthy of consideration in connection with the circumstances surrounding this parting between them at Seventh and Broad streets is that John Ratcliffe was present on that occasion, and claimed in the presence of plaintiff and his friends, and in rather conspicuous manner, that he was going to his own home in the city for the night, but, instead, went almost immediately to the home of his father in the country, arriving there about 30 minutes after Frank Ratcliffe and Mrs. Walker arrived.

Mrs. Walker found her mother in bed and, as she thought, in a sort of stupor. The record shows conclusively that her condition was not, in fact, and had not been at any time, alarming. It may have been made to appear otherwise to Mrs. Walker. There had been no reasonable ground at any time that day for saying that she was dying, and after Mrs. Walker arrived she, and not her mother, was the center of interest and attention on the part of the family. Her brother Frank told her, in substance, that night in the presence of her brother John that she could see for herself what her mother's condition was; that she had caused it; that he would take her back that night or the next day if she

wanted to return to Walker, but that there was no middle ground, and she must choose between Walker and her family. Before this interview was concluded her father came in the room and told her that if Walker came there that night he would shoot him. Her mother had stated during the day that if Walker came on the place she would "cut his heart and liver out," and had used other expressions indicating a high degree of temper and ill will towards the plaintiff. Her father and her brothers, Frank and John, had told Dr. Redd during the day that they were going to try to keep the plaintiff and his wife apart, or words to that effect. Mrs. Walker decided that night to give up her husband, taking from her finger her engagement ring and wedding ring and turning them over to one of her brothers. It was agreed that her brother Frank should take her out of the state to some place which was not fixed upon that night. Later on in the night, in compliance with a suggestion which they say came from Mrs. Walker, John and Frank went to the home of an attorney who had been theretofore acting as counsel for John Ratcliffe, and arranged with him to come to the Ratcliffe home the next day for a conference. This was the Friday night of the wedding day. The next day the plaintiff, who had requested to see his wife, was permitted to see her at John Ratcliffe's home, but was not allowed a private interview; both John and Frank Ratcliffe were there at the time, and, while the plaintiff was left for a few moments with his wife in the parlor, one or the other of the brothers was in a position to hear everything that was said all the time. John had in his possession, and delivered to her there, her engagement ring and wedding ring, and she in turn delivered them to her husband, and told him that she had made a mistake in marrying him, and wanted to be released. After Walker had left the house, John Ratcliffe commended Mrs. Walker's decision to go to Pittsburg, advising her to go on there and "forget everything except that she had two friends" (meaning himself and Frank) who would supply her needs, adding, however, that if she should decide to come back to Walker he had nothing to do with that. On the next day, which was Sunday, Frank took her to Pittsburg, where she lived under her maiden name in the family of an intimate friend of his until this suit was brought.

After she went to Pittsburg the plaintiff, having secured her address, wrote her several times and visited her once, earnestly appealing to her to come back to him, but without avail. The Ratcliffe family kept in close touch with her, and her mother and brother Frank visited her shortly after the plaintiff had been to Pittsburg to see her. Finally the plaintiff, giving up all hope of reconciliation, instituted this suit.

[1] The fundamental question here present-

ed, as to the liability of the immediate family of the consort in a suit for alienation, as distinguished from the liability of a stranger, is new in Virginia, but has frequently arisen in other jurisdictions. The general rule, consonant with reason and sustained by authority, is that parents may advise their children about their domestic affairs without incurring liability, if the advice be given in good faith and prompted by worthy motives, even though such advice results in a separation and estrangement of husband and wife. Bad and improper motives will not be presumed as against parents, but must be clearly proved. The burden in such cases is upon the plaintiff to show that the parent has been prompted by malice; the presumption being that what he has said and done has been due to natural affection and to a regard for the best interests of the child. When, however, it is made to appear by clear and satisfactory evidence that the parent has been actuated by malice, and has willfully interfered on that account, and not on account of the welfare of his child, to bring about a separation, an action will lie against him for damages. The law on this subject is so satisfactorily discussed and so many pertinent authorities are cited in the case of *Multer v. Knibbs*, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322-325, 9 Ann. Cas. 958, that we deem it proper to quote somewhat at length from the opinion in that case:

"There is a material difference between the acts of a parent and those of a mere intermeddler. Even in the latter case a defendant may disprove any intent on his part, in advising the wife, to cause a separation, and may show that his advice was given honestly. *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. But the rights and the corresponding duties of a parent are much greater than those of a stranger; and much stronger evidence is required to maintain an action against him. It is proper for him to give to his daughter such advice, and to bring such motives of persuasion or inducement to bear upon her as he fairly and honestly considers to be called for by her best interests, and he is not liable to her husband in damages for her desertion resulting therefrom unless he has been actuated by malice or ill will towards the plaintiff, and not by a proper parental regard for the welfare and happiness of his child. In such an action the material question is the intent with which the parent acted, rather than the wisdom, or even the justice, of the course which he took. These questions have arisen in other jurisdictions; and, so far as we have been able to discover, they always have been answered in the same way. The leading case is *Hutcheson v. Peck*, 5 Johns. [N. Y.] 196; and the doctrine there laid down has commanded assent. *Oakman v. Belden*, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396; *Smith v. Lyke*, 13 Hun. [N. Y.] 204; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; *Payne v. Williams*, 4 Baxt. [Tenn.] 583; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Huling v. Huling*, 32 Ill. App. 519; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. * * * And the

burden is upon the plaintiff to show that the defendant has been prompted by malice in what he has said and done, and to overcome the presumption that he acted under the influence of natural affection and for what he believed to be the real good of his child. *Bennett v. Smith*, 21 Barb. [N. Y.] 439; *Pollock v. Pollock*, 9 Misc. Rep. 82, 29 N. Y. Supp. 37; *White v. Ross*, *Westlake v. Westlake*, and *Brown v. Brown*, supra; *Young v. Young*, 8 Wash. 81, 35 Pac. 592; *Reed v. Reed*, supra. But if there is evidence upon which the jury would have a right to find that the defendant has actively interfered to cause his daughter to abandon her husband, and has deprived him of her affections and of the comfort and solace of her society, and has done this from malice to the plaintiff, and not for the purpose of affording proper protection to his child and furthering her true welfare, then the case must be left to the jury, with the instruction that, if these facts are proved, the action may be maintained. *Holtz v. Dick*, supra; *Price v. Price*, 91 Iowa, 693, 60 N. W., 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; *Tucker v. Tucker* and *Bennett v. Smith*, supra; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119. This was recognized by all the judges in *Hutcheson v. Peck*, 5 Johns. [N. Y.] 196. The question accordingly is whether there was such evidence in this case."

The principles above announced have usually found expression in actions against the father, but they seem to apply as well to mother, brothers, and sisters. *Powell v. Benthall*, 136 N. C. 145, 48 S. E. 598; *Miller v. Miller*, 154 Iowa, 344, 134 N. W. 1058; note to *Geromini v. Brunelli*, 46 L. R. A. (N. S.) 465; *Glass v. Bennett*, supra.

There is no essential difference between counsel for plaintiff and defendants upon the substantive law of this case; their differences being found in the application of the law to the evidence and in certain collateral questions arising in the course of the trial.

[2] The first ground upon which we are asked to reverse the judgment is that the evidence was not sufficient to warrant a verdict against any of the defendants; and this ground is especially urged as to H. L. Ratcliffe and wife and their daughter Alice.

We do not think this contention can be sustained. The evidence is so voluminous as to preclude the possibility of bringing any detailed discussion or recital of it here within reasonable limits. We have considered it carefully, and are of opinion that the direct testimony, together with the fair inference from the circumstances and from the conduct of the parties, warranted the jury in finding a verdict against all of the defendants. It is strongly urged on behalf of H. L. Ratcliffe and wife that their threats against the plaintiff and their manifest ill temper towards him should not be considered as evidence against them, because under the law their anger should be attributed not to malice, but to their affection for their daughter and to a concern for her best interests. The mere fact that these defendants manifested ill will towards the plaintiff would not be sufficient to overcome the legal presumption in their favor, but we think the record dis-

closed sufficient facts and circumstances to justify the court in submitting the question to the jury, and to justify the jury in finding against the defendants. They themselves say that if their consent had been sought they would have acquiesced, and would have wished the young couple well, and they were unable to suggest a single satisfactory reason why the marriage should not have occurred.

[3] More activity in bringing about the separation was displayed by some than by others of the defendants. All five of them, however, were in the home together when the separation was agreed upon. The evidence in its entirety, if it does not impel the conviction, is sufficient to sustain the jury's conclusion that there was a common understanding and a common design. Any person present at the doing of a wrong, "encouraging or inciting the same by words, gestures, looks or signs, or who by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal." *Daingerfield v. Thompson*, 33 Grat. (74 Va.) 136, 151, 36 Am. Rep. 783.

[4] In concluding this branch of the case we quote with approval the following language from the opinion of the judge who presided at the trial:

"The two main questions of fact to be decided by the jury in this case were whether a conspiracy existed among the defendants, and whether they maliciously sought to deprive the plaintiff of the society of his wife. Such issues are especially for the determination of a jury, as their decision so largely turns upon inferences from the evidence as to motives and intent, which are, as a rule, not capable of direct proof. The evidence in cases involving conspiracy, malice, and fraud is apt to be circumstantial only. As said by Mr. Greenleaf (*Evidence*, vol. 8, § 93): 'The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.'

"Upon a careful consideration of all the evidence in the case, viewed in the light of these established principles of law, I am unable to hold that the verdict of the jury was so plainly against the evidence or so palpably without evidence that it is the duty of the court to set it aside. The case involved the scanning of various phases of human conduct under the circumstances in which the parties were placed, with inferences to be drawn as to the intent and motives by which they were actuated. Conclusions upon such matters are peculiarly for the judgment of a jury, and, while the direct testimony is not very convincing, and not equally strong against all of the defendants, yet the voluminous evidence discloses sufficient facts, in a case of this character, to render the conclusion of the jury final, so that the court is without power to disturb it."

We pass now to a consideration of the alleged errors in the instructions to the jury.

[5] Complaint is made that the court refused to amend one of its instructions so as to tell the jury that they must be guided by reasonable and natural inferences only, and not by mere conjecture and suspicion. The instructions, taken as a whole, emphasize and reiterate the legal presumptions in favor of the defendants, the burden of proof on the plaintiff, and the character and clearness of the evidence necessary to sustain that burden, and we are satisfied that the defendants could not have been prejudiced by the refusal of the court to make the amendment in question.

[6] The defendants asked the court, in what they designate as prayer No. 8½, to tell the jury "that there was no proof": (1) That the defendants, or any of them, gave any advice to the wife to induce a separation; (2) indulged in any solicitation or used any compulsion to that end; (3) made any threats to that end; (4) entertained any malice towards the plaintiff. Under our view of the law and the evidence, this prayer was properly denied. The instruction requested would have improperly withdrawn from the jury a state of facts and circumstances peculiarly within its province.

[7] Defendants' prayer No. 13 was also properly refused. The instruction requested was as follows:

"The jury are instructed that, if they believe from the evidence that there was not exercised by any one or more of the defendants either compulsion or solicitation to cause or persuade plaintiff's wife to separate and remain away from him, and that all that was said by any one of the defendants as to such separation was the statement of Frank Ratcliffe that she saw the condition in which her mother was, that if she desired it he would take her to her husband that night or the next day, as she might prefer, but that there could be no middle course, and that she must understand that she must choose between her own family and her husband, and that she thereupon asked the said Ratcliffe whether, if she should decide to stay with her family, he would protect her, to which he replied that he would give her all the protection in his power, and that thereupon she asked him if he would take her away, to which he replied that he would if she desired to go, then the jury must find for the defendant."

This instruction singled out one statement of the defendant Frank Ratcliffe in a context which might have led the jury to infer that the court did not regard the statement as of serious import, and tended to withdraw that statement from consideration by the jury in the light of the temper and attitude which all of the defendants had assumed towards the plaintiff's marriage at the time the statement was made. It ignored John Ratcliffe's encouragement to her to go on to Pittsburg, and disregarded a number of other facts and circumstances proper for

the jury to consider in determining the purpose and probable effect of the statement recited in the instruction, and directed a verdict for the defendants upon a partial and incomplete view of the evidence. Instructions of this character have repeatedly been condemned by this court. See *Vaughan M. Co. v. Staunton Tea Co.*, 106 Va. 452, 56 S. E. 140; *Southern Ry. Co. v. Baptist*, 114 Va. 723, 77 S. E. 477.

[8-10] Instruction No. 4 requested by defendants was properly refused. It would have told the jury that, unless the plaintiff proved a conspiracy by all of the defendants, there could be no recovery. The argument used for this instruction is based on the claim that the plaintiff was bound to prove the conspiracy as alleged. If by this it is meant that in an action like this there must be a recovery against all or none of the defendants, the contention is plainly untenable. The damage to the plaintiff, and not the conspiracy, was the gist of the action, and the court in other instructions properly told the jury, in effect, that they might find a verdict against two or more of the defendants, if the charge of conspiracy was sustained, and as to any one or more for individual responsibility if no conspiracy was proved. 5 R. C. L. § 56, p. 1106; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; 1 *Cooley on Torts* (3d Ed.) 210-214; 4 *Enc. Pl. & Pr.* 738, 739. Independently of these authorities, any real difficulties that could arise in a case like this from a misjoinder of defendants or a variance between the allegations and the proof are fully met by sections 3258a and 3334 of the Code.

[11] In so far as the argument for instruction No. 4 relates to the proof of the methods by which the alleged conspiracy was carried out, conceding it to have been right in this respect, it is sufficient to say that the error already pointed out eliminates the instruction from further consideration. The other instructions, as given, were correct and free from ambiguity, and there was no duty upon the court to modify and give this one or to give a new one in its place. *C. & O. Ry. Co. v. Stock*, 104 Va. 97, 110, 51 S. E. 161.

With respect to the remaining exceptions to the action of the court in giving or refusing instructions, we deem it sufficient to say that no new or novel questions are presented therein, and that the instructions in the aggregate seem to us to have fairly and fully submitted the law of the case to the jury. It is not too much to say that the instructions, considering the number asked for and the number actually given, were remarkably accurate and clear as a whole.

The judgment complained of is affirmed.
Affirmed.

(117 Va. 520)

MAHONEY et al. v. FRIEDBERG et al.
(Supreme Court of Appeals of Virginia. June 10, 1915.)

WATERS AND WATER COURSES—§89—CONVEYANCE—CONSTRUCTION—RESERVATION.

The owner of land which abutted on a creek conveyed lots adjacent to the creek, bounding them by the port warden's line in the creek as then or thereafter it might be established. At that time the port warden's line had been established, and thereafter land was added to these lots by accretion. It appeared that at the time of the conveyance the port warden's line marked the bank of the creek. *Held* that, as a deed is to be construed most strictly against the grantor, the conveyance must be held to include the grantor's riparian rights, if any, under the bed of the creek.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 91, 92, 107, Dec. Dig. §89.]

Appeal from Circuit Court of City of Norfolk.

Bill by Mary R. Mahoney and others against Solomon Friedberg and others. From a decree for defendants, plaintiffs appeal. Affirmed.

G. M. Dillard, of Norfolk, for appellants.
John B. Jenkins, G. Tayloe Gwathmey, and W. A. Graff, all of Norfolk, for appellees.

KEITH, P. The bill in this case was filed by Mary R. Mahoney and others, residuary devisees of Edward Mahoney, making Solomon Friedberg and others defendants, and stating their case as follows: That the plaintiffs are seised of a fee-simple estate in a parcel of land in the city of Norfolk, commencing on the west side of James street, now called Monticello avenue, and formerly known as Armistead road, or Armistead Bridge road, at a point where the southern line of lot No. 64 on the plat of the property of Edward Mahoney, which is duly recorded in the clerk's office of the corporation court of the city of Norfolk, intersects the western line of said street, avenue, or road, and extending thence southwardly along the said street, avenue, or road a distance of 35 feet more or less to the center of Smith's creek; thence westwardly along the center of Smith's creek to the eastern side of Granby street; thence northwardly along the eastern side of Granby street, a distance of 54 feet, more or less, to the intersection of the southern line of lot No. 41 on the said Mahoney plat with the eastern line of Granby street; and thence eastwardly along the southern line of lots 41 and 64, on the said plat, to the point of beginning.

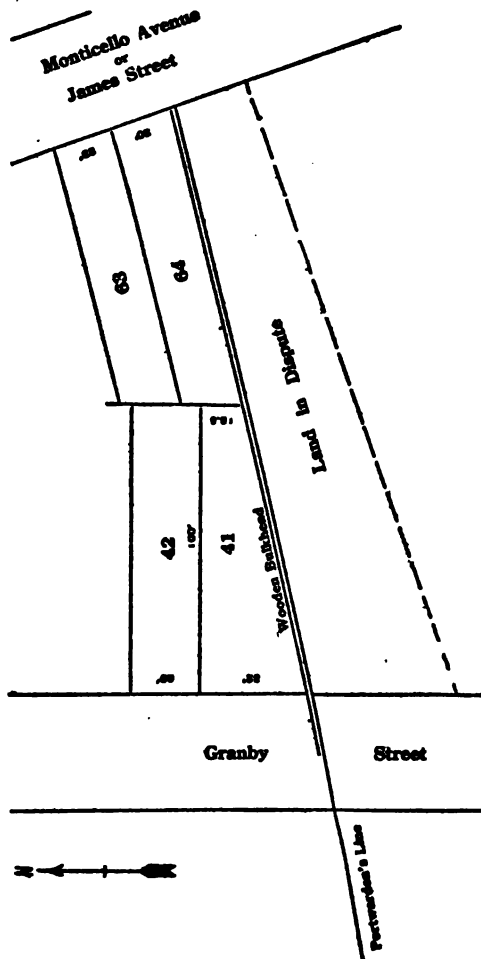
This land is claimed by the plaintiffs under the residuary clause of the will of their father, Edward Mahoney, who acquired it under a deed from John Mahoney and wife, in which it is described as:

"All that certain tract, piece, or parcel of land, known as 'The Bower,' with the buildings thereon, situated in the county of Norfolk, containing * * * acres, more or less, adjoining the corporate limits of the city of Norfolk near

Armistead's Bridge, and bounded on the north and east by the public road leading to the said bridge, on the west by the land of Abel Llewellyn, and on the south by the port warden's line in Smith's creek as the same is now or may hereafter be established."

The bill claims that Smith's creek, which constitutes the southern boundary of the land, was and is a tidal inlet extending eastwardly from the Elizabeth river, through a section of the city of Norfolk, and that the said creek, throughout the entire extent of the boundaries of the property in dispute, especially between James street and Granby street, where the parcel of land is located, ebbs bare at mean low water, so that the entire parcel of land in question is above mean low-water mark; that Edward Mahoney, soon after acquiring title and possession under the deed in 1891 from John Mahoney, proceeded to have the tract subdivided and platted into lots and streets by the city engineer of Norfolk, and the plat of the same recorded in Plat Book 1, page 7, a certified copy of which plat is filed with the bill as Exhibit C, that Edward Mahoney thereupon sold to various persons certain of the lots with reference to, and according to the location given on the said plat, and, among others, he sold lots 41 and 64 to J. Bunyan Jones, by deed dated June 18, 1906, and by successive conveyances the said two lots were transferred to and became vested in Solomon Friedberg, the defendant, who now owns the same; that a large portion of the land purchased and platted by Edward Mahoney consisted of marsh lots, lying between high water and low water, over which the tide ebbed and flowed, being alternately covered with water and bare; that when Edward Mahoney acquired this tract of land, embracing all of the high land therein, extending down to high-water mark and beyond to the port warden's line, as the same then was or might thereafter be established, he acquired all of the land, under this general description, within the boundaries mentioned extending to the line of mean low-water in Smith's creek, and, as the whole creek opposite this land ebbs bare at low water, he acquired title to the center of the creek, but when he sold lots 41 and 64 to J. Bunyan Jones he sold by specific description only the clearly defined space embraced in the lots, as defined on the recorded plat, without mention of any riparian rights or other appurtenances; and that said Friedberg, the successor in title to J. Bunyan Jones to the said two lots, occupies the same position as Jones, and has no legal or equitable claim to any other land lying south of the limits of the said two lots as defined on the said plat, yet he, the said Friedberg has claimed, and now claims to own, the parcel of land first described in the bill of complaint, lying between the southern boundary of lots 41 and 64 aforesaid and the center of Smith's creek.

That there may be a clear apprehension of the lots here mentioned, the accompanying diagram will be inserted in this opinion.



The bill then goes on to say that at the time of the purchase by John Mahoney of the said parcel of land, and at the time of his conveyance to Edward Mahoney, as aforesaid, there was reputed to be a port warden's line extending along the northern side of Smith's creek, within the boundaries of the said tract of land, "but your complainants question the legality of the same, for the reason that the port warden's line is intended to be a line defining the line of navigation for various purposes in waters beyond mean low-water mark, and as the owner of the shore owns to low-water mark in Virginia, and as the location in question on Smith's creek is above low-water mark, no port warden's line was or could have been established at the place in question."

Complainants allege that they acquired title to the parcel of land in question, but they further allege that on March 5, 1911, William H. Mann, Governor of Virginia, conveyed to I'Anson and Eason by deed duly recorded in the clerk's office of the corporation

of the city of Norfolk, in pursuance of an application under the patent laws of Virginia, the said parcel of land, on the theory that the land lying between the southern boundary of lots 41 and 64 and the center of Smith's creek was beyond mean low-water mark, and was therefore the property of the state of Virginia; that complainants' devisor, Edward Mahoney, thereupon entered a suit in the court of law and chancery of the city of Norfolk against I'Anson and Eason to set aside said grant and deed, and to maintain his title, and thereupon I'Anson and Eason abandoned their claim, and by deed duly recorded conveyed the land first described in this bill of complaint to Edward Mahoney. A copy of this deed is also filed as Exhibit F.

The immediate grantor of Solomon Friedberg was one Farant, from whom Friedberg acquired lots 41 and 64, and claims to have acquired an interest in the parcel of land first described in the bill lying between the southern line of lots 41 and 64 aforesaid and the center of Smith's creek.

The complainants in the bill allege that they became seised and possessed of the land in the manner described, that they are now so seised and possessed, and they charge that the claim of Friedberg to ownership of or interest in said land is without foundation in law or equity, and constitutes a cloud upon their title, and they pray that the cloud be removed and their title quieted, that the full and complete fee-simple title to the parcel of land in question may be decreed to be vested in complainants, that the defendants may be restrained and enjoined from all further acts which would becloud the title to the said parcel of land, and for all other and further relief which may be suited to the case and agreeable to equity.

Friedberg and his codefendants answered this bill, and denied that complainants are possessed of a fee-simple title to the land described in the first paragraph of the bill. They contend:

"That in the deed from John Mahoney and wife to Edward Mahoney, dated March 5, 1890, under which Edward Mahoney acquired title, the land conveyed to him is described as follows: "On the north and east by a public road leading to said bridge, on the west by the land of Abel Llewellyn, and on the south by the port warden's line in Smith's creek, as the same is now or may hereafter be established." That at and before that time "the port warden's line had been duly established by the board of harbor commissioners of the cities of Norfolk and Portsmouth south of the said property, and any property rights south of said port warden's line were subject to the rights of the public therein, and Edward Mahoney parted with any right of title or riparian or other rights south of the said port warden's line and in front of lots 41 and 64 which were conveyed by Edward Mahoney to J. Bunyan Jones and by apt and proper conveyances such riparian and other rights became and now are the property of Solomon Friedberg."

They deny that said parcel of land described in paragraph 1 of the bill passed under the will of Edward Mahoney, because neither

said lands nor any rights therein were the property of the said Edward Mahoney at the time of his death, but were the property of the defendant Farant, subject to the rights of the public therein; and respondents claim that the property in dispute and all riparian and other rights thereto now belong to the defendant Solomon Friedberg, subject to the deed of trust from him to John B. Jenkins and William A. Graff, trustees, mentioned in the bill, and that the only cloud upon the title thereof is the claim of the complainants set up in their bill.

From what has been said it will be seen that the decision of this controversy turns upon the southern boundary line of lots 41 and 64. The deed from John Mahoney to Edward Mahoney described the land conveyed as bounded on the south by the port warden's line in Smith's creek, "as the same is now or may hereafter be established." The deed from Edward Mahoney to J. Bunyan Jones conveys 20 lots of land situated in the city of Norfolk, on Granby street and the Armistead Bridge road. By referring to the map accompanying this opinion it will be seen that lot 41 is bounded on the west by Granby street, and of the 20 lots conveyed by deed to Jones 12 are bounded on the west by Granby street, lot No. 41 being the southernmost of the 12, and all of which have a front of 25 feet on Granby street, except No. 41, which has a frontage of 32 feet on that street. On Monticello avenue, or James street, the remaining 8 of the 20 lots have a frontage of 25 feet, except lot No. 64, which has a frontage of 30 feet on that street. It will be observed that the two lots 41 and 64 contain no description, except that 41 has a frontage of 32 feet on Granby street, and runs back 100 feet; while 64 has a frontage of 30 feet on Monticello avenue, or James street, and runs back 100 feet to the west. There is no reservation of any interest or right of any kind or description in this deed. At the time it was executed it appears from the deposition of W. T. Brooke, the engineer of the city of Norfolk, that a port warden's line was established along the boundary of the Mahoney property on Smith's creek, and the property of Edward Mahoney was laid off and platted by the engineer into lots and streets, and Exhibit C filed with the bill is identified by the engineer as a correct representation of the work done by him. In the course of his deposition Mr. Brooke was asked this question:

"Are the beds of streams or any land outside of these port warden lines indicated on this exhibit waste or unappropriated land?"

"A. There is no indication here of any waste or unappropriated land; on the contrary, it is marked 'Smith's Creek.'"

The language of a deed is to be taken most strongly against the grantor. In this case the lots are conveyed in express terms as "described on the map of the land of Edward Mahoney made by W. T. Brooke, city engineer, in January, 1891." That map shows the southern boundary of lots 41 and 64 as

Smith's creek, and there is no suggestion of any reservation, or, indeed, of the existence of any land owned by the grantor to the south of the line described as Smith's creek appearing on the map referred to as descriptive of the lots conveyed.

We regard it also as confirmatory of the view that no reservation was intended, and, in fact, that no land belonging to Edward Mahoney existed between the southern boundary of these lots as ascertained by reference to the map made by the city engineer, that all the lots north of 41 and 64, the two lots the southern boundaries of which are in dispute, have a front of 25 feet on Granby street and Monticello avenue, respectively, except lot 41, which has a front on Granby street of 32 feet, and lot 64, which has a front on Monticello avenue of 30 feet. We can see no reason for departing from a uniform width of 25 feet of 18 of the lots conveyed, except that the front of 32 feet in lot 41 and 30 feet in lot 64 covered and disposed of all the land at that time held at this point by Edward Mahoney.

In *Watson v. Peters*, 26 Mich. 508, the court said:

"The owner of city lots bounded on navigable streams, like the owner of any land thus bounded, may limit his conveyance thereof within specific limits, if he shall so choose, but, when he conveys with the water as a boundary, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed, which he may grant to others for private occupation, or so occupy himself as to cut off his grantee from the privileges and conveniences which appertain to the shore of navigable water. Such privileges and conveniences constitute a part, and in many cases the principal part, of the value of the grant; and it is precisely in these cases of city lots that they are of most value, and generally constitute the chief inducement to the purchase, and the chief, or at least a very important element, in determining the price."

In *Board of Park Commissioners v. Taylor*, 133 Iowa, 459, 108 N. W. 927, it was contended that the defendants were limited in the size of their lots to the dimensions shown on the plat, but the board said:

"Without doubt the plat is to be interpreted as showing that the east and west lines bounding lot 3 on the north and south are each 38 feet long, the east and west line between lots 1 and 2 is 34 feet long, and the south line of lot 1 is 30 feet long. It is conceded that the conveyances of these lots described them by number only, and not either by dimensions or by reference to the Des Moines river. But, when a lot is thus described as on a map or plat to which reference is made, such map or plat becomes, for the purpose of description, a part of the deed, and has the same effect as though it were incorporated into the instrument. Therefore defendants' deeds, although they contain no calls to the Des Moines river, do, by reference to the plat, call for lots extending from First street west to the Des Moines river, for they are so represented on the plat as of specified dimensions east and west; but, where a monument is referred to, as, for instance, the shore of a river or lake, such monument, when identified, and its location established, controls courses and distances in the description."

Thomas Jefferis v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872, was a case of accretion to a lot on the Missouri river. In 1853 Jefferis had a patent for lot No. 4, fractional section 21, etc., according to official plat. Thereafter the land was conveyed simply as lot No. 4, section 21, etc. About the time of the original entry new land had formed along the whole north line of this lot, and continued to form until about 40 acres had been added by accretion. The defendant contended that some area, however narrow, had formed between the line when the survey was made in 1851 and when it was entered by the patentee in 1853, and, the deed having been simply for lot No. 4, it passed title to the lot as it was at the time of the survey, and not at the date of the deed, and that, as accretions were formed while the several successive grantees held the title, such accretions did not pass by their deeds. The court said:

"But we think that in all the deeds the accretion passed by the description of the land as lot No. 4. * * * When each successive owner took his title, lot No. 4 was a water lot, having the rights of wharfage, landing, and accretion."

The case of **Commonwealth v. Alger**, 7 Cush. (Mass.) at page 80, is an instructive one, but we do not perceive that it aids the case of appellants. It is doubtless true that:

"The upland and flats may be severed by the owner at his pleasure. He may alien the flats or any part of them without the upland, or the upland without the flats; and it will depend on the descriptive terms of the conveyance, embracing or excluding them, whether any and what part of them will pass."

But, continuing, the court says:

"We think it entirely clear that since the adoption of the colony ordinance every grant of land bounding upon the sea, or any creek, cove, or arm of the sea, and either in terms including flats to low-water mark, or bounding the land granted on the sea or salt water, with no terms limiting or restraining the operation of the grant, and where the land and flats have not been severed by any intervening conveyance, has had the legal effect to pass an estate in fee to the grantee, subject to a limited right of way for boats and vessels."

As we have seen, there is in the deed under consideration no term limiting or restraining the operation of the grant that the lots as described on the map referred to in the deed bound upon Smith's creek, and Solomon Friedberg is, in consequence, the owner of those lots as shown on the plat, with a right to all the accretions formed in the creek adjacent thereto.

The case of **Higinbotham v. Stoddard**, 72 N. Y. 94, is much relied upon by appellants. It holds that:

"The rule that, in the construction of a deed, courses, distances, and quantities must yield to natural or artificial monuments called for by the grant is not inflexible; it applies with less force to artificial than to natural monuments, and, where there is anything in the description showing that the courses and distances are right, they will prevail."

With all which, of course, we take no issue. It clearly appears that in that case the plaintiff had not by his deed conveyed the land which was in dispute between him and his grantee; while in this case, as we have said, it plainly appears that the deed from Edward Mahoney, by reference to the map made by the city engineer, adopted Smith's creek as the southern boundary, and that whatever changes may have taken place in the intervening years by way of accretion belong to the defendant Friedberg, as owner of lots 41 and 64.

We are of opinion to affirm the decree of the circuit court.

Affirmed.

(101 S. C. 224)

CARTER v. WESTERN UNION TELEGRAPH CO. (No. 9118.)

(Supreme Court of South Carolina. June 9, 1915.)

1. TELEGRAPHS AND TELEPHONES §54—LIMITATION OF LIABILITY—LAW OF GEORGIA.

By the law of Georgia a stipulation on the back of a telegraph blank that, if the message be sent to the office by the telegraph company's messenger, such messenger is the agent of the sender for that purpose, is valid and binding, and for delay in the transmission of a dispatch caused solely by delay of such messenger, the message having been transmitted promptly after its delivery by the messenger to the company's office agent, the company is not liable.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. §54.]

2. TELEGRAPHS AND TELEPHONES §27—CONTRACT FOR TRANSMISSION OF MESSAGE—LAW GOVERNING.

Where a contract for the transmission of a telegraph dispatch was made in Georgia, and the message was sent from such state to a point in South Carolina, the law of Georgia governed the liability of the telegraph company to the recipient for delay.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 80; Dec. Dig. §27.]

Appeal from Common Pleas Circuit Court of Hampton County; Thomas S. Sease, Judge.

Action by E. P. Carter against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

Nelson, Nelson & Gettys, of Columbia, for appellant. W. B. De Loach, of Camden, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant under the statute of this state for \$200 actual damages for mental anguish caused by the failure of defendant to promptly transmit and deliver to him a telegram sent by his wife from Millen, Ga., to him at Hampton, S. C., under these circumstances: About July 12, 1911, Mrs. Carter, with her baby, went from Hampton to Millen to visit a relative. She had been sick, and Mr. Carter accompanied her as far as

Augusta, and returned to Hampton the same day. He expected her to write him on her arrival at Millen, but she was not feeling well and failed to do so. If she had written him, he would have received her letter, in due course of mail, the next day. Not hearing from her, in the afternoon of the 14th he telegraphed her: "No letter from you. Is there anything wrong? Wire answer." This message was promptly transmitted and delivered. Mrs. Carter replied on a blank furnished her by the messenger: "All O. K. Have written. All well. Write soon"—and delivered the message to the messenger to be carried to the office and sent. On his way back to the office the messenger ran into a tree and broke his bicycle, and went home, instead of returning to the office with the message. He kept the message in his pocket until the afternoon of the 18th, when he put in on the typewriter in the office, when the agent and operator was temporarily out of the office. It was a custom with some of the patrons of the office to lay messages on the agent's typewriter when he was out of the office temporarily, being the place where they would most likely be seen by him on his return. Finding this message there on his return, the agent dated it the 18th (it appears to have been undated), and immediately sent it at 6:40 p. m. to Augusta, where it had to be relayed for Hampton. As the closing hour of the Hampton office was 6 o'clock p. m., it was too late to get it to Hampton that evening, but it was sent as soon as the office opened the next morning, the 19th, and was promptly delivered to the plaintiff. In the meantime Mrs. Carter had written to plaintiff, and he had received her letter on the 16th, and she had returned home on the 18th, and was there before her message came. The following stipulation appears on the back of the blank upon which the message was written:

"No responsibility attaches to this company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender."

On the face of the blank and above the message are these words:

"Send the following message subject to the terms on the back hereof, which are hereby agreed to."

[1, 2] Under the law of the state of Georgia, where the contract was made and partially performed, the stipulation above quoted is reasonable, valid, and binding on sender and sendee. *Stamey v. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95. It follows that the negligence of the messenger cannot be imputed to the defendant, and that the message was not received by the defendant until 6:40 p. m. on the 18th. The undisputed evidence shows that it was transmitted and delivered with due diligence after its receipt.

There being no evidence of negligence for

which defendant is liable, its motion to direct the verdict should have been granted.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 221)

MOBLEY v. QUATTLEBAUM. (No. 9064.)
(Supreme Court of South Carolina. April 10, 1915.)

1. VENDOR AND PURCHASER § 33—MISREPRESENTATION—EXISTING FACTS.

Where a vendor of property gave his agent an unsigned statement as to advantages of the property, including the fact that railroad shops were to be removed and a street paved, but stated that these latter were rumors, a purchaser from the agent, shown the statement, and told that the agent could not guarantee the same, cannot rely upon such statement without making inquiry to ascertain their truth, as such statements were but an advertisement, and not a positive statement of an existing fact.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 33, 40-43, 66; Dec. Dig. § 33.]

2. SPECIFIC PERFORMANCE § 12 — TITLE OF VENDOR—INCUMBRANCES.

Specific performance should not be denied on account of incumbrances, where vendor had arranged, and at the time for deed was prepared to remove, the incumbrances, and give defendant a clear title in fee simple.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 26-28, 37; Dec. Dig. § 12.]

Appeal from Common Pleas Circuit Court of Richland County; George E. Prince, Judge.

Suit for specific performance by John G. Mobley against E. G. Quattlebaum. From a decree for defendant, complainant appeals. Reversed and remanded.

The decree of Judge Prince, in the lower court is as follows:

This is an action commenced by the plaintiff vendor against the defendant vendee, to enforce specific performance of a contract made on the 17th day of March, 1913, by which the plaintiff agreed to sell and convey to the defendant a lot containing one acre measuring 208 feet on each side, in the city of Columbia, at the southeast corner of Barnwell and Blanding streets, in the said city, at the price of \$22,000, of which price the defendant was to pay \$5,000 in cash upon the execution and delivery of the titles within 60 days after contract made, and was to give "bond and mortgage for \$17,000 for three years at 6 per cent. from this date." Deed to be made and bond and mortgage to be given within 60 days from the date of the contract. The complaint sets out the contract in full, and there is no dispute as to its execution.

The defendant denies that the contract became operative and binding because of misrepresentations which entered into it. The contract itself provides that the plaintiff is "to convey the said property above described to the said E. G. Quattlebaum, heirs, or assigns, in fee, by a proper deed, with covenants of general warranty, with the dower duly renounced, free from incumbrances, except such as are herein agreed to be assumed." There is nothing in the contract and no allegation or proof showing, or tending to show, that there were to be any mortgages assumed.

The plaintiff alleges (paragraph 1) that he is the owner in fee simple of this land; and that (paragraph 4) he is ready and willing to perform the agreement on his part, and "stands ready to convey and let this defendant in possession of said premises," etc.; and that (paragraph 5) on the 15th of May, 1911, he "duly tendered to the defendant the deed for the premises pursuant to the agreement"; and that (paragraph 6) he "has duly performed all the conditions of the said agreement on his part." The defendant, in answer to the allegations of paragraph 1, as to the title of the plaintiff, says he has no knowledge sufficient to form a belief as to the truth thereof, and a similar answer is made in respect to the allegations of paragraph 4 as to the willingness of the plaintiff to perform his agreement. In answer to the allegations of paragraph 5 as to the tender of the deed, the defendant only admits tender of "some paper writing." But denies knowledge or information sufficient to form a belief as to the balance of the allegations in reference thereto; and in answer to the allegations of paragraph 6, that the plaintiff has performed his part of the agreement, defendant denies the same. The defendant, as a further answer, sets up misrepresentation by the plaintiff inducing him to enter into the contract and material to it.

The material representation relied upon by the defendant in his pleading and his proof consist of the statement contained in a paper writing, Exhibit Y, which was prepared by the plaintiff himself and furnished by him to his agent Keenan, for the purpose of being used "by Mr. Keenan to sell the property by," and it was prepared to "enhance the sale," in the language of the plaintiff himself. The statements contained in this paper and relied upon by the defendant are the following: "Premises now renting for \$95 a month. Ordinance passed by the city council making Blanding street the next to be paved. Southern Railway authorities have decided to move shops which are in front of the residence in the next two years. This work may be done much sooner as the land now occupied for shops is totally inadequate." Defendant alleges and offers testimony of himself and of the agents for plaintiff, showing that the paper writing containing these statements, prepared by the plaintiff himself, was offered by plaintiff's agents to the defendant before he entered into the contract sued on herein. The agents say that they believed the statements to be correct, and so represented them to plaintiff, and the defendant says that he relied upon them in making the contract. And there is much evidence offered by the defendant, tending to show that these three distinct representations would materially enhance and add to the value of the property in question. On the other hand, plaintiff seeks to limit the authority of his agent, and the scope and effect of this paper writing, claiming that it was only given to the agent as a matter of opinion, largely based upon rumor and hearsay, and that the agent had no authority to present or represent these statements as facts. And plaintiff also takes the position that defendant could have ascertained the truth of these statements by inquiry and diligence and ought not to have relied upon them.

Plaintiff also offers evidence to show that the statement as to the rents is true, and that the statement in regard to the removal of the railway shops is not material, and would not add materially to the value of the property because the land where the shops are situated might be put to other purposes which would also detract from the value of the property, and that defendant could have easily ascertained by inquiry from the city authorities as to whether paving ordinance had been passed. The evidence in the case shows that the defendant did not wait for 60 days to elapse, but had made his arrangements, and had made an agreement with the plaintiff, in consideration of a small discount, to carry out and comply with this contract, in

the early part of April, 1913, and was ready and able at that time to do so. On the day fixed for compliance, the defendant, while coming into the city for the purpose of meeting an appointment to carry out the contract, first learned that the rentals actually being received for the property were materially different from that stated in the paper writing. He then called up the attorneys who were acting for both parties, and advised them of this fact, and that he must refuse to comply. He says that he then made further inquiries and ascertained that the other statements contained in this paper were not correct.

The defendant testifies that he went over with the plaintiff the rents on the property shortly before this, about the 4th or 5th of April, and plaintiff showed him that he was receiving \$93 per month as rental. The evidence shows that the actual rental being received by plaintiff at the time this contract was made, as shown by his tenants, and his agent, Parker, was \$75 per month; but plaintiff, while not materially questioning this, claims he was not getting the full rental value of the property, and that upon a fair estimate of its rental value, it was more than \$95 per month.

Plaintiff admits, and the uncontradicted evidence shows, that no ordinance had been passed for the paving of this street, and that the paving of a street does materially enhance the value of property thereon. A petition had been circulated to the city council, asking for the paving of this street, and it had been largely signed. The evidence does not show whether it had enough signatures to warrant the passage of an ordinance for its paving. The evidence does show that the residents on a number of other streets had filed similar petitions, and that in the opinion of the street commissioner, who made recommendations and whose recommendations were usually acted upon, this street would not be the next one to be paved. The undisputed evidence also shows that the Southern Railway authorities had not decided to move the shops which are now situated in front of this residence. Plaintiff claims that he based his statement in this regard upon rumors, and offers evidence of such rumors. Each of these statements contained in the paper writing is a positive statement of an existing fact, and the plaintiff himself says it was made to enhance the value of the property and to sell it by.

As to the alleged limitations of the authority of the plaintiff's agents in making representations, in order to effect the sale of the land, the law, as we understand it, is that such limitations on the authority of the agents within the general scope of his duties, is not binding upon and does not affect a third party, in this case the defendant, unless such limitations are brought home to the knowledge of such party, and there is no evidence in the case tending to show knowledge on the part of the defendant of limitations of the authority of plaintiff's agents. *Lowry v. Railroad Co.*, 92 S. C. 42, 43, 75 S. E. 278; *Whaley v. Duncan*, 47 S. C. 147, 25 S. E. 54; *Hiller v. Bank*, 96 S. C. 74, 79 S. E. 902. The court is of the opinion that the said statements are material; and, even if not material, it does not lie in the mouth of the plaintiff to say either that they are not material or that the defendant ought not to have believed or relied upon them. In the language of the Supreme Court of the United States in *Claffin v. Ins. Co.*, 110 U. S. 95, 3 Sup. Ct. 507, 28 L. Ed. 78, "No one can be permitted to say in respect to his own statements upon a material matter, that he did not expect to be believed." *Nat. Bk. v. Kershaw Oilmill*, 202 Fed. 90, 120 C. C. A. 365.

It is not material, in our opinion, as to whether these statements were knowingly false, or made without any knowledge as to their truth or falsity or by mistake, for in any event the party making them is responsible therefor, and if they turn out to be false in fact, it is fraud

in law. *Clafin v. Commonwealth Ins. Co.*, supra; *Munro v. Gairdner*, 3 Brev. 31, 5 Am. Dec. 532; *Nash v. Company*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 493.

The right of specific performance, either in behalf of the vendor or vendee, is not an absolute right, but rests in the judicial discretion of the court to be exercised according to the settled principles of equity, and always with reference to the facts of the particular case. *Davenport v. Latimer*, 53 S. C. 572, 31 S. E. 630; *Midland Timber Co. v. Prettyman*, 93 S. C. 16, 75 S. E. 1012; *Holley v. Anness*, 41 S. C. 354, 355, 19 S. E. 646; *Pope Mfg. Co. v. Gormully*, 144 U. S. 237, 238, 12 Sup. Ct. 632, 36 L. Ed. 419.

It has been suggested that the case of *Holley v. Anness* has been overruled by the decision of the Supreme Court in *Hammond v. Foreman*, 48 S. C. 178, 179, 26 S. E. 212. An examination of the *Hammond* Case will show that the justice who delivered the opinion did not overrule the *Holley v. Anness* Case, or in any wise touch upon the principle for which it is cited above. And an examination of the case of *Midland Timber Co. v. Prettyman*, 93 S. C. 16, 75 S. E. 1012, and the case of *Marthison v. McCutcheon*, will show that both of them recognize, refer to, and approve the doctrine above announced, and the case of *Holley v. Anness* in express terms. The principle announced in all of these cases is that before the court will enforce specific performance, "the contract must be certain, and upon a valuable consideration; it must be perfectly fair in all its parts, free from any misrepresentation or misapprehension, fraud, or mistake, imposition, or surprise." And that the court will refuse to enforce a contract "where it appears that the contract sought to be enforced does not express the true agreement of the parties, either by reason of fraud, accident, or mistake."

Another principle of equity equally as well settled is "where one of two innocent parties must suffer by the fraud or wrong of a third person, the loss should fall on him who enables said third person to commit the fraud or other wrong." *Nat. Bk. v. Kershaw Oilmill*, and authorities there cited.

Under these settled rules of the court of equity for such cases in view of the evidence offered herein, we are of the opinion that this is one of the cases which the court will not require to be performed specifically. The language in some of the cases cited above may almost be applied to this case. It may be that the defendant made a mistake in signing the contract before he had made proper inquiry, and that he should have ascertained from first hand the truth of these statements before signing the contract. But the plaintiff cannot claim laches or negligence on the part of the defendant, when he furnished the statements which misled the defendant.

It is said that the defendant was a shrewd, experienced real estate trader. A careful examination of the evidence shows that he had bought and sold three or four pieces of property in the city of Columbia, upon which he had made some supposed profit, but the profit was tied up in and represented by mortgages on the property. His profession from which he derives his support and income was and is the practice of dentistry.

But a further reason for the refusal to decree specific performance in this case lies in the fact that the undisputed evidence shows that at the time of the making of the contract and at the time plaintiff offered to carry it out, there existed on the property three valid mortgages, securing debts to the amount of \$9,500 of principal, besides accumulated interest, as to which latter there was no evidence. All of these mortgages were past due and payable. There is no mention made of them in the contract, and the defendant testified that the first time he had any intimation of them was a statement by Mr.

Belser, attorney for both parties, early in April, when he was arranging to comply, that Mr. Mobley could not comply the first time because he had not made arrangements as to some bond or bonds. The plaintiff offers the testimony of himself, and of the witness Belser, that they had arranged to have these mortgages taken up; but nothing beyond these general statements is offered to the court to show how this was to be carried out.

The plaintiff has alleged in his complaint his willingness and his ability and his tender of full compliance with all the conditions of the agreement, and this it put in issue by the answer. Plaintiff offers in support of this allegation the deed which he had executed and tendered to the defendant. This deed contains on it no release of any of these incumbrances, and no other paper has been offered tending to show that any such release was made or being made. What the arrangements were for releasing these mortgages the plaintiff does not give any definite information as to. It is certain that the amount of cash to be paid was not sufficient to pay off these mortgages. But it is said that the defendant waived performance of this condition by refusal to comply when the deed was tendered in May. This is not an action for damages for breach of contract, in which such suggestion might be material, but is an action in which the plaintiff seeks to hold the defendant for the specific purchase of land under the contract set out in the complaint, and undertakes to show, as he must, that he is complying fully on his part. In such case, he must both allege and show to the court such facts as would enable it to see definitely that he can carry out his contract. *Prothro v. Smith*, 6 Rich. Eq. 332; *Alexander v. Herndon*, 84 S. C. 136, 65 S. E. 1048; *Farm Land Co. v. Roseman*, 93 S. C. 351, 76 S. E. 979.

The plaintiff has set out a contract to convey a title with full warranty and "free from incumbrances." Even if he had not set out and proved this specific provision of the contract, the law would imply a contract to make such a title free from incumbrances, and the existence of mortgages on the property is sufficient excuse for nonperformance on the part of the vendee. *Prothro v. Smith*, 6 Rich. Eq. 333; *Gallamore v. Grub*, 156 N. C. 575, 72 S. E. 629; *Alexander v. Herndon*, 84 S. C. 136, 65 S. E. 1048.

For these reasons, the court is of the opinion, and so adjudges, that the plaintiff is not entitled to the relief prayed for, and that his bill herein be dismissed with costs.

Frank G. Tompkins, of Columbia, for appellant. D. W. Robinson, of Columbia, for respondent.

WATTS, J. This was an action by plaintiff against the defendant for the purpose of enforcing specific performance of a contract to purchase a piece of real estate in the city of Columbia. After issue joined the cause was referred to A. D. McFadden, Esq., master, to take the testimony and report the same to the court without any finding or recommendation on his part. Upon coming in of this report the case was heard at the spring term of the court for Richland county, 1914, by his honor, Judge Prince, who filed his decree on July 17, 1914, by which he denied the plaintiff the relief prayed for and dismissed the complaint. By Judge Prince's decree the facts are fully set forth, and his decree should be reported in the case. From this decree the plaintiff appealed after entry of judgment, and seeks reversal by 14 exceptions. He complains of error on the part

of his honor in his findings of facts and conclusions of law, and in not granting the relief asked for by the plaintiff in the case.

We will not attempt to take up each exception separately. The contract was entered into by the parties. The defendant refused to comply and accept the deed which was tendered him by the plaintiff upon the ground that the plaintiff had induced the defendant to enter into the contract by material misrepresentations contained in the paper in the evidence marked "Exhibit Y" as to the rental value of the property, as to an ordinance having been passed for the paving of the street in front of the property sought to be sold and as to the removal of the Southern Railway shops in front of this property.

Defendant also took the position that he had contracted for a title in fee "free from incumbrances," and that the property was incumbered at the time the plaintiff undertook to convey it by three separate mortgages all part due, and plaintiff did not tender any title free from these incumbrances or any indemnity against them. It appears from the evidence in the case that the plaintiff some time previous to the execution of the contract in question had been endeavoring to sell the property; that he lived in Fairfield county; that the property is one acre of land, situate in the city of Columbia, on Blanding street, and has on it one 14-room house, one store, one set of rooms back of the store, and two small negro dwellings, and part of the lot unoccupied by any of the buildings and being used by one of the tenants for garden purposes. J. T. Reese, a real estate agent in Columbia, offered to sell the property to the defendant, but defendant declined to buy it. Later on Kelly, another real estate agent, had the property for sale, and had a plat made of the same, and about that time submitted to the defendant a statement that the plaintiff had prepared, but had not signed, setting out the different features and advantages of the property; this statement was typewritten, and contained 13 statements, and was long prior to the time that it was put in the hands of the Keenan Agency for sale. Later on the plaintiff, who had been asking \$25,000, placed the property with the Keenan Agency to sell for \$22,000, and gave them the plat and list of statements with regard to the property, with the explanation to them that the statement in regard to paving the street and removal of the railway shops were mere rumors. The evidence shows that the property was reasonably worth the price it was listed for sale. A member of the Keenan Agency went to the defendant and showed him the statement of plaintiff, but told defendant that Mobley did not, in any manner, guarantee the same. It does not appear by any evidence in the case that the defendant made any inquiries or attached any importance to the statements of plaintiff prior to the bringing of this suit.

The defendant signed the contract in ques-

tion, and after defendant had signed it, it was carried to plaintiff by the Keenan Agency and signed by plaintiff, and the defendant immediately listed it with W. A. Keenan, another member of the Keenan Agency, for sale at a profit of \$5,000, Keenan telling the defendant that he believed he could sell it at that advance price before the time expired between making the contract and the time to comply, which statements were made before defendant signed the contract with plaintiff and actuated the defendant in buying. Keenan as agent for defendant used the same statement (Exhibit Y in evidence) in endeavoring to sell the property for the defendant up to the time defendant refused to comply with his contract with plaintiff more than 30 days. There was convincing evidence that the defendant wanted the property, not for the buildings on it, but bought it for the number of front feet it contained, that the defendant lived in the city of Columbia, and, according to all the evidence in the case of real estate agents and business men, that he was an extensive operator in real estate, and had bought and sold numerous pieces of real estate property, and was a wide-awake, shrewd real estate operator, making careful investigations and keeping well informed as to prices and changes in value as to real estate in Columbia, and that he owned a house and lot on Blanding street, and had lived in it for years, and along with other citizens, a year or more before this transaction and before he moved off of this street, signed a petition, which petition had a sufficient number of signers to warrant the city in having this street paved. It is in evidence that the firm of Messrs. Melton and Belser were attorneys of both plaintiff and defendant in arranging the details of the transaction, both in the examination of the titles and financing the matter for the plaintiff, and when the time arrived to close the transaction defendant refused to comply on the ground that the property did not rent for as much as \$95 per month. At that time no question was raised as to the paving or removal of railroad shops. Plaintiff thereupon made his offer in writing to defendant's attorney, who was also his attorney, to guarantee the rents set out in statement, which proposition was submitted to and refused by the defendant. On the date provided for in the contract plaintiff tendered the defendant a deed of the property in question, and demanded a compliance of contract on part of defendant. Defendant refused to comply, and notified plaintiff that at no time did he intend to comply; and gave as his only reason at that time as his refusal for complying that he found the plaintiff was paying the water rate, which reduced the rent. No complaint was made until the bringing of this suit that the rents were not as represented. It was in evidence that in the spring of 1913, about the time of the transaction, that there was a

considerable change in the money markets of the city of Columbia, owing to federal legislation in reference to currency, and by reason thereof property was not at that time as salable and in as much demand as it had been previous to that time. It also appears in evidence that after the contract between plaintiff and defendant was signed, and after defendant had placed it with Keenan for sale, the defendant made a proposition to take it up before the 60 days were out if plaintiff would make a cash discount, and wanted plaintiff to fix it up before the 60 days expired, and offered plaintiff a consideration therefor.

[1] We think his honor was in error in finding as he did in his decree that the unsigned paper writing was a positive statement of an existing fact, it was no more than an advertisement, and the defendant could have, by proper care and inquiry, got the truth upon investigating as to the paving of streets and removal of shops. Upon investigating what ordinances had been passed by the city council he could have found out about the paving of the streets, and throughout the whole case there is nothing to show that Mobley made any representations that were calculated to mislead or deceive the defendant to his injury. The defendant made no effort to verify any of the rumors or statements that he claimed were made, there was no fraudulent representation made by Mobley, or nothing that could be strained or distorted into such, but on the contrary, the overwhelming testimony is that in his dealings and statements he was frank and fair, and that the defendant was an extensive real estate operator, who had bought and sold extensively, a shrewd, bright trader, and perfectly competent to take care of himself. Plaintiff made no statements, either by mistake on his part or by concealment of things within his knowledge, or false statements, that defendant could rely on to avoid the contract solemnly made.

In *Anderson v. Rainey*, 100 N. C. 338, 5 S. E. 189, it is held:

"If, in a contract for the purchase of land, a party fails to avail himself of those sources of information readily within his reach, and chooses to rely upon representations, which, though not true, were not made with any false and fraudulent intent, the maxim of caveat emptor applies, as it does to personal property, and courts will not aid the purchaser. *Walsh v. Hall*, 66 N. C. 233."

The case of *Cape Fear Lumber Company v. Matheson*, 69 S. C. 87, 48 S. E. 111, discusses this question quite fully, and lays down the following principles as governing on questions of this kind:

"The parties occupied no fiduciary relation to each other; they were dealing at arm's length, and were fully competent to contract. They had every opportunity of knowing the contents of the option signed by the defendant, and of understanding what it should have contained and did contain. There is no evidence of any concealment on the part of Mitchell, the agent of the plaintiff.' The burden of proof to show

mistake is upon the appellant, and we think that he has not shown, by the preponderance of evidence, such a state of facts as would entitle him to the equity that he seeks to invoke in this cause."

In *Murrel v. Murrel*, 2 Strob. Eq. 153, 49 Am. Dec. 684, the court uses the following language:

"If parties come to a settlement, and will not see their rights in their true character, or use proper diligence in ascertaining them, or, perceiving their rights, think proper by their silence to waive them; there is no reason why this court, or any other, should be called upon to protect them from the consequences of their own default or folly. There are but few settlements or accountings in which, by a searching scrutiny, some errors or omissions might not be detected. And this court will not open them when by a proper vigilance they might have been guarded against, and unless some of the circumstances above adverted to as affording grounds for relief are alleged and proved. A party fully competent to protect himself, under no disability, advised as to all circumstances by which he * * * might by due diligence be so advised, not overreached by fraud, concealment, or misrepresentation, nor the victim of a mistake against which prudence might have guarded, has no right to call upon courts of justice to protect him against the consequences of his own carelessness, and to disturb the peace of society by his clamors for that justice which he has voluntarily or negligently surrendered."

In the case of *Montgomery v. Scott*, 9 S. C. 35, 30 Am. Rep. 1, Chief Justice McIver, in writing the opinion of the court, cites with approval *Story's Equity*, § 200:

"If he does not avail himself of the knowledge or means of knowledge open to himself or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations. * * * It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute any loss or injury in such a case to his own knowledge and indiscretion. Courts of equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion."

The learned Chief Justice says with regard thereto:

"This rule, which has received the sanction of this eminent text-writer, as well as of courts of the highest authority, is but the expression of a natural feeling of equity which would prompt any just man to say that where one comes into court of equity and asks, against an innocent party, the interposition of its extraordinary powers, to protect him from danger or loss occasioned by the fraud of a third party, he ought to be required to show that he has in no way, either by his misconduct or negligence, contributed to the perpetration of the fraud, from the consequences of which he seeks to be relieved at the expense of such innocent party."

The evidence satisfies us that the plaintiff stated positively and fully to the agents that the statements in the papers were only rumors, and the defendant should have investigated, and he had no right to rely on them as he claims that he did.

[2] As to the finding of the judge that the plaintiff could not comply and give title by reason of the fact there were incumbrances on the property for over \$9,000, and for this reason specific performance would not be decreed, the evidence abundantly shows that

the plaintiff had arranged, and at the time was prepared to remove, these incumbrances and give to the defendant a clear, free, and unincumbered title in fee simple. We are of the opinion that the defendant attempted to get out of what he considered a poor trade, and that under all of the evidence in the case he should not be allowed to do so, and that the circuit judge was in error in his findings and decree, and that the exceptions should be sustained and judgment reversed, and that under the facts proven the plaintiff is entitled to a decree for specific performance, and that the case be remanded to the circuit court for the purpose of carrying out this judgment.

Reversed and remanded.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

CHISOLM et al. v. SEABOARD AIR LINE RY. (two cases). (No. 9120.)

(Supreme Court of South Carolina. June 22, 1915.)

APPEAL AND ERROR §805—DETERMINATION—ABANDONMENT.

Where, pending the disposition of an appeal, the parties effected a settlement, further consideration of the appeal will not be had.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3174, 3175; Dec. Dig. § 805.]

Appeal from Common Pleas Circuit Court of Barnwell County; I. W. Bowman, Judge.

Actions by Mrs. S. E. Chisolm and her husband and by J. B. Chisolm against the Seaboard Air Line Railway. From verdicts for plaintiffs, defendant appeals. Appeals abandoned.

Harley & Best, of Barnwell, and Lyles & Lyles, of Columbia, for appellant. R. C. Holman, of Barnwell, and W. H. Townsend, of Columbia, for respondents.

GARY, C. J. A settlement of all matters in dispute in the above-entitled actions, which were heard at the April, 1915, term of this court, having been made and had between the parties, since the argument on appeal was had:

It is, on motion of Messrs. Harley & Best, for the appellants with the consent of Messrs. R. C. Holman and W. H. Townsend, for respondents, ordered that the further consideration of the appeal be abandoned, and the cause marked settled, and appeal abandoned upon the calendar.

We consent:

Harley & Best,

Lyles & Lyles,

Defendant's Attorneys.

R. C. Holman,

W. H. Townsend,

Plaintiffs' Attorneys.

(101 S. C. 23)

FEWELL v. HALL et al. (No. 9092.)

(Supreme Court of South Carolina. May 4, 1915.)

1. FRAUDULENT CONVEYANCES §95—TRANSACTIONS BETWEEN HUSBAND AND WIFE—RIGHTS OF CREDITOR OF HUSBAND.

Where at the making of a contract to purchase land in the name of a husband, and at the execution of a deed to him, it was the bona fide understanding of the husband and his wife that the purchase was for her, and thereafter a deed was executed by him to her to carry out the intent, the transaction was valid as against a creditor of the husband who became such after the deed to the husband, unless the wife was estopped from setting up her title.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 243-288; Dec. Dig. § 95.]

2. FRAUDULENT CONVEYANCES §299—TRANSACTIONS BETWEEN HUSBAND AND WIFE—CREDITOR OF HUSBAND.

Evidence held not to show that one becoming a creditor of a husband holding legal title to land relied on his title, and so as to estop the wife to assert her title under a deed to carry out an intention formed prior to the transaction relied on by the creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 876-890; Dec. Dig. § 299.]

3. FRAUDULENT CONVEYANCES §277—TRANSACTIONS BETWEEN HUSBAND AND WIFE—BADGE OF FRAUD.

A deed executed for a nominal consideration by a husband to his wife is only presumptively fraudulent as against a creditor of the husband, and the transaction may be shown to be valid as against the creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. § 277.]

4. FRAUDULENT CONVEYANCES §300—CONVEYANCE BY HUSBAND TO WIFE—FRAUDULENT AS AGAINST HUSBAND'S CREDITORS—EVIDENCE.

Evidence held not to show that a deed executed for an expressed nominal consideration by a husband to his wife was made with fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. § 300.]

5. FRAUDULENT CONVEYANCES §291—CONVEYANCE BY HUSBAND TO WIFE—FRAUDULENT AS AGAINST HUSBAND'S CREDITORS—EVIDENCE.

On the issue whether a deed executed for a recited nominal consideration by a husband to his wife was made with fraudulent intent as against his creditors, the fact that a reputable attorney who drew the deed was alone responsible for the insertion of the recited consideration must be considered.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 849-856; Dec. Dig. § 291.]

6. EVIDENCE §273—DECLARATIONS—OWNERSHIP OF PROPERTY BY WIFE—ACTS OF HUSBAND.

That a husband stored in his own name property, and deposited in a bank the proceeds on a sale thereof, are but declarations in his own interest, and not binding on the wife, claiming the property and the proceeds.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.]

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

Action by Ed Fewell against Allen Hall and others. From a judgment for plaintiff, defendants Allen Hall and Nannie Hall appeal. Reversed.

Spencer, Spencer & White, of Rock Hill, for appellants. Dunlap & Dunlap, of Rock Hill, for respondent.

GAGE, J. The circuit court held that the deed from Allen Hall to his wife, Nannie Hall, was voidable under the statute of Elizabeth, and that is the issue here, upon appeal by Allen and Nannie. The plaintiff sues as a judgment creditor. The parties defendant other than the Halls are mortgage creditors, and about the last named there is no contest.

There are five exceptions, three by Allen, and two by Nannie; but there is really but one primary issue in the cause, and that is stated in the outstart. The exceptions merely suggest errors by which the court reached the conclusion that the deed was voidable, or they suggest reasons why a different conclusion should have been reached.

The history of the case is this: Allen and Nannie are negroes, and husband and wife; the plaintiff is a cotton buyer; the other defendants are white mortgage creditors. Allen and Nannie bought from Johnson and Stevens in August, 1908, a small parcel of land containing 100 acres, for which they agreed to pay \$35 per acre, or a total of \$3,500. Of the purchase price there was paid down \$350, and thereafter \$650 was paid on the 1st January, 1909, making a total payment of \$1,000; and the balance of \$2,500 was set to be paid in six yearly installments of \$416.66, the last to be due not until January 1, 1915. Johnson and Stevens' contract to sell was in terms with Allen, and the deed was made to him 28th December, 1908, and Allen conveyed by mortgage to them to secure the balance of the purchase price. And Allen thereafter conveyed the land to five other persons by way of mortgage, generally to secure payment of borrowed money, and on most of these conveyances Nannie renounced her dower. These mortgages run, in time, from December, 1908, to March, 1912, and one of the mortgagees (Wright) is not a party. On 15th of May, 1909, Allen made a contract with the plaintiff to deliver to him during the month of October thereafter 30 bales of cotton for the price of 10 cents. When October came and went cotton had advanced above 10 cents, and Allen did not deliver the cotton. On 8d November, 1909, Allen conveyed the land by deed to Nannie, and the consideration was expressed therein to be \$1 and love and affection. On the 16th of March of the next year (1910) the plaintiff sued Allen for a breach of his cotton contract, and on 25th of April, 1910, judgment thereon for \$620.40 was rendered

for Fewell against Allen. And this is the debt invoked against Nannie's title.

[1] The decision must turn largely on one transaction, it is a matter of fact, and it is this: When the contract to purchase was made in August, 1908, and when deed was made by Johnson and Stevens to Allen on 28th December, 1908, was it the bona fide intent of Allen and Nannie at these times that the purchase was made for Nannie, and was the deed of November, 1909, made to carry out that intent formed aforetime? If the answer is Yea, then the transaction assailed was lawful, and the decree of the circuit court is wrong, unless Nancy is estopped now to set up her title against Fewell. Around these issues the testimony ranges itself, and its right interpretation must conclude the question. The only difficulty in the case, if such there be, is to ascertain the truth from the testimony. The law is plain. The referee, who heard and saw the witnesses, made no conclusions of fact; he simply reported the testimony.

[2] Ahead of a consideration of the chief issue and blocking its way is the conclusion of the court that, even though the transaction between Allen and Nannie was what they claim for it, yet it may not be allowed against Fewell, because he extended credit to Allen upon the faith of Allen's apparent ownership.

The following is all the testimony of the plaintiff thereabout, direct and cross:

"Did you know whether or not Allen Hall owned any land, Mr. Fewell? A. Yes, sir; I did. Q. State whether or not this contract for 30 bales of cotton was based upon that knowledge. A. It was. Q. State whether or not, Mr. Fewell, you would have contracted with Allen Hall for as many bales of cotton as that unless you knew that he had the control of land and property sufficient for him to deliver that."

"A. I would not to any unreasonable extent, with the knowledge I had of Allen's ability to deliver. Now, I could go into some explanation of that contract right there by way of a statement as to his ability to deliver or not, if it is in order. Q. Well, does it refer to this land? A. Well, yes, sir; it refers to this land. Q. All right, sir; just state it."

"Allen wanted to sell me 40 bales of cotton, and he came to me, and I objected to buying so much, telling him that it was a serious proposition, and that whether it was up or down I wanted him to understand that he had the cotton to deliver, and I asked him the question if he was sure that he would make 40 bales, that I didn't feel disposed to buy so much from him, for I didn't want him to sell himself into any hole, and my recollection is that he said that he expected to make quite a good deal more cotton than that, some 50 or 60 bales, or something like that, perhaps more, and, not wishing to buy forty bales, I suggested to him—I asked him if Mr. J. B. Johnson wasn't interested with him in the land he had bought, and he said he was in a way. 'Well,' I says, 'suppose you go and talk to Mr. Johnson before you sell all of that cotton and see what he has to say about it; whether he will advise you to do it or not;' and he took my suggestion and went and talked with Mr. Johnson, at least he went off and came back, and I was sitting in a buggy right in front of this building, and he come back and

said, Mr. Johnson said maybe he had better not sell but 30 bales; he thought he would be safe in selling 30 bales, and I told him all right, I would just buy the 80 bales; that I thought better of it myself."

"Q. Mr. Fewell, at the time of the contracting with Allen Hall for this cotton, did he or not give you any information that would lead you to believe that the title to this property was in his wife, or that he was dealing for her as her agent, or anything like that? A. Not a word."

"Q. Except as to the interest of J. B. Johnson and, I believe you said, Dr. Stevens, did he intimate to you that anybody else had anything to do with that farm? A. He did not; no, sir."

"Q. Mr. Fewell, you made those trades with farmers because they are farmers? You didn't have their title looked into in advance of making these contracts for the cotton futures? A. That depends on who they are and whether I know them or not. Q. Well, you didn't make any examination in this case, did you? A. I did not; no, sir. Q. You knew that Allen was a farmer or was farming? A. Yes, sir. Q. And that is about all that you did know? A. Well I had a pretty general knowledge of his standing. I knew he had bought this land. Q. How did you know that he had bought this land? A. Well, I knew it because he told me so."

We are of opinion that this testimony is not sufficient to show that the plaintiff was misled by Allen's apparent ownership. The plaintiff relied on Allen's ability to grow the 30 bales; not on his responsibility consequent on his failure to grow. "I asked him if he was sure he would make 40 bales." The plaintiff did not examine the record to ascertain if Allen owned the land in fact. The plaintiff never testified that Allen told him that the title was in himself. The plaintiff testified, in the language of the question not his own, that Allen gave him no information that would lead him to believe that the title was in the wife; he did not say Allen gave him information to lead him to believe that the title was in himself. If the plaintiff knew Allen had the title, then he knew that it was then incumbered with a \$2,500 mortgage, and was worth nothing over that plus a homestead and a dower. When the cotton contract was made Allen was not Fewell's debtor; non constat but that in the following November Fewell might be Allen's debtor. The true status depended upon an uncertain event, to wit, the price of cotton in November. That was the event both parties had their minds on when they made the contract. The testimony of Fewell about a reliance upon Allen's apparent ownership is manifestly an afterthought. It does not nearly make out a case of misleading.

[3-5] The real inquiry in the case then presents itself disincumbered. And before we consider the testimony of the witness touching intent some reference will be made to the circumstances of the transaction so much relied upon by the court to prove fraud. But the circumstances will be so stated as may modify the inference which has been drawn

from them. And along with the circumstances we state, as closely akin to them, assumptions of fact the correctness of which will not be denied.

The Halls are negroes; they were dealing with white men far superior to them in all respects; the negro will generally sign any sort of paper which a superior white man directs him to sign; Allen was the agent of his wife about all the business when it came to dealing with third persons; that is generally the rule both with white women and black women; that is why before 1868 the law regarded the two as one; that is why since 1868 the fact generally regards them still as one; this woman was, and women generally are, not familiar with the technical conception of titles, and that includes dower; they sign when and where they are told to sign, and generally ask no questions; the renunciation of dower is by a too loose practice, but a formal act; it ought not to be so, but it is. We do not declare that women shall not be held to their contracts; they shall; but these conditions and assumptions often explain their contracts, and help to ascertain the truth of the case. Again, the cotton contract was an unusual transaction; the Halls got no money when they made it, and it would be remarkable if they comprehended all the obligations and liabilities which sprang out of it. The land was already, in May, 1909, and November, 1909, heavily incumbered, and was of small, if any, value over the mortgage debt and the homestead. The land very soon after November, 1909, fell again under a new mortgage. Two mortgages were put upon it after November, 1909, and before the plaintiff sued in March, 1910. In all these transactions and in all the testimony there is nothing to show Allen and Nannie were planning and intending to defeat the plaintiff; their ship was about to founder from other causes, and they were struggling to escape them, and not the plaintiff's hitherto uncertain claim. It is true the circumstances—that the deed in issue was made by a husband to his wife, for an expressed nominal consideration; and it is true that by the law these are badges of fraud. But a badge on a man's breast is no conclusive proof of what he is; the badge cannot speak more certainly than the man speaks; if the man speaks truly, and if his witnesses do the same, the badge is only presumptive, and calls for an explanation from him who wears it. It is a circumstance of much import that the deed in issue was drawn by a lawyer of established character, that the deed from Johnson to Allen was executed in the office of another lawyer of like character, and that the writer of the deed in issue inserted the consideration in the instrument, and was alone responsible for stating that consideration as it was stated.

About the signing of the deed from Stevens

and Johnson to Allen Mr. C. W. F. Spencer testified:

"When Allen Hall and his wife came in I read the papers over to them, and as soon as Nancy Hall understood that the deed was drawn to Allen Hall and the note and mortgage to be executed by him, she said that the papers were not properly drawn; that she had bought the land, and the deed ought to be made to her. They stayed in my office about half an hour, and I told them that I didn't have time to prepare any new papers. They went out and stayed a while, and came back, and finally Nancy Hall asked if Allen could convey her the property afterwards, and I told her that he could. I remember positively that both Allen Hall and Nancy Hall said that the deed should have been drawn to Nancy Hall. I remember to have told them that the deed was drawn to Allen Hall, because the contract was originally made by Allen Hall, but they both said that the land was to be conveyed to Nancy Hall. The papers were then executed, and I returned them to Mr. Spencer. That is all I know about it. Q. Did they agree upon the execution in that form before you told them that he could make the transfer at any time? A. The papers were executed afterwards. Q. And they both understood by being advised by you that that could be done at any time that they saw fit to make the change? A. Yes, sir."

About the preparation and signing of the deed in issue Mr. C. E. Spencer testified:

"She made strenuous claim here in the office some time during the year after the papers were sent to Rock Hill that the papers ought to have been drawn otherwise—drawn between her and Stevens and Johnson. I answered her that her husband had the contract in his own name, and he had not told me anything about her interest, and for that reason they were drawn the way they were drawn; that I would just as readily have drawn them the other way if I had been notified to do so. She protested that the land belonged to her, insisted on it, and finally the paper was drawn up between them transferring the land to her. I don't recollect the date of that paper. Q. Do you recall anything of the date when she made the protest? Have you anything to show? I will give you the date of the transfer. (Witness shown Exhibit B.) A. Allen Hall to Nannie Hall? Q. Yes, sir; I am referring to the protest now. A. Yes, sir; I understand I can't recall when the protest was made, whether it was made at the time of this deed, or before the making of the deed. I knew that when she called the matter to my attention I took the matter up with my son, and he then stated to me that at the very beginning when these papers were executed she commenced to kick. But when that took place I don't remember. I know that I had no reason to doubt the statement; at the same time I knew nothing about it, and for that reason, when the papers were drawn making the transfer, I was particular to name a consideration that would leave the whole matter absolutely open, because I didn't want to get mixed up in the effort to hinder and delay creditors; and if you will look you will see the consideration is for love and affection, knowing that if she had any right she could establish it, and the consideration could be used one way or the other."

"I will state that one reason for stating my recollection is that I believe, if I had known of the Nancy Hall claim at the time that deed was drawn, that I would have recited the true consideration for it. It would have been the perfectly natural thing for a lawyer to do, instead of the consideration I did recite, and I am in-

clined to think I didn't know anything about it at that time. But I may have known of this Fewell claim, and, knowing the Fewell claim had been contracted before this—perhaps did—in order to protect the thing from any semblance of fraud so far as the deed would go, I cited the consideration as love and affection. I think that that was done more to hold the bars down between Allen and his creditors rather than to hold them up."

There is no testimony to refute these statements, and they are taken as true. If that be so, the fact is established that before the cotton contract was ever made a lawful intent was formed by Allen and Nannie; and but three days after the cotton contract was breached that intent was executed by them. It is plain that, if Nannie paid the cash installment of \$350 on the purchase price with the understanding then between her and Allen that the title was to be made to her, then such a contract was good against the world, except incumbrances and creditors subsequent thereto without notice, but the plaintiff does not fall within the exception.

The conclusion of the circuit court on the issue of intent was rested almost exclusively on the badges referred to and on the circumstances recited. The court, we venture to think, did not give enough heed to the undisputed testimony of the Spencers, which fixed certainly the bona fides of the parties before the cotton contract was ever entered into.

There remains yet to consider if the wife paid the cash installment of \$350. But, so far as the plaintiff is concerned, if the bona fide agreement between Allen and Nannie at the time of the purchase was that the title was to be made to her, and that the purchase was made for her, then equity will consider that to have been done; and, if that was done, it matters not, so far as the plaintiff is concerned, who made the initial or the subsequent payments. Nevertheless we think there was no warrant to discredit the uncontradicted testimony of Nannie that she made the initial payment of \$350. The cross-examination brought out all the facts relevant thereto. There is no question but that the money proceeded from the sale of seven or eight bales of cotton which had been grown on the same lands which are in issue.

[8] It is true the cotton was stored in the name of the husband, and the proceeds of sale was deposited in bank in his name; but that is not conclusive of the fact of ownership, else a husband might convert all the wife's property by marking it as his own. The acts were but declarations of the husband in his own interest.

Nobody has yet fixed the limit of a thrifty woman's capacity to save, and thus turn into dollars the cents which a more prodigal husband would waste. Reliance is put by respondent upon the manner in which the woman testified. He contends that the woman's testimony and the way she gave it dis-

credits her good faith. It is true she made an indifferent witness; but she was a negro woman of poor capacity when set against the astute counsel who pressed her to answer many questions.

We are therefore of the opinion that the plaintiff did not prove the case he set out to prove, and as to him the judgment of the circuit court is reversed. But, since there are defendants other than the Halls, who are in fact plaintiffs, and may desire relief, the cause is remanded to the circuit court for such orders and decrees to be had as the parties in interest may desire.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

FRASER, J., disqualified.

(101 S. C. 253)

CLARK v. NEW YORK LIFE INS. CO.
(No. 9111.)

(Supreme Court of South Carolina. May 24, 1915.)

INSURANCE — §367—LIFE INSURANCE — CONTRACT — CONSTRUCTION — PERIOD OF INSURANCE.

An insurance policy provided premiums should be paid annually, and that if any was not paid on the due date, and there was no indebtedness to the company, the insurance would automatically continue for a time to be ascertained by reference to a table in the policy. By agreement later premiums were made payable quarterly. The insured paid annual premiums for five years, which entitled him to five years and three months extended insurance. In addition he paid quarterly premiums for half a year. The question at issue was to how much extended insurance such payment of quarterly premiums entitled him in addition to the period given him by his payment of annual premiums. Plaintiff contended that the period of time which the payment of a quarterly premium under the substituted agreement continued the insurance was one quarter of that for which payment of an annual premium continued it. Defendant contended that the continued insurance could only be computed by the year, irrespective of the new agreement for the payment of premiums quarterly, and also that the quarterly premiums due on the second half of the year for the first half of which the insured had paid premiums were a debt against the insured, depriving him of continued insurance by the terms of the policy. *Held*, that the payment of a quarterly premium extended the insurance for a quarter of the time that the payment of an annual premium did under the original agreement, such being the construction placed upon the contract by the insured, as shown by his notations on the policy, and that premiums for the half year remaining when the insured ceased payments were not an indebtedness to the company, since the rights of the parties in respect to the continued insurance became fixed when the insured ceased to pay.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. §367.]

Hydrick, J., dissenting.

Appeal from Common Pleas Circuit Court of Lancaster County; J. W. De Vore, Judge.

Actions by S. Joyce Clark against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the decree of the trial court:

These two cases are identical. They are brought by the plaintiff on insurance policies Nos. 3238433 and 3234947, issued by the New York Life Insurance Company to Adolphus J. Clark, on the 14th day of January, 1902, and the provisions of the policies "relate back to that time." The beneficiary is S. Joyce Clark, the daughter of the insured. Jury trial was waived; both cases being referred to W. P. Robinson, Esq., as special referee, to take the testimony only. Testimony was taken by him, and both cases were heard by me at the same time at the March, 1914, term of this court.

The admitted facts of both cases, and those about which no contention is made, are the execution and delivery of the policies and the payments of premiums thereon to July 14, 1907, and that Adolphus J. Clark, the insured, died at Lancaster on December 5, 1912, further that the original agreements as to the payment of the premiums on the policies was that the premium of \$46.46 was to be paid annually, and that the first annual premium was paid on January 14, 1902, for the insurance year from January 14, 1902, to January 14, 1903.

Subsequently (that is to say, on February 18, 1903) an "agreement for change of payment of premiums" was made by and between the New York Life Insurance Company, the defendant, A. J. Clark, the insured, and S. Joyce Clark, the beneficiary. This agreement was that the premiums on both of said policies "shall be payable in equal quarterly installments of \$12.31 each, on the 14th day of January, April, July, and October, instead of annually on January 14th, as provided in said policy." This agreement was:

"Second. That all of the conditions of said policy as to the payment or nonpayment of any premium shall apply to any installment payable under the preceding agreement."

"Third. That any unpaid installments of any insurance year's premium shall be an indebtedness to be deducted in any settlement of said policy."

"Fourth. That all of the conditions of said policy, except as herein modified, remain in full force."

The contest in both cases is admitted to be under, and the result dependent upon, that clause of the policies providing for "continued insurance." That clause is as follows: "First. If any premium of interest is not paid on the date when due, and if there is no indebtedness to the company, the insurance will automatically continue as term insurance from the date to which premiums were paid, for the amount stated at the head of column 3 of the table on the second page thereof, for the term specified therein, and no longer." By referring to column 3 therein designated, we find a table or scale fixing the periods for which the insurance will continue after the failure of the insured to pay the premiums due on the policies. The periods fixed by this table are predicated upon the payment by the insured of full annual premiums; that being the manner of the payment of the premiums fixed by the original agreement of the parties. The scale, or table, shows that under the original agreement (that is, the payment of annual premiums) the insurance referred to in table 3 was extended or continued by the year. Therefore, if no subsequent agreement had been entered into between the parties, and the payment of the premiums had been continued annually, the insurance could only have

been continued or extended by the year, as provided at that time, because that was the agreement of the parties.

The vital question is: To what extent, and in what manner, were the terms of the original policies modified by the agreement of February 18, 1903? It is admitted that the insured, Clark, paid all premiums due on both policies up to July 14, 1907; that is, he paid the full insurance year's premiums for the following years: January 14, 1902, to January 14, 1903, in one premium, then on and through each full insurance year up to January 14, 1907, he paid the premiums by the quarter (five full years), and that he also paid the quarterly premiums of \$12.31 due on each policy on the 14th of January and April, 1907, thus paying for six months' additional insurance in 1907, thereby paying all premiums due to July 14, 1907, thus making five years and six months full insurance paid. It being admitted that all insurance premiums due were paid up to July 14, 1907, the rights of the parties became fixed at that time. Now what were those rights? What were they under the original policies, and wherein have they been modified or enlarged by the agreement of February 18, 1903? The plaintiff contends that the insurance must be continued by the quarter of a year in order that the benefit of the policies may conform to the new method of paying the premiums by the quarter instead of by the year, agreed to by all of the parties; and that the method of computing the continued insurance by the quarter is simple, it only being necessary to divide the increased continued insurance fixed for any one year by the quarter to ascertain how much continued insurance is purchasable by the payment of one quarter's premium; and that the second and fourth clauses of the February 18, 1903, agreement extend all of the conditions and benefits of the policies by the quarter instead of by the year.

The defendant's contention is twofold: First, that continued insurance can only be computed by the year, as fixed in the table referred to, notwithstanding the new agreement of February 18, 1903; and, second, that the two quarterly premiums due on July 14 and October 14, 1907, for the remainder of the premiums due on the insurance year, ending January 14, 1908, should be considered and adjudged a debt against the insured which would deprive him of the continued insurance under the third clause of the agreement of February 18, 1903. A. J. Clark, the insured, died on December 5, 1912. His death, therefore, occurred 5 years, 4 months, and 21 days after the lapse of the policies on July 14, 1907; that is, this length of time elapsed from July 14, 1907, the date to which it is admitted that premiums were paid on the policies, to December 5, 1912, the date of Clark's death. It is clear, therefore, that more than 5 years and 3 months (the period mentioned in the table of continued insurance) from January 14, 1907, the date to which full annual premiums were paid, had elapsed before Mr. Clark's death, and it is equally clear that the policies were utterly lapsed at his death if defendant's contention is to be accepted, and if no charge for continued insurance is to be considered for the full six months additional insurance for which Mr. Clark paid. In other words, if the insured is to get no benefit of the continued insurance sold him under the original agreement in the policies before the new agreement was entered into, for the six months' premium paid by him under the new agreement, then he was not insured at the date of his death. To so hold would be permitting the defendant to accept and retain premiums for six full months on the policies for which it gives the insured nothing, unless there are other conditions in the policies which deprived Clark of the continued insurance. There is no contention as to the construction of the policies as they were originally issued, except, perhaps, as to what should be

considered such an indebtedness against the insured as would deprive him of continued insurance. It is clear that if no subsequent agreement as to the payment of the premiums had been made, and the original annual payment plan had been adhered to, all benefits of continued insurance would have been predicated upon the payment of annual premiums, and only continued or extended by the year. But a subsequent agreement was made stipulating that premiums should be paid quarterly instead of annually, and this agreement provides:

"Second. That all of the conditions of said policy as to the payment or nonpayment of any premium shall apply to any installment payable under the preceding agreement."

"Fourth. That all conditions of said policy, except as herein modified, remain in full force."

What does this language mean? What construction would the ordinary mind put upon it? There is no intimation to be gleaned from it that the defendant meant to say that the insured should be deprived of any of the benefits or conditions of his policies; on the contrary, it is specifically stated "that all of the conditions of the policy, except as herein modified, remain in full force." The conditions of the policies were that, if the insured paid a full year's premium, he should have the benefit of a full year's continued insurance, as fixed by the table. The new agreement is that all of the conditions of the policies remain in full force; only the times of paying the premiums is changed. Now if the insured was entitled to a certain period of continued insurance, if he had paid a full year's premium, why should he not be entitled to the proportionate part of that period, if he had paid a proportionate part of the premium? The second clause of the agreement unequivocally states that all of the conditions of said policies as the payment or nonpayment of any premium shall apply to any installment. The defendant admits that the payment of a full year's premium entitles the insured to continued insurance for the periods stated in the table. The new agreement extends the same benefits and conditions to the payment of any installment on a year's premium. Therefore it is clear that the agreement of February 18, 1903, can only be construed as extending by the quarter all of the benefits of the policies that had originally been extended by the year. To hold to the contrary would clearly be against the proper and unambiguous meaning of the language used. Again, the fourth paragraph provides: "That all of the conditions of said policy, except as herein modified, remain in full force." This reaffirms all of the conditions of the policy, except as therein modified. The modification was only as to the times of the payments of the premiums, and this, of a necessity, modified and conformed thereto all conditions and benefits of the policies predicated upon the time of the payments. Nor is there any difficulty in the application of the modified methods of paying the premiums. By reference to the table the defendant could fix to a day the time when the continued insurance would expire. This table provides that, if five full years' premiums are paid, the insurance is continued for five years and three months. It also provides that, if six full years' premiums are paid, the insurance is continued for five years and eleven months. It is seen, therefore, that, by the payment of the full year's premium from the fifth to the sixth year, the insurance is continued eight months. Now what must be the result if the premiums are paid for five full years, and for six months on the sixth year, or five and one-half years in all? What is to become of the premium for the one-half year paid on the sixth year's insurance premium? Clearly the insurance must be extended for one-half of the period fixed in the table for its continuance in the event that the full premium for the sixth year had been paid. Payment of the

full year's premium would have extended the insurance eight months. The payment of one-half year's premium must, therefore, extend the insurance for a period equal to one-half of what it would have been extended by the payment of a full year's premium or for the term of four months; this being one-half of eight months. In the case at bar, the insured paid five full years' premiums, which entitled him to five years and three months extended insurance. He then paid additional premiums for one-half of the sixth year, which entitled him to extended insurance for a period equal to one-half of that named in the table for six full years' payment, or, as shown, four months more continued insurance. At the time he quit paying the premiums, to wit, on July 14, 1907, he was therefore entitled to continued insurance as follows: Five years and three months for the five full years' premium paid by him, and four months for the one-half year's premium paid by him up to July 14, 1907, or five years and seven months in all. His continued insurance dates from July 14, 1907. Five years from that date was July 14, 1912. Seven months from July 14, 1912, expired February 14, 1913. Mr. Clark died on December 5, 1912. It is clear, therefore, that the insurance was in force at the date of his death.

To hold the contrary would be putting a most strained construction on the language of the policies and the agreement of February 18, 1903, and one not to be arrived at, except by the most ingenious strain of reasoning. Furthermore, it would be placing the insured at the mercy of a most technical and artistic construction of a contract which the law says would be most strongly construed against the defendant. The result would be, too, to permit the defendant to accept and retain one-half year's premium (\$24.62), for which it gives the insured nothing whatever in return as continued insurance. There is nothing in the policies or the agreement requiring him to elect whether or not he desired continued insurance. It was optional, and the defendant has no right to undertake to deprive him of the choice. The agreement of February 18, 1903, has not the slightest intimation in it that a full year's premium must be paid before the insurance is continued; on the contrary, the language contained in clause 4 specifically declares that all of the conditions of the policies, except as modified, remain in full force, and there is no attempted modification of any benefits or conditions of the policies, except as to the time of paying the premiums. There is no evidence of any kind of notice from the defendant to the insured that his continued insurance would only apply annually and not by the quarter.

But the effort of the defendant to allow continued insurance by the year only, because the policies only stipulate annual extension, is entirely inconsistent with the other parts of its defenses. By the testimony of its witnesses it, in undertaking to compute the insurance purchasable under the reserve fund, provided for in the second paragraph of page 3 of the policies takes cognizance of and recognizes the two premiums paid in 1907, and bases its calculation on figures of which they are a part. The plaintiff does not claim under this clause at all. Why should the defendant be permitted to admit its liability for these premiums under one clause of its policies and denies its liability under another? That is just what it does. It admits that Clark should have credit for these premiums under this clause, but denies that he should have credit under the clause granting him continued insurance. Why the distinction? The other, and the only other, contention of the defendant is that paragraph 2, page 3, of the policies, does not allow continued insurance, if there is an indebtedness to the company, and that the two premiums for July and October, 1907, were an indebtedness that would bar the

continued insurance. This contention cannot be sustained. There was no indebtedness to the defendant by the insured when the policies lapsed. It is admitted that Clark paid all premiums up to July 14, 1907, and then quit paying. At that time the relative rights of the parties became fixed, and there is no evidence of any indebtedness from Clark to the company. The language of the section relied on precludes the contention of the defendant. The clause (section 1, page 3) of the policies, under which continued insurance is claimed, is: "If any premium or interest is not paid on the date when due, and if there is no indebtedness to the company, the insurance will automatically continue as term insurance from the date to which premiums were paid," etc. The clause, "and if there is no indebtedness to the company," following the reference to the nonpayment of premium and interest, shows conclusively that any premium or interest thereon is not to be considered as an indebtedness that deprives the insured of continued insurance. Again, the next clause, reiterating the same idea is, "If any premium or interest is not paid on the date when due, and if there is an indebtedness to the company," again shows that any past-due premium or interest is not considered as a debt, and the language in section 5 of the general provisions that "any indebtedness to the company, including any balance of the premium for the insurance year remaining unpaid, will be deducted in any settlement of this policy or of any benefit thereunder," again shows that any balance of an insurance year's premium is not considered as a debt that bars any rights under the policies, but that such balance is merely to be deducted in any settlement of the policy or from the amount payable under either of the "Six Accumulation Benefits" mentioned on page 1 of the policies. The third clause of the February 18, 1903, agreement again asserts the idea that any unpaid installment of any premium is to be deducted from the settlement of the policy simply as a matter of accounting between the parties. The provision of the policy (column 1) for borrowing money from the company is clearly the indebtedness referred to in the clauses mentioning indebtedness to the company. The construction of the term "indebtedness to the company" must be referred to, and construed with, the provisions of the policy providing for loans to the insured on which interest was to be paid at the rate of 5 per cent. per annum, thereby creating an indebtedness to the company as indebtedness is ordinarily contracted or created between parties. There was no indebtedness of the insured, Clark, to the defendant on July 14, 1907. That is admitted by both parties. At that time all of the rights of the various parties became fixed, and their rights under the policies must be considered as fixed also. The provisions in the policies and in the agreement providing that any unpaid installment of any insurance year's premium shall be deducted in the settlement of the policies is simply the right reserved by the defendant, that is usually reserved by insurance companies, to deduct the remainder of the premium due for the insurance year in which the insured died. The effort of the defendant in its testimony to deduct this amount from the reserve referred to in paragraph 2, page 3, of the policies, thereby taking from the reserve that much of its purchasing power, could not be allowed if plaintiff was claiming under that clause of the policies. This would not be deducting the remainder of the insurance year's premium in the settlement of the policies; it would be deducting it from a fund for the purchase of insurance held by the defendant to the credit of the insured, and, if this was permitted, the defendant could deprive the insured of the benefits of this clause by so reducing his reserve purchasing fund by the reduction from it of a charge against the face of the policies themselves that the period

for which it ought to buy insurance might expire before the rights of the insured could vest under it. In other words, in no event could any unpaid installments of a year's premium be deducted from any fund due the insured, except the face values of the policies themselves. The plaintiff objected to all of the testimony of the defendant that tended to modify, enlarge, or restrict the terms of the policies on the ground that it was incompetent as an effort to change the contract between the parties. All parts of the testimony so tending is incompetent and is ruled out.

From all of which it follows that the plaintiff is entitled to a verdict and judgment in both cases. It is therefore ordered, adjudged, and decreed that the plaintiff, S. Joyce Clark, do have judgment against the defendant, New York Life Insurance Company, in her action on policy No. 3234947, in the following sums, to wit: \$975.38, and interest thereon at 7 per cent. per annum since December 5, 1912, amounting to \$155.33, aggregating \$1,130.71. This allows a deduction of \$24.62 from the face value of each policy for the unpaid installments of the premiums due for the year 1907. Interest is allowed in each case on the balance of \$975.38 due on each policy from December 5, 1912, to the date of this judgment, March 16, 1914. The promise of the defendant is to pay "immediately upon receipt and approval of death" of the insured. It admits in its answers that it refused to furnish blanks for proof of death upon the application of the plaintiff, and that it has refused to pay her. It follows, therefore, that plaintiff is entitled to interest from the date of the death of the insured. The amount due was liquidated at that time. The prayer of the complaint did not ask for interest, it is true, but the prayer is no integral part of the complaint, and interest always follows, by operation of law, the refusal to pay any past-due liquidated demand. The plaintiff's counsel contends for it in argument and it is allowed.

Let judgment be entered for the plaintiff in conformity hereto in both cases.

Thomas & Lumpkin, of Columbia, for appellant. Harry Hines, of Lancaster, for respondent.

WATTS, J. Two actions were brought by the plaintiff against the defendant; and as the two cases were identical, by agreement of counsel, they were heard together at the April term of court, 1914, for Lancaster county, by his honor, Judge De Vore. A jury being waived, Judge De Vore filed his decree finding in favor of the plaintiff, and defendant appeals and by 13 exceptions alleges error on the part of the judge in finding in favor of the plaintiff. The decree of Judge De Vore should be reported in the case. It will be seen by the exceptions that the question before the court is: What right to extended or continued insurance did the insured, Adolphus J. Clark, have on July 14, 1907, the date of the lapse of the policies? The court below found, and it is not disputed, that by the terms of the policies, as originally written, Adolphus J. Clark, the insured, was entitled to five years and three months extended insurance as provided in the table in the policy, which term began on the 14th day of July, 1907, and expired on October 14, 1912, or more than a month before the date of the death of the insured.

As originally agreed upon, the premiums

on the policies in evidence were to be paid annually, and the first premiums were paid on that basis. On February 18, 1903, an agreement was entered into changing the mode of the payment of the annual premium to quarterly payments. Under this agreement and clause "second" thereof, it was the contention of the plaintiff, and held and found by the circuit court, that, upon each payment of the quarterly premium, the extended insurance therein expressed and stipulated was increased proportionately, and that therefore the two payments made by the insured, Adolphus J. Clark, on the sixth annual premium, increased the extended insurance provided for in the table for four months, which would carry the insurance in force, according to the finding and decree of his honor, to February 14, 1913, which was after the death of the insured, Adolphus J. Clark, which was on December 5, 1912. The policies were introduced in evidence, and had notations on them in pencil, which the evidence shows was made by the deceased insured, Adolphus J. Clark:

"Premiums paid on this policy for five and one-half years (up to July 14, 1907). This extends the policy for five years and seven months after said date, or Feb. 14, 1913."

This clearly shows how the insured construed the agreement and what his understanding was.

In *Williamson v. Association*, 54 S. C. 593, 32 S. E. 769, 71 Am. St. Rep. 822, this court laid down this wholesome rule by Mr. Justice Gary (now Chief Justice), wherein, as the organ of the court, he says:

"It is a well-known fact that comparatively few people who become shareholders in such associations are familiar with their by-laws. They rely upon the honesty, integrity, and fair dealing of those who manage the affairs of the association. It is also a well-known fact that the by-laws are frequently intricate and almost unintelligible to the average shareholder, and that those in charge of the affairs of the association usually become exceedingly expert in the interpretation of them, thus giving the association a decided advantage in the way of information over the shareholders. Public policy, in order to prevent the perpetration of fraud, and to prevent just such a case as we now have before us, in which the plaintiff alleges that he was induced by the express promises and the literature of the defendant to part with his money, in purchasing its shares of stock, demands that the defendant should not be allowed to elect whether it will be bound by its by-laws, or its express agreement, as to the time when the shares would mature. These views render unnecessary a consideration of the rule of interpretation discussed in the case of *Wis. M. & F. Ins. Co. Bank v. Wilkin* [95 Wis. 111, 69 N. W. 354] 60 Am. St. Rep. 86, and in the extensive notes to that case, that, when two clauses of a contract are in conflict, the first governs rather than the last. The circular will next receive consideration. The construction of a written instrument is a question of law to be decided by the court. This court has the right, therefore, to construe the circular. It unquestionably shows that the defendant interpreted the contract to mean that the shares would mature at a fixed and definite period. It is a well-settled principle that, when the construction to be given a contract is rendered doubtful by the

language thereof, the interpretation of the contract by the parties themselves is entitled to great weight. *Chicago v. Sheldon*, 9 Wall. 50 [19 L. Ed. 594]; *Railroad Co. v. Trimble*, 10 Wall. 367 [19 L. Ed. 948]; *Steinbach v. Stewart*, 11 Wall. 566 [20 L. Ed. 56]; *Lowber v. Bangs*, 2 Wall. 728 [17 L. Ed. 768]."

We think that Clark's interpretation of the contract was correct, and we agree with the circuit judge both as to his finding and reasoning in reference to the construction, and we see no error at all on the part of the circuit judge in his decree as complained of on the part of the defendant and as made by the exceptions. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and FRASER, J., concur. HYDRICK, J., dissents.

GAGE, J. I must concur in the opinion of Mr. Justice WATTS; but the contention of the appellant is so strong, I have thought proper to reduce my own views to writing.

The case turns on a very narrow issue. The facts are novel. They need to be correlated, and in that process not much help can be had from the consideration of other cases. The thing to be decided is the construction of a contract for life insurance evidenced by the policy and a paper writing amendatory thereof.

The policy in issue was written January 14, 1902. The amendment was made February 18, 1903. The annual premiums were agreed to be paid in advance, the first on January 14, 1902, and the others yearly thereafter. The policy provided:

"If any premium is not paid on the date when due, * * * the insurance will automatically continue * * * from the date to which premiums were paid * * * for the term specified (in an annexed table)."

That table provides, "after expiration of five years" (that is, after the payment of five years' premiums), then an extended or continued insurance shall be effective beyond that period five years and three months more (that is to say, the policy shall live five years and three months after default in the payment of premiums).

The rights of the insured in this case are those of a policy holder who has "no indebtedness" to the company. The only indebtedness to the company pretended by it is evidenced by notes made for a premium. If that be a debt which was contemplated by the terms of the policy, then it existed without reference to the making of notes, for the note is only evidence of the debt. Yet that was not contemplated.

Indebtedness, as used by the policy, plainly means indebtedness for money borrowed on the policy, called "cash loans payable on demand." And the meaning of the words is not enlarged by the third paragraph of the amended contract of 1903. Therein an unpaid premium is called indebtedness, but

plainly not in the sense named in the body of the policy.

The insured paid the premiums for years 1902, 1903, 1904, 1905, and 1906; and he paid one-half the premium for the year 1907. It is conceded by the plaintiff that the policy would have been forfeited on December 2, 1912, but for this last payment, which squared all premiums up to July 14, 1907.

For the insured died on December 5, 1912, and five years and three months, the survival life resulting from first five years' premiums, mounted on July 14, 1907, would reach only October 14, 1912.

The plaintiff, however, contends that, inasmuch as the "table of cash loans of paid-up or continued insurance" allows five years and three months extension for five annual payments and five years and eleventh months extension for six annual premiums, therefore the extension for five and a half years premiums ought to be five years and seven months, to wit, up to January 14, 1907. In a word, after the amendment of February 18th, the plaintiff rejects the year as the unit upon which an extension must be mounted, and contends that a quarter or a half year may be a unit, because a half year's premium was paid and accepted. The defendant, of course, rejects that view.

For support, the plaintiff relies on the amendment to the contract of insurance made as aforementioned, and which he claims modified the terms of the policy. The premiums had been theretofore paid by the year. This amendment provided for payment of them by the quarter; and that was plainly the primary purpose of its making; but it embraced other stipulations. The pertinent clause of that contract is this:

"That all the conditions of said policy as to * * * nonpayment of any premium shall apply to any installment payable under the preceding agreement."

Confessedly, before the amendment, the default of a premium for a whole year, payable at the outstart on the first day of the premium year, had been the lapsed event from which imputed life in the policy should be extended. The policy read, in the aforesaid table:

"After expiration of five years * * * insurance continued for five years and three months." Extreme left marginal column at the top of it and column 3.

But the amendment declared that the conditions of the policy as to nonpayment (and payment, too, but that is irrelevant to the inquiry) should apply to any installment. I have italicized the two words of import—the words "conditions" and "installment." Technically speaking, the policy states no "condition," and it does not use that word or the word "forfeiture"; on the contrary, it declares that the policy is "automatically non-forfeitable"; but the last three words of the paragraph marked "first" on page 3 set out

that which will work a forfeiture. The only condition, meaning a clause in a contract made to defeat it, pertinent to this inquiry, is that expressed in the paragraph marked "first" on the third page of the policy.

The amendment by express words makes that condition, that method of forfeiture, *applicable to a quarterly payment*, to wit, "any installment payable under this preceding agreement," as well as it had been applicable to an annual payment. How applicable? And, if applicable, entirely so.

The appellants conceded unusual import to the date July 14th whenever they reckon the date of the default to have occurred on July 14th instead of January 14th. They say:

"The rights of the parties under the policies of insurance before the court became fixed on the 14th day of July, 1907."

If the half year's payment had no effect to revive, then it had no effect at all, and the policy lapsed on January 14th before. And if the half year's payment had the effect to revive, which is tacitly admitted by appellants, then it carried all the fruits of revival. It is true the extreme left column of the table has not been expressly amended to meet the case; but the implication is if the default occurred at the beginning of a quarter instead of a year, to wit, on July 14th, then the policy *survived from that date*, and such survival was fed *by all that had been paid in as premium*, and for so long a time as might be computed from the date of the policy. The table before referred to shows upon its face that the survival period of a policy lasts in proportion to the accumulated premiums; the greater the accumulation of the premiums the longer the survival period.

This date, in the third column, shows that, after five years of accumulated premiums, the survival life of a half year's premium paid thereon would make the policy to survive for yet four months in addition to five years and three months. That would make the policy outlive the assured. This conclusion is reinforced by the reflection that forfeitures are not favored in law; that the act and instrument which works a forfeiture ought to be plain; and that, in a case of doubt, the insured ought to have the benefit of the doubt, and the forfeiture ought to be solved against him who asserts it.

(101 S. C. 277)

TOWN OF HARTSVILLE v. McCALL et al.
(No. 9116.)

(Supreme Court of South Carolina. June 8, 1915.)

1. INTOXICATING LIQUORS §168—PARTIES TO OFFENSES—ACCESSORIES—AGENCY.

Where one convicted of transporting intoxicating liquors within the limits of a town in violation of an ordinance had not entered the

corporate limits, but had the liquor transported by his agent, he was guilty under the rule that one may commit a crime through the agency of another.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 189-192; Dec. Dig. § 168.]

2. CRIMINAL LAW §59—ACCESSORIES—MISDEMEANOR.

What would make one an accessory before the fact in a felony makes him a principal in a misdemeanor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.]

3. CRIMINAL LAW §98—JURISDICTION—CITY COURTS.

Where a nonresident of a town procures another to transport intoxicating liquor in the town in violation of its ordinance to his home, his absence from the town did not deprive the mayor's court of the town of jurisdiction to try him for what was done by his agent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 192-195; Dec. Dig. § 98.]

Appeal from General Sessions Circuit Court of Darlington County; Frank B. Gary, Judge.

E. B. McCall and another were convicted of violating an ordinance of the Town of Hartsville, prohibiting the transportation of alcoholic liquors within the corporate limits. From a judgment reversing the conviction as to E. B. McCall, the town appeals. Reversed.

L. M. Lawson and J. M. Spears, Sol., both of Darlington, for appellant. E. C. Dennis, of Darlington, and D. W. Galloway, of Hartsville, for respondent.

HYDRICK, J. The respondent McCall resides and his place of business is outside the limits of the town of Hartsville. He ordered three gallons of whisky from Richmond, Va., which the testimony tends to prove and the trial jury found was for unlawful use. On arrival of the whisky at the express office within the town, McCall sent a written order to the express company to deliver it to R. R. Bain, who received it and put it in a dray. The drayman carried it to McCall's store, outside the limits of the town, and delivered it to him, and he paid the drayage. McCall was not actually present within the town at any time during the transportation of the whisky, and took no part therein, except as above stated. Upon the foregoing facts he and Bain were tried before the mayor of the town and a jury for violating an ordinance of the town, which makes it unlawful to transport alcoholic liquors within the corporate limits for unlawful use. The mayor refused to direct a verdict of acquittal as to McCall, and the jury found both defendants guilty. From the sentence, they appealed to the circuit court, which affirmed the judgment as to Bain, but reversed it as to McCall. From the judgment of reversal

as to McCall the town appealed to this court.

The circuit court did not state the ground upon which the reversal of the judgment as to McCall was based, but it was evidently based upon the ground taken by him in the mayor's court for a directed verdict, to wit, that because he was not personally within the limits of the town during the transportation, and took no part therein, except to write the order and send Bain for the whisky and pay the drayage, all of which was done by him outside the limits of the town, he had not violated the ordinance within the town, and the mayor's court had no jurisdiction to try him for what he did outside the corporate limits. This must be so, because, if the reversal had been based upon any other of the grounds of appeal, the judgment would have had to be reversed as to Bain also.

[1] The circuit court erred in reversing the judgment of the mayor's court. It is well settled that one may commit a crime by and through the agency of another. "Qui facit per alium facit per se." In contemplation of law, Bain's acts, done by McCall's directions, were McCall's acts, and McCall is liable for them the same as if he had been personally present and had done himself what Bain did by his directions. It makes no difference whether Bain was a guilty or an innocent agent. If he had been an innocent agent, as probably the drayman was, and if McCall could not be held responsible for his acts, we would have the anomaly of a crime having been committed without a criminal. "Since an act by an agent has in law the effect of a personal act, if one employs another to do a criminal thing for him, he is guilty the same as though he had done it himself." 1 Bish. Cr. L. § 631. The same principle is held in *State v. Anone*, 2 Nott & McC. 27, *State v. Borgman*, Id. 34, note, and *State v. Williams*, 3 Hill, 91.

[2, 3] What would make one an accessory before the fact in a felony makes him a principal in a misdemeanor. *State v. Lymburn*, 1 Brev. 397, 2 Am. Dec. 669; *State v. Westfield*, 1 Ball. 132. The case of *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, is conclusive of the question, and shows that McCall is liable criminally for the acts of Bain, done within the corporate limits by his authority, and that his own absence from the limits of the town at the time did not deprive the mayor's court of jurisdiction to try him for what was done by his agent within the limits of the town by his direction. See, also, *Tutt v. Greenville*, 142 Ky. 536, 134 S. W. 890, 33 L. R. A. (N. S.) 331, and note, where numerous cases are cited which sustain this conclusion.

The judgment of the circuit court is reversed, and that of the mayor's court is affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(16 Ga. App. 66)

HALL v. GENERAL ACCIDENT ASSUR. CORPORATION, Limited. (No. 5725.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

(Syllabus by the Court.)

1. INSURANCE — 148, 454, 668 — ACCIDENT INSURANCE — CAUSE OF DEATH — QUESTION FOR JURY.

The court erred in awarding a nonsuit.

(a) A clause in a policy of accident insurance, in which payment in the event of death is conditioned upon the requirement that the death shall result solely from an accidental cause, must be reasonably construed, most favorably to the insured, and must be so construed as to give effect to the manifest intention of the parties in entering into the contract.

(b) Where an old man, large and heavy, and suffering from an incurable chronic affection of the kidneys, slipped and fell in a heap while endeavoring to step down from a sidewalk into the street, with the apparent intention of crossing the street diagonally, and death resulted in a few days thereafter, and there is no evidence that the insurer was not fully aware of the physical condition of the assured, the insurer is not necessarily relieved from liability upon its contract because the death may only have been accelerated by the fall; nor is the insurer relieved even if the chronic malady from which the insured suffered may have contributed to cause his death, for, if the fall was the sole proximate cause of the death, it would be immaterial that the physical condition of the insured aggravated his injury or hastened his death.

(c) The question of proximate cause is one of fact, for determination by a jury; and in the present case the evidence in behalf of the plaintiff authorized the conclusion that, though the insured might have died within a short time even if he had not received the injury in question, he would probably have lived for a considerable period of time, and would not have died at the time he did if he had not received the injury.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298, 1177, 1178, 1556, 1732-1770; Dec. Dig. —148, 454, 668.]

2. EVIDENCE — 571 — EXPERT TESTIMONY — PROBATIVE EFFECT.

The opinion evidence of an expert witness is not conclusive, and is not entitled to more probative value than the jury may think it has; and especially is this true when the opinion announced by the witness is coextensive with the entire scope of the jury's investigation, and is absolutely decisive of the only issue to be determined by the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2395-2398; Dec. Dig. —571.]

3. INSURANCE — 668 — ACCIDENT INSURANCE — PROXIMATE CAUSE OF DEATH — SUBMISSION OF ISSUES — QUESTION FOR JURY.

Upon the evidence adduced, the plaintiff was entitled to have the court submit to the jury the issue of fact as to whether the accidental injury or a pre-existing ailment of the insured was the proximate cause of his death, with an instruction that, to entitle the plaintiff to recover, the jury must be satisfied that the alleged injury was the proximate cause of his death. Whether the injury in this case was the proximate cause of the death was purely a question of fact, for it involved a determination, upon evidence, of the relations between the alleged causes and effects, and nothing more; and not only might the jury have found that one of the causes was a mere condition, but when two or more causes may have contributed

to an injury, and there is doubt, or the facts are of such a character that equally prudent persons would draw different conclusions as to which of the contributing causes was the efficient, dominant, and proximate cause, the question should be submitted to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by J. Elsworth Hall against the General Accident Assurance Corporation, Limited, etc. Judgment for defendant, and plaintiff brings error. Reversed.

John R. L. Smith, of Macon, for plaintiff in error. Hardeman, Jones, Park & Johnston, of Macon, and Payne & Jones, of Atlanta, for defendant in error.

RUSSELL, C. J. On June 26, 1913, suit was brought in the city court of Macon upon a policy of accident insurance, issued in favor of the plaintiff upon the life of Judge John I. Hall. On September 12, 1913, the defendant company filed a petition and a bond in the city court for the purpose of having the cause removed to the District Court of the United States for the Southern District of Georgia, and an order was entered approving the bond and granting the petition for removal. Thereafter, on December 12, 1913, the defendant company filed an answer to the suit in the city court of Macon. Prior to this date no pleading of any kind had been filed by the defendant in the city court. On December 19, 1913, the defendant filed in the city court a petition that the case be again placed upon the docket of that court, subject to be called up and tried. With this petition, and as a part thereof, the defendant filed an order from the District Court of the United States, dated December 11, 1913, directing that the case be remanded to the city court. On December 22, 1913, an order that the case be redocketed in the city court was entered, and on December 27, 1913, the defendant filed in that court another answer to the suit. On January 17, 1914, the plaintiff filed a motion to strike the defendant's answers, upon the ground that they were not filed within the time allowed by law, and insisted that the case was legally in default in both the United States court and the city court; no defense having been filed in the United States court while the case was there pending, and none in the city court in due time. The court overruled the motion to strike the answers, and to this ruling exception is taken.

The evidence adduced tended to show that at the time of the injury Judge Hall was 72 or 73 years of age; a large, tall, heavy, fleshy man. He had an incurable chronic case of interstitial Bright's disease for about two years prior to his injury. The contract of insurance was made 26 days prior to the injury. It was made upon statements made

by him and warranted to be true. So far as the record shows, the company knew of his age, his physical condition, and the state of his health at the time of the issuance of the policy. At the time of his injury he was regularly engaged in the practice of law, daily pursuing his duties of that profession. His office was on the second floor of a building in which there was no elevator, and had to be reached by a flight of marble steps without any banister or railing—a treacherous place. He constantly ascended and descended these steps without assistance, and walked from his home to his office twice each day. On Saturday before the injury on Monday, he left his home in Macon and went to Griffin alone, to spend the week end, returning home alone on Sunday afternoon. Monday morning he was at his office, although it was a raw, cold, drizzly, rainy day (the 23d day of December). He went home to his dinner as usual. After dinner, although it was raining quite hard, he started back to his office. While going downhill in the rain with his umbrella over him, he started to leave the sidewalk and cut across the street, "he stepped off the curbing and slipped," his foot "went from under him," and "he went down in a heap." He was picked up out of the gutter and carried into a nearby church out of the rain. He was then carried in a hack to his home. He was suffering pain and was unable to walk. He could not bear his weight on his injured leg. He was badly bruised about the buttock and on the knee, and abraded about the scalp. The symptoms were such that the attending physician thought his hip was fractured. It was only by waiting until the next day and resorting to measurements that it was determined that his leg was not broken. However, when first injured, he was perfectly conscious and rational, and he continued so during the day and the following night. The next morning there was a slight increase of temperature, "and that condition gradually progressed until his death," a week later. A physician testified that if a man of his size, weight, and general physical condition, in consequence of his foot slipping from under him, fell upon a sidewalk or against a curbing, "such an occurrence was one that was calculated to cause the death of such a man." He testified, also, that in his opinion the fall precipitated uræmic poison, which is the terminal state of chronic Bright's disease, and caused the death; that in his opinion the fall "precipitated the uræmia which caused his death"; also, that he had been afflicted with chronic Bright's disease for at least two years, perhaps longer; and, "if there had been no interference, that condition of the kidneys would have killed him." However, he could not say that it would have caused his death at that time. How long it would have been reasonably possible for a man in his condition to live, if nothing extraordi-

nary had happened to him, the witness "could not say, for the simple reason that he might have lived a year, he might have lived two years, and he might have lived a week, and he might not have lived more than one day. You cannot prognose conditions of that kind at all with any degree of extent [certainty?]. I can say he might have lived two years." He testified, also, that he regarded Judge Hall, considering his age, etc., as a man of unusual constitution, with very good recuperative powers. The plaintiff (a son of the deceased) testified that he had been closely associated with his father for many years, and that a very slight illness would make him more or less delirious, and he would very quickly recuperate; but that the progress of his condition from the time of his fall was steadily worse. At the conclusion of this evidence, the court, on motion of the defendant's counsel, granted a nonsuit; and to this judgment exception is taken.

The assignment of error in which complaint is made that the court erred in refusing to strike all of the defendant's pleas, because they were filed too late, raises an important question of practice, which is further complicated by the fact that at the time the United States District Court remanded the cause to the city court of Macon no answer had been filed in the United States court, although the case had been pending therein for a period longer than that allowed for the filing of a plea; and, since we are of the opinion that the judgment should be reversed upon the award of a nonsuit, we do not deem it best to undertake at the present time to adjudicate the merits of the assignment of error in regard to the court's refusal to strike the plea of the defendant, when the decision must be rendered by only two judges of this court, and therefore would not have the same finality as the conclusion reached by a full bench. The omission to decide this point at this time will not prejudice the rights of the parties, since the exceptions to the ruling of the trial judge have been preserved by timely exceptions *pendente lite*.

[1] 1. In our opinion the learned trial judge erred in awarding a nonsuit, the judgment being based, in our opinion, upon a construction of the language of the policy of accident insurance so strictly literal as to defeat the intention of the parties, and, as we think, losing sight of the fact that the stipulations relied on for defense necessarily referred to the prime controlling proximate cause of the injury—the *causa causans*, without which death would not have resulted at the time that it did. To our minds, the fact that Judge Hall may have had an incurable disease, which by the acceleration of its influence and effect may have caused the death, would not necessarily preclude a right of recovery, although it was stipulated in the contract of insurance that the amount stipulated should be paid only when death resulted solely and exclusively from the in-

jury. Presumably the company knew from the application of Judge Hall, which was made 26 days before the accident, that he was suffering from an incurable affection of the kidneys. If they did not know it, they could have known it, for there is no charge in the answer that there was any concealment on the part of Judge Hall of his true condition at the time the application was made. To hold, in any case, that a contract which stipulates that the loss for death should be payable only when the loss results solely and exclusively from an injury, would be to hold that death must, in every case, be instantaneous and the immediate effect of the injury in question, for it is a matter of common knowledge that almost every human being has some weak spot in his organism which might to a larger or smaller degree contribute to bring about death in a particular way in that particular case, although another person under the same circumstances might not have died. Except in the case of a human being who is in perfect health, or unless the death is instantaneous, death never supervenes when it cannot be said that there was perhaps more than one cause which contributed to the fatality. If a company which writes accident insurance insures one who is suffering from a number of maladies against loss of life solely and exclusively due to the accident, and an accident happens which perhaps would not have caused the death of a normally healthy person, and yet which, by precipitating the baneful effects of the maladies, shortens the life of the person in question by any appreciable length of time, no matter how short, the injury, as the underlying essential proximate cause, must at least be said to have produced the result which otherwise would not have happened at the time and place at which it occurred. In the present case the insured was in many respects a vigorous man; he was afflicted with an incurable disease of the kidneys which sooner or later was certain to have terminated his life. How long he might have lived but for the injury which accelerated the effects of his disease is immaterial. The true question in the case is whether he would have died at the time that he did die if he had not received the injury, conceding the injury to have been the result of an accident. If the jury should find that his fall was due to disease, and not an accident due to his misplacing his foot or miscalculating the distance to be descended from the edge of the sidewalk to the roadway of the street, or other accidental cause, there would be no right of recovery, because the loss, in that event, would not be due solely and exclusively to an accident as the proximate cause, but might be due to the disease. This is the first fact for a jury to determine. However, if on the other hand the assured accidentally slipped and fell upon the street, the mere fact that the fall hastened his death by aggravating the disease so that he only

lived a week, when even if he had not fallen he might not have lived as much as a month, would not defeat a recovery on the policy. It may be granted that the words of the policy which restrict the indemnity for death losses to those resulting solely and exclusively from bodily injuries through external, violent, and accidental means might avoid the contract in the present case if consideration be given only to the matter of predominance of the various causes which may have contributed to Judge Hall's death, instead of focusing the investigation upon the ascertainment of the proximate and primary cause, but for which death might or might not have resulted at the time that it occurred. In the view most strongly favorable to the defendant, the testimony showed that Judge Hall's tenure of life was more than ordinarily uncertain, but it did not show that he would have died when he did if he had not fallen, for, on the contrary, there was evidence that the fall, by aggravating the complaint from which he was suffering, probably hastened his death. In our view of the case, it is for a jury to declare, from all the facts in proof, what was the proximate cause of the death of the insured. If there was only one proximate cause of the bodily injury and this was brought about by "external, violent, and accidental means," such as an accidental slipping and falling, the insurance company would be liable upon its contract without regard to the fact that the assured was badly diseased and that the results of the fall in his case would naturally be more serious than if he had been in perfectly good health and a young man. Cases can be imagined where one of two young men (both supposed to be in excellent health) might survive without shock an injury effected through external, violent, and accidental means, while the other, having a weak heart, might collapse and die from fright in the presence of imminent and appalling danger. We think the circumstances in proof were sufficient to have required the case to be submitted to the jury, since the question of proximate cause is peculiarly a jury question; and that the learned trial judge erred when he "chopped off" the case by "the mechanical process of nonsuit."

For the purposes of this case, the two clauses of the policy are to be read together as insuring against loss of life "which shall result solely and exclusively" "from bodily injuries effected through external, violent, and accidental means." If the contention of the defendant in error is correct, or if the contract is given an absolutely literal meaning, these clauses of the policy mean nothing to the plaintiff; with the result that the writing was no contract at all. It certainly cannot be presumed that an intelligent man would take such a policy if he had supposed it to be an absolute nullity. When policies of this kind are made and circulated and the money of those who are insured is taken,

the law will impute to the company an intention that the policy shall mean something beneficial to the insured. This court will not presume that the parties intended to make a contract which was not in fact a contract, but will give the language a reasonable interpretation in furtherance of the purposes which the whole body of the writing imports. As was said by the Supreme Court of Arkansas, in a similar case:

"It is the duty of courts to give such construction to a policy, if the language used fairly admits, as will make it of some substantial value and carry out the intention expressed therein that liability is incurred where death occurs from accidental injury." *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 99, 152 S. W. 998, 44 L. R. A. (N. S.) 493.

It is a settled rule that policies of insurance are construed liberally in furtherance of a general scheme proposed. Such policies are construed most liberally in favor of the assured and most strongly against the insurer. *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256 (2), 277 (2), 30 S. E. 918, 42 L. R. A. 261. The courts, of course, have no power to make contracts for parties, nor even to vitalize a void contract; it is their duty only to enforce such contracts as have been made, but it is plain that, where strict and literal construction of a policy of insurance would defeat the whole purpose of the contract, it is the duty of the courts to discover and give effect to the manifest and reasonable intention of the parties. To say, in construing contracts like that now before us, that if there was any contributing cause to an injury, no matter how small, the benefits of the contract would be withdrawn, would be to defeat the contract as it was undoubtedly understood by the insured at the time it was proposed to him; and the Code provides that in case of doubt that construction should be given to a contract, when doubtful, which goes most strongly against the party executing the instrument, or undertaking the obligation. *Civil Code*, § 4268. As was said by the Supreme Court of Missouri in *Fetter v. Fidelity, etc., Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560:

"If we should give to those qualifying words of the policy the meaning it is now claimed by defendant they were intended to have, there would be scarcely any limit to their nullifying influence. * * * If * * * there could be discovered in a man's body, after his death, any condition before undiscovered and unsuspected, that, under scientific tests, would render him * * * amenable to accidents, or less capable of resisting their influence, the policy would not cover the case."

We think the Supreme Court of Georgia, in accordance with the general proposition stated above, has decided the principle controlling this case, and has announced the doctrine, not only that the disease from which the insured suffered must have been a substantially contributing cause to the injury, but that liability is not defeated merely because the existing disease aggravated or ren-

dered more serious the consequences of the accident. It is true that the policy under consideration in *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, and in *Travelers' Ins. Co. v. Thornton*, 119 Ga. 455, 46 S. E. 678, used the words "independently of all other causes," instead of the words "solely and exclusively," used in the contract now under consideration; but there is no difference between means which "independently of all other causes" produce a result and means which "solely and exclusively" produce it. If a cause operates to produce an effect independently of all other causes, it is the sole and exclusive cause of that effect, and the result accrues solely and exclusively from that cause. *Penn v. Standard Ins. Co.*, 158 N. C. 29, 73 S. E. 99, 42 L. R. A. (N. S.) 593; *Id.*, 160 N. C. 399, 76 S. E. 262, 42 L. R. A. (N. S.) 597. In the *Thornton* case, 116 Ga. 124, 42 S. E. 287, 94 Am. St. Rep. 99, the contract contained an additional clause which exempted the insurer from liability if an injury or death resulted wholly or partially, directly or indirectly, from hernia, which naturally made the policy more favorable to the insurer than is the contract involved in the present case. *Illinois Ass'n v. Parks*, 179 Fed. 794, 103 C. C. A. 286; *Fidelity Ins. Co. v. Meyer*, *supra*. Yet, with these clauses added to one having the same force and effect as the clause involved in this case, the Supreme Court held that the plaintiff was entitled to recover unless the "existence of the hernia at that time was a substantial contributing cause which wholly or partly, directly, or indirectly brought about the injury resulting from the accident," and that "liability under the policy is not defeated by showing simply that the existence of the hernia rendered more serious the consequences resulting from the accident." In the opinion (116 Ga. 129, 42 S. E. 290, 94 Am. St. Rep. 99) Mr. Justice Cobb says:

"To illustrate: If a policy holder should have a serious and long-continued illness, such as a fever of some nature, and while recovering therefrom, and in a condition unable to resist successfully any serious shock, should receive a blow upon the head from falling plastering, from which death ultimately, though not immediately, resulted, the proximate cause of the death would be, not the fever, but the blow from the plastering, although death may not have resulted but for the debilitated condition of the injured person resulting from the fever. In such a case the immediate cause of the death was the blow on the head, though the consequences might be the result of the disease from which he suffered. In order to defeat a recovery under such a clause, * * * it must be shown that the disease was the substantial cause of the injury, and the mere fact that the disease may aggravate the consequences of the injury and make them more serious than they would have been otherwise does not bring the case within the exception stated in the policy."

The Supreme Court could not give the terms of the contract in the *Thornton* case their absolutely literal meaning without holding that the contract amounted to nothing

and was intended to mean nothing; and, since there is no man who is physically perfect (and only of such can an accidental injury to which no other cause contributes be predicated), so, in the contract now before us, the agreement to pay in the event of disability or death would be valueless if any one of a thousand conditions which might as variously differ in as many different individuals should aggravate the results of an injury of which the real prime efficient underlying cause was an accident. While the precise point was not then before the court, and the dictum quoted is for that reason obiter and mere persuasive authority, we are satisfied that the correct principle controlling the case at bar is stated in the opinion of Mr. Justice Cobb in the *Thornton* case. The kind of clause which the excerpt quoted refers to as "such a clause" is one insuring only against loss resulting from bodily injuries effected through external means which shall independently of all other causes immediately and wholly disable, and which, in addition, expressly stipulates that the insurance shall not cover death resulting wholly or partially, directly or indirectly, from disease—a contract which would seem to be stronger in favor of the company than the one involved in the present case. In that case it was left with the jury to say whether the injury was caused by the fall and the result merely aggravated by the hernia, or whether the hernia was a contributing cause of the injury. And so in the present case we think that it should have been left to the jury to determine whether the death of Judge Hall was caused by the fall, although accelerated by the incurable disease from which he suffered, or whether the disease was a contributing cause of the injury from which his death resulted. We think that when the plaintiff shows a bodily injury which, *prima facie*, was inflicted through external, violent, and accidental means, the insurer, in order to rebut a *prima facie* right of recovery and to defeat liability must show (and of course he may do this by testimony which comes from the plaintiff's witnesses) that the injury in question was due in the first instance, either wholly or in part, to the disease from which the insured appears to have suffered. In other words where, as in the present case, it appears that the assured was bruised and wounded by a fall which was apparently accidental, it is to be presumed, until the contrary appears from the testimony (whether for the plaintiff or the defendant of course being immaterial), that the fall was the prime cause of the final result. If there is evidence that the result was caused by an intervening cause, or that such a cause contributed to the result, it is then for a jury to say whether or not the presumption raised by proof of an injury due to a cause *prima facie* accidental has been rebutted. *Bank of Tifton v. Timmons*, 84 S. E. 232 (4). The ascertainment of the

proximate cause of death is the real object to be attained in every such case as that now before us. Lawyers, judges, and psychologists have groped for centuries and settled on nothing more definite than proximate cause. To say absolutely that a death resulted solely and exclusively from an injury is to say that it would not have resulted without the injury, and this can never be said except as a matter of mere probability. "The days of our years" are numbered, but it is reserved to the Infinite Great Cause alone to know the number. Policies of life and accident insurance are not contracts of indemnity; they are anomalies in the law. The nearest approach to reconciling them with legal principles is to classify them as sales of annuities by the insured—as contracts whereby, in consideration of the insurer agreeing to pay a certain larger sum to the assured, the latter pays the insurer an annuity. Vance on Insurance, 56, § 564. Nevertheless, life insurance and accident insurance are well-settled businesses, and such contracts are well recognized. A contract of insurance is a serious matter, and not a mere contest of skill in using words. "Insurance is business and not elaborate and expensive trifling." Bleckley, J., in *Mobile Fire Department Ins. Co. v. Coleman*, 58 Ga. 251. The law presumes that the insurer really intends to pay for the annuity which the insured pays. In contracts of life and accident insurance the amount to be paid is arbitrary and need not bear any relation whatever to the amount of pecuniary loss actually sustained. A man whose life is worth nothing may insure it for a million dollars, and the insurance may be collected regardless of the amount of pecuniary loss resulting from the accident insured against. These considerations, we think, dispose of the idea that the holder of a contract of accident insurance would be entitled to nothing because perhaps the assured was about to die anyway, and places the case where not only the presumable intention of the parties to the contract, but the law itself, in giving effect to such an intention, would place it.

In the opinion in the *Thornton Case*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, Justice Cobb cites a number of authorities sustaining the proposition that, in giving effect to contracts such as the one now before us (in which liability is assumed only in those cases in which loss results solely and exclusively from external, violent and accidental means), the prime proximate cause of the injury must be sought. A number of additional authorities which have been brought to our attention by the industry of the learned counsel for the plaintiff in error may also be cited. In *Fidelity Insurance Co. v. Meyer*, supra, the policy insured against injuries sustained through accidental means resulting directly, independently, and exclusively of all other causes, in death, and this language must be said at least to be

as strong as the words "solely and exclusively," used in the policy before us. It appeared that Meyer received a bruise as the result of a jolt while riding in a wagon, and that after some time he died. After his death it was discovered that he was affected with a dormant cancerous growth or formation within his body, which was affected by the bruise and excited it to rapid growth, causing an erosion of the blood vessels, with consequent hemorrhages, from which death resulted. The trial judge charged the jury that if they found that Meyer would not have died as and when he died if the accident had not occurred, and that, while death from the cancer might have resulted, it would have been deferred until a later period of his life, they should find for the plaintiff. As to this the Supreme Court of Arkansas said:

"It is contended that that instruction is wrong, and that it involves an erroneous construction of the terms of the policy, in that it permits a recovery even though the previously existing disease has co-operated in producing death. The determination of this question involves the construction of that part of the policy which limits liability to 'bodily injuries sustained through accidental means resulting directly, independently and exclusively of all other causes in death.' The effect of this instruction was to make the company liable, under the contract, if death resulted when it did on account of the aggravation of the disease from the accidental injury, even though death from the disease might have resulted at a later period, regardless of the injury. We are of the opinion that that is the correct interpretation of the contract, for if the injury, by aggravating the disease, accelerated the death of the assured, then it resulted 'directly, independently, and exclusively of all other causes.' In other words, if death would not have occurred when it did but for the injury resulting from the accident, it was the direct, independent, and exclusive cause of death at that time, even though the death was hastened by the diseased condition."

In *Fetter v. Fidelity Ins. Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560, the insured was an old man, 69 years of age. In attempting to close a window with a pole, it slipped, and he was thrown against the edge of a table. He immediately dropped the stick, turned pale, and groaned. In a few minutes he went home, looking tired and pale when he arrived. He ate his supper and went to bed. Next morning he went to see his physician and returned home. He suffered pain in his kidney and passed blood in his urine. He grew gradually worse and died 26 days after the injury. The autopsy revealed that a kidney was cancerous and ruptured between the cancerous and normal part. The court charged the jury that:

If the death "was directly caused by the accidental rupture of his right kidney, then their verdict should be for plaintiffs on both counts of their petition. * * * [in amounts stated]; notwithstanding that the jury further believes from the evidence that said kidney was at the time of the rupture diseased, provided that the jury further finds that said Fetter would not have died at the time and under the circumstances and in the manner he did die, if it had not been for the accidental rupture of his kidney."

The Supreme Court sustained the judgment as against an exception to this charge, saying:

"But the contention of the defendant is that the accident would not have resulted in the rupture if the cancer had not been there. * * * If we should give to those qualifying words of the policy the meaning that is now claimed by the defendant they were intended to have, there would scarcely be any limit to their nullifying influence. * * * If therefore there could be discovered in a man's body, after his death, any condition, before undiscovered and unsuspected, that, under scientific tests would render him more amenable to accidents or less capable of resisting their influence, the policy would not cover the case. * * * The causes referred to in the policy are the proximate or direct, not the remote causes."

In *Driskell v. U. S. Health & Accident Ins. Co.*, 117 Mo. App. 362, 93 S. W. 880, where the company agreed to pay only if death should result "solely from such injury," the court said:

"We think the only reasonable interpretation to be placed upon this clause is to say that the injury must stand out as the predominant factor in the production of the result, and not that it must have been so virulent in character as necessarily and inevitably to have produced that result regardless of all other conditions and circumstances. People differ, so widely in health, vitality, and ability to resist disease and injury, that what may mean death to one man would be comparatively harmless to another; and therefore the fact that a given injury may not be generally lethal does not prevent it from becoming so under certain conditions; and if, under the peculiar temperament or condition of health of an individual upon whom it is inflicted, such injury appears as the active, efficient cause that sets in motion agencies that result in death, without the intervention of any other independent force, then it should be regarded as the sole and proximate cause of death. The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause. In such case, disease or low vitality do not arise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury."

See, also, *Belle v. Travelers' Protective Ass'n*, 155 Mo. App. 629, 135 S. W. 497; *Modern Woodman Accident Ass'n v. Shryock*, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826; *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824; *Bohaker v. Travelers' Ins. Co.*, 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543.

[2] 2. The opinion evidence introduced in this case was not conclusive or controlling. As has several times been held by this court, the opinion of witnesses, expert and nonexpert, is submitted to juries under a different rule from that concerning testimony of witnesses who purport to swear to actual facts. It is the duty of the jury to accept as true testimony of the latter kind, unless the witness is impeached or otherwise discredited; but the opinions of witnesses, expert or nonexpert, are submitted to the jury for merely

whatever the jury may think they are worth. The jury, upon review of the facts in the case, or even by reference to their own experience, may discard entirely the opinion of the most learned expert; and certainly an expert witness cannot by categorical testimony decide the entire issue in a cause, unless the jury approves his statement.

"An expert may aid the jury, but he cannot perform the functions of a juror and, under the guise of giving testimony, state a legal conclusion. An expert may give his opinion as to medical facts, but he cannot determine the legal classification of such facts and testify as to what was or was not 'a contributing cause' of an injury." *Travelers', etc., Co. v. Thornton*, 119 Ga. 455, 46 S. E. 678.

Even if the physician could testify categorically in the present case that the fall was not the sole and exclusive cause of the death of the deceased, that evidence, under the rule as to the probative value of opinion evidence, would not have demanded a verdict in favor of the defendant or authorized the award of a nonsuit.

[3] 3. Upon the testimony in the present record, a jury must decide what was the real efficient proximate cause of Judge Hall's death.

"When two or more causes contribute to an injury, where there is doubt, or the facts are of a character that equally prudent persons would draw different conclusions therefrom, in such cases, which of the contributing causes is the efficient, dominant, proximate cause, is a question to be submitted to the jury." *Continental, etc., Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824.

"The genius of our law does not claim for it infallibility. It recognizes that there is an element of uncertainty that enters into every forensic contest, which human wisdom cannot always make certain, and its aim is to come as close to the right as the means at hand will permit. Under our system of jurisprudence the jury is the tribunal to which questions of this kind are submitted for determination, and with all their human liability to err we have never yet discovered any better tribunal for the trial of questions of fact, even where highly scientific propositions are involved. Science itself appeals to common sense for its recognition." *Fetter v. Fidelity, etc., Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560.

And so, while we hesitate to differ with our very able brother of the trial bench who presided in the present case, we are clearly of the opinion that the evidence in this record should have been submitted to a jury.

Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 446)

ANDERSON v. CAVANAUGH & BEARDEN.
(No. 5931.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. CONTRACTS — 10—MUTUALITY.

A contract reciting that it was "for the delivery of actual cotton," and was "not to be settled by the price of futures," whereby one

person agreed, for and in consideration of the sum of \$1 in hand paid, to sell to another, for delivery at a place named, at any time at the option of the seller between October 1st and November 30th of that year, 25 bales of cotton, to average 500 pounds per bale, of a specified grade, at the price of 10½ cents per pound for that grade, with deductions and additions for other grades, according to the differences in effect on the day of delivery, classification and weight to be settled at the agreed place of delivery, which is signed by the seller, and upon which the buyers entered the following signed acceptance: "We accept the above contract subject to the conditions and obligations as therein stated"—was mutually binding, unconditional, explicit, and complete as to its terms. *Gates v. Freeman & Reeves*, 11 Ga. App. 345, 75 S. E. 265. See, also, *Hamby v. Truitt*, 14 Ga. App. 515 (1), 81 S. E. 593; *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596; *Phillips v. Riser*, 8 Ga. App. 634, 70 S. E. 79; *Lundy v. Livingston*, 11 Ga. App. 804-805 (3), 76 S. E. 594. The demurrer, on the ground that the contract was unilateral, was therefore properly overruled.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. ¶ 10.]

2. APPEAL AND ERROR ¶553—PRESENTATION FOR REVIEW—PROFFERED AMENDMENT—BILL OF EXCEPTIONS.

The proffered amendment, which was rejected by the court, is not set forth either literally or in substance in the bill of exceptions, or attached thereto as an exhibit, and therefore forms no part of the record in the case, and this court cannot consider what purports to be a copy of it which is embraced in the transcript of the record sent up by the clerk of the court below. "Where exception is sought to be taken to the refusal of the court to allow such an amendment, it should be set forth, literally or in substance, in the bill of exceptions, or attached thereto as an exhibit. An amendment which is offered, but which the court declines to allow filed, does not become a part of the record in the case, and this court cannot consider what purports to be a copy of it appearing in the transcript of the record." *Taylor v. McLaughlin*, 120 Ga. 703-706, 48 S. E. 203. "The rule is well settled that where a party offers an amendment to his pleading, and the judge declines to allow it, the proffered amendment cannot be specified as record." *Schaeffer v. Central of Georgia Railway Co.*, 6 Ga. App. 282, 283, 64 S. E. 1107, and cases there cited. Aliter, if the amendment had been allowed and filed, and was thereafter stricken by the court. *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. ¶ 553.]

3. SALES ¶406 — BREACH OF CONTRACT — RIGHT OF ACTION—CONDITIONS PRECEDENT — DEMAND.

The contract for the breach of which the plaintiff sought damages was mutually binding, and according to its terms no demand for the delivery of the property described in the contract was necessary as a condition precedent to the bringing of the action. *Lundy v. Livingston*, supra, and cases there cited.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1156-1158; Dec. Dig. ¶ 406.]

4. EVIDENCE ¶418 — PAROL — CONTRACT OF SALE.

The contract sued upon was by its terms between the plaintiffs and the defendant alone, and there was no error in excluding parol testimony tending to vary its terms by showing that the instrument in fact covered, concerned, or related to an agreement between the plain-

tiffs and a person other than the defendant in whose behalf or as surety for whom the defendant in fact acted in subscribing her name thereto.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1722, 1906-1911; Dec. Dig. ¶ 418.]

5. EVIDENCE ¶437 — PAROL — CONTRACT OF SALE.

There was no error in excluding testimony that the seller understood that, when she signed the contract sued upon, either party thereto could discharge the same at any time during the life of the contract by paying the difference between the price of futures and the contract price of cotton as stated in the contract. The contract was in writing, was plain and unambiguous, and parol testimony was inadmissible to ingraft thereon an agreement tending to destroy its legality and to establish that it was purely speculative in its nature, or, in other words, to vary its plain meaning.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2025-2029; Dec. Dig. ¶ 437.]

6. EVIDENCE ¶139—BREACH OF CONTRACT—EVIDENCE OF OTHER TRANSACTIONS.

The court did not err in excluding testimony that another person "had a contract for the delivery of cotton" with the plaintiffs which was settled by payment to them of the difference between the price of cotton at the date of settlement and the price named in the contract. The conduct of the plaintiffs in adjusting other cotton contracts (even had it appeared from the evidence offered and excluded that the contract was of like character) could not affect the liability of the seller under the contract sued upon, nor could evidence showing that the plaintiffs were engaged generally in cotton speculation with others render invalid the contract with the defendant.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 415; Dec. Dig. ¶ 139.]

7. GAMING ¶11—TRIAL ¶29—GAMBLING CONTRACT—CONDUCT OF COURT—INTIMATION OF OPINION.

No intimation of opinion on the part of the court as to the nature of the contract was conveyed by the question twice propounded by him to a witness for the defendant, whether it was understood by the plaintiff in the case that settlement would be had by the payment of the difference in price between future cotton and the price of cotton at the time of the settlement, or whether it was so understood by the witness himself—the husband and agent of the defendant. It was important to know whether both parties to the contract intended to speculate, and the question was entirely germane and proper. "An executory agreement for the sale of goods to be delivered at a future date is valid; and such a transaction will not be declared invalid on the ground of being a gambling contract, unless it is made to appear that neither of the parties contemplated an actual delivery, and it was the intention of both that there should be no actual delivery, but on the day fixed for delivery there should be a settlement of differences based on the market value of the goods on that day." *Robson & Evans v. Weil*, 142 Ga. 429, 431 (2), 83 S. E. 207, and cases there cited.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 19-21, 23, 26; Dec. Dig. ¶ 11; *Trial*, Cent. Dig. §§ 80-83, 508; Dec. Dig. ¶ 29.]

8. NEW TRIAL ¶163—GROUND OF MOTION—ASSIGNMENTS OF ERROR.

The assignments of error in the fourth and eleventh grounds of the motion for a new trial, based on the alleged recharge of the jury by the court during the temporary absence of de-

fendant's counsel on leave, are identical, not only in effect, but even in the language employed, and since the court expressly declined to approve the eleventh ground of the amendment to the motion for a new trial, it must be concluded that the fourth ground raising the identical question is also not approved, and therefore we cannot consider this assignment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330-332; Dec. Dig. § 163.]

9. CONTRACTS § 140—VALIDITY—FIRM DOING ILLEGAL BUSINESS.

The court did not err in refusing a request to charge "that if the firm of Cavanaugh & Bearden was formed for the purpose of speculating in cotton through the method of contract for future delivery, and purchasing same solely for speculating in cotton, then the partnership would be an illegal partnership, and any contract made by them pursuant to said illegal agreement would be void." Had the firm been organized to carry on an illegal business (which the evidence does not disclose), the contract sued upon may have nevertheless itself been a legal and binding contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 713-721; Dec. Dig. § 140.]

10. TRIAL § 252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Neither did the court err in refusing the various requests to charge the law touching surety contracts made by a married woman in behalf of her husband. The contract involved was in writing, was signed solely by the seller, Mrs. Anderson, and her husband was not bound thereby, nor could he have been so bound, and the entire evidence (including her own) tended to show that she signed the instrument as principal, though at her husband's request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.]

11. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict returned, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by Cavanaugh & Bearden against O. V. Anderson. Judgment for plaintiff, and defendant brings error. Affirmed.

M. C. Few, of Madison, for plaintiff in error. S. H. Sibley, of Union Point, and Willford & Lambert, of Madison, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 417)

MCBREARTY v. MAYOR AND COUNCIL OF CITY OF MACON. (No. 6532.)

(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

INTOXICATING LIQUORS § 236—KEEPING FOR SALE—VIOLATION OF ORDINANCE—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize a conviction under the municipal ordinance making it unlawful to keep for sale intoxicating liquor in the city.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.]

Russell, C. J., dissenting.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

John McBrearty was convicted of keeping intoxicating liquor for sale in violation of an ordinance of the City of Macon, and, certiorari being overruled, he brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error. Walter De Fore, of Macon, for defendant in error.

WADE, J. The various assignments of error set out in the certiorari, other than the complaint that the verdict is contrary to the evidence and without evidence to support it, need not be discussed, since the questions raised thereby have been so often adjudicated by our Supreme Court and by this court that any discussion thereof would serve no useful purpose.

The accused was convicted on the charge of having violated an ordinance of the city of Macon, making it unlawful to keep for sale intoxicating liquors within the corporate limits. The entire evidence adduced at the trial, as appears from the petition for certiorari and the answer of the recorder, and including also the statement of the defendant, was as follows:

Dave Riley, a police officer, testified:

"I made a raid yesterday afternoon about 5 o'clock at the place on Monroe street called the 'John McBrearty Place,' and I found eight pints of whisky in the harness house in the place, and I arrested two or three negroes there and put them in jail. I arrested this young negro, Charlie Mathews, and put him in jail. I found these two bottles of whisky, one pint and one half pint, full on these negroes' persons. I raided the grocery store, and I found no whisky there, except these two bottles found on the negroes that I arrested and put in jail. Charlie Mathews, one of the negroes, was not there when the raid was made."

Luther Scott (colored) testified:

"On yesterday, I bought this bottle of whisky from Charlie Mathews in this place; they called it Mr. McBrearty's place. I paid 30 cents for it. This little boy that I bought the whisky from is not there all the time. There is another negro there, that stayed there, that I bought whisky from. He ran away yesterday afternoon. I was locked up last night to be a witness in this case. I did not turn state's evidence to get out. But I am in prison now; I have been, but I suppose I will gain my liberty."

Ben Stafford (colored) testified:

"I was in the place on Monroe street yesterday afternoon and bought a bottle of whisky from this boy, Charlie Mathews; he was staying there. There was another negro in there when I bought the whisky, who was grown, and he ran away. This is the only whisky that I ever bought from this boy. I was locked up last night to be a witness in this case. I did not turn state's evidence to get out. But I am in prison now; I have been, but I suppose I will gain my liberty."

Charlie Mathews, a codefendant, made the following statement:

"I did not sell any whisky to these negro men who have sworn here against me. I have never sold any whisky there to anybody. I stay there

and clerk in the grocery store, but I have never sold any whisky. I was not there at the time the raid was made by the officers of the city."

John McBrearty, the defendant then on trial, made the following statement to the jury:

"I am not guilty of the accusation. I did not sell any whisky. I know nothing about the boy, Charlie Mathews, selling any whisky at my grocery store. The officers made a raid out there yesterday afternoon about 5 o'clock, but I have no knowledge of the sale of any whisky at that place. I did not sell it or authorize it to be sold. The negroes that were locked up walked into the front door of the store, and went to the back door, and took the whisky out of their pockets and started drinking it. These two negroes, Luther Scott and Ben Stafford, that I refer to, are the witnesses who swore against the negro Charlie Mathews."

The recorder answered that the petition "sets forth fairly what occurred at said trial, except the witness Luther Scott testified that the boy that he got the whisky from in this place worked for the defendant, and that he had bought whisky there before."

It is insisted by counsel for the plaintiff in error that this evidence raises merely a suspicion of guilt against the accused, and does not authorize the inference of his guilt, drawn by the recorder. The evidence is somewhat weak and unsatisfactory, and is circumstantial so far as it tends to disclose the purpose of the accused in having the liquor at his place of business; but there were circumstances in proof from which the recorder might properly have inferred that he kept the liquor at his place of business for the purpose of sale, and that this hypothesis was supported by the proved circumstances to the exclusion of all other reasonable hypotheses.

It is insisted, first, by the plaintiff in error, that there was no proof that any intoxicating liquor was actually stored by him. From the evidence of Riley, it will be observed that eight pints of whisky were found "in the harness house in the place" known as the John McBrearty place. No whisky was found in the grocery store conducted by McBrearty; but, from the testimony of this witness, the "harness house" was evidently a component part or a room of the place conducted by McBrearty, and therefore the court was authorized in finding that the whisky was in his place. McBrearty himself, in his statement, did not deny that the "harness house" referred to was in fact under his control and constituted a part of his store or place of business, nor did he deny that the whisky found by the officer was his property and in his possession, though he said he had no knowledge of the sale of any whisky at that place, and neither sold whisky nor authorized it to be sold. The defendant's only witness, Charlie Mathews (who, according to his own testimony, was a clerk in the grocery store), also failed to deny that the "harness house," where Riley testified he found eight pints of whisky, was under the control of the

defendant, or was a part of his grocery store, or that whisky was found there. So it may be rationally concluded that the recorder was authorized to find, from the testimony of Riley, wholly uncontradicted, that eight pints of whisky were found in the possession of the accused at his store or place of business within the corporate limits of the city of Macon.

As to the establishment of any connection between the sale of whisky made at the defendant's storehouse by his clerk or clerks and the defendant himself, and therefore as to the purpose for which he had the whisky, the evidence is not so direct; but there was enough shown to authorize the conclusion, reached by the recorder, that the sales made were made with the knowledge and consent of the defendant. Except by way of introduction to what follows, it is unnecessary to advert to the proposition that in misdemeanors all who participate are principals. It was said by Judge Bleckley, in *Kinnebrew v. State*, 80 Ga. 232 (2, 3), 5 S. E. 56, that:

"A general authority by an employer to his clerk to sell unlawfully will render him answerable criminally for any single sale made by the clerk in pursuance of such authority," and "whether a general authority from an employer to his clerk will suffice to render the former answerable criminally for an unlawful sale made by the latter is a question of law; and it is also a question of law whether the jury would be legally authorized to infer the existence of a general authority from a given state of facts, *the logical sufficiency of the facts to warrant the inference, and the existence of the facts themselves, being left to the jury for their determination.*" (Italics ours.)

It must be conceded that the determination of the facts as to the various sales of whisky was a question solely for the recorder, and the logical sufficiency of the facts in evidence to warrant the inference drawn therefrom was also for determination by the recorder. It only remains, then, for us to say whether the jury in this case would be legally authorized to infer the existence of a general authority from the master to the servant to sell, from the facts as found by the recorder. Whisky put up in eight pint bottles was found in the defendant's store. The very fact that the whisky was found in containers of this size was in itself a suspicious circumstance, indicating that it was thus bottled probably for convenience in making quick sales thereof. Scott testified that the bottle of whisky found on his person when he was arrested by the officer at the defendant's place of business was bought by him from Charlie Mathews, who was indisputably shown to be a clerk working for the defendant in the defendant's grocery store. Scott testified, also, that he bought whisky from another negro at McBrearty's place, who "stayed there," but who ran away on the afternoon when the place was raided and the witness was arrested. According to the answer of the recorder, Scott testified distinctly that:

"The boy that he got the whisky from in this place worked for the defendant, and that he had bought whisky there before."

So from Scott's testimony it is apparent that at the place of business owned and controlled by McBrearty *somebody*, more or less habitually kept whisky, which was sold to purchasers, not only by *one* clerk working for McBrearty, but by *two* different individuals employed by and working generally for him. It will be recalled here that proof of a sale by the defendant, or by some one acting for him or by his authority, is important only as demonstrating the *purpose* for which the whisky was kept at the defendant's place of business; so that the evidence of Scott that he had bought whisky at McBrearty's place of business "before" tended to indicate or illustrate the purpose for which McBrearty had in his possession at the time of the raid the eight pints of whisky found in that part of his store called the "harness house." Stafford also testified that he bought a bottle of whisky from Mathews, the clerk of the accused, on the same afternoon; so that the proof shows two sales of whisky at McBrearty's place by one of his clerks during the afternoon of the raid, and also shows that one of these witnesses had bought whisky at the same place before that time (how often he does not say) from still another clerk who worked for the accused. Of course it is *possible* that these whisky sales may have been conducted by the two clerks in McBrearty's place of business and literally under his nose, without his knowledge or consent, and that they, and not he, may have stored in that part of the store called the "harness house" the eight pints of whisky found by the officer; but it is hardly conceivable that this was the truth of the case, and certainly, while the evidence did not *demand* a judgment of guilty, the recorder had the right to infer, from the facts in evidence, that McBrearty had given a general authority to his clerk to sell liquor at his place of business, and therefore that the whisky found stored at that place was in the possession of McBrearty himself, and was there kept for the purpose of sale.

"A clerk who in a municipality sells intoxicating liquor kept by his employer in his place of business may be convicted of violating the municipal ordinance forbidding the keeping of liquor on hand for the purposes of illegal sale." *Toney v. Atlanta*, 6 Ga. App. 356 (2), 84 S. E. 1106.

So, also, an employer may be convicted of violating such an ordinance where the testimony shows a sale of intoxicating liquor kept at his place of business, if the facts and circumstances proved warrant the inference that the sales were made under a general authority from him, or by his consent and approval and for his benefit. It was said in *Rooney v. Augusta*, 117 Ga. 709 (3), 45 S. E. 72, that:

"A sale of liquor by a person in charge of the regular place of business of a liquor dealer, at a time when a sale could not be lawfully

made, will authorize a conviction of the liquor dealer for a violation of an ordinance of the character above indicated [an ordinance prohibiting the having or keeping of intoxicating liquors within the corporate limits for the purpose of illegal sale], when on the trial the accused does not make it appear to the satisfaction of the court that the person in charge of the place of business was not authorized to make the sale."

When the testimony showed that the sale was made in the place of business of the accused, and was made by his clerk, who, under his own statement, had general authority to sell goods in his grocery store, a strong inference was created that the clerk had authority to sell the whisky which the proof showed he did actually sell, notwithstanding the presumption of innocence existing in behalf of the accused, and we cannot say that the recorder was not justified in disregarding the attempt on the part of the accused, by his statement alone, to show that his clerk "was not authorized to make the sale" or sales, especially when the improbability of their being made by the clerk without the knowledge of the proprietor is considered. As was said by Russell, C. J., in *Bragg v. State*, 15 Ga. App. 631, 84 S. E. 82:

"The circumstances were certainly sufficient to raise such a presumption that the actual seller was an agent of the defendant as to shift the burden and call for explanation at his hands and proof of the fact that the party making the sale was not his agent."

No stronger presumption of innocence exists in behalf of one accused of the violation of a liquor law than in favor of those accused of other offenses.

This court, in *Groves v. State*, 8 Ga. App. 690, 70 S. E. 93, speaking through Russell, J., who delivered the opinion for the court, said:

"Though there was no direct evidence that the defendant directed or authorized the sales of the intoxicants, which were proved to have been made by his employes, the circumstantial evidence to that effect is sufficient to exclude any other reasonable supposition. All of the circumstances illustrating the conduct of the defendant's business and his familiarity with its details, as well as his frequent presence and close personal superintendence and supervision of his places of business, where intoxicating liquors were sold, authorized the jury to infer that the unlawful sales were made with his consent; and this in spite of the fact that he had forbidden his salesmen to violate the law. If the jury had found (as the circumstances of this case would have warranted them to find) that the defendant was obliged to know that his employes were disobeying his oral instructions, and yet retained them in his employ, the jury were authorized to infer that his instructions to his employes were not given bona fide, or with the intention that they should be obeyed, but were given merely for the purpose of preparing a defense if he should be detected in a violation of the law."

It was held in that case that because the facts and circumstances illustrating the conduct of the defendant's business and his familiarity with its details, as well as his frequent presence and close personal superintendence and supervision of his places of business where intoxicating liquors were sold (apparently he had more than one place

of business, and therefore could not at all times personally conduct or superintend *any one* place), authorized the jury to infer that the unlawful sales were made with his consent, and this notwithstanding the fact that he had actually *forbidden* his salesmen to violate the law in the sale of liquor. In the case under consideration, while it does not appear from the evidence how close was the supervision, McBrearty exercised over the conduct of his grocery business, it may be reasonably inferred that he was there a large part of the time, if not all the time, since the record does not disclose that he had any other place of business, and the negro clerk, Charlie Mathews, who worked for him in the grocery store, was a mere boy, to whose care it can hardly be assumed he would have left the management and conduct of his grocery store; and it does not appear that he went through the idle form of forbidding his clerk, Mathews, to sell liquor at his place of business, which he himself was actually in charge of, and where, therefore, any sales made would almost of necessity be made with his knowledge and consent. The case as made out against McBrearty, so far as disclosed by the facts recited in the opinion of this court in the Groves Case, is certainly as satisfactory as that against Groves, which this court sustained, holding that since the defendant retained in his employ the clerks who were disobeying his instructions not to sell whisky, the jury were authorized to infer that the instructions were not given with the intention that they should be obeyed, but were given merely for the purpose of preparing a defense in case the defendant was detected in a violation of the law. The evidence in the present case discloses that the negro boy Charlie Mathews had been for some indefinite time in the defendant's employment; and since the sales of whisky made by this boy were necessarily almost under the eye of the defendant, the recorder was justified in concluding that the defendant had knowledge thereof, and since the defendant did not discharge Mathews, but retained him in the same employment even after the raid and the consequent exposure of his actions, and up to the day of the trial, and it nowhere appeared that the defendant had forbidden him to sell intoxicants, the recorder was warranted in further concluding that the sales were made by the clerk, not only with the knowledge and consent of his employer, but for his benefit and by his express direction even.

Finally, it has been often said by this court that where one is convicted of the violation of a municipal ordinance, and the judgment is attacked on the ground that it is not supported by evidence, and the judge of the superior court has approved the finding of the municipal court, so far as such an attack on the evidence is concerned, this court will not

reverse that ruling, where there is even *slight* evidence to warrant the conclusion reached. As we have already indicated, we think the evidence in this case was weak, and yet we cannot say that it is insufficient to sustain the judgment of guilty, even though circumstantial evidence alone was relied upon to establish the purpose for which the accused kept the intoxicating liquors at his store. To our minds, as to the mind of the recorder who tried the case, and to the mind of the learned and careful judge of the superior court who reviewed the trial on certiorari, no other reasonable hypothesis is supported by the evidence as a whole than that whisky found in McBrearty's possession was kept by him for the purpose of illegal sale, that such sales were made on the day the whisky was seized, as well as before that day, by his clerks acting under and by virtue of at least a general authority from him, and the purpose of the keeping was therefore established.

Judgment affirmed.

RUSSELL, C. J., dissents.

(16 Ga. App. 426)

RHODES et al. v. ELBERTON & E. RY. CO.
(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ~~§~~255, 853 — ~~BILLS AND NOTES~~ ~~§~~516 — ~~COURTS~~ ~~§~~485 — ~~WAIVER OF OBJECTIONS~~ — ~~EXCEPTIONS~~ — ~~NECESSITY~~.

As no exception was taken to the ruling of the trial court, which allowed the defendants, over objection to amend their plea, by setting up that the note sued upon, given to cover a subscription for stock in a proposed railway corporation, was an illegal and unenforceable contract because the plaintiff had failed to register its business as provided by section 978 of the Civil Code (Acts 1909, p. 60, § 5), this ruling became the law of the case. The final judgment of the court (sitting as both court and jury) simply holds, in effect, that this plea was not sustained, in that the evidence adduced in support thereof disclosed that at the time the contract was entered into, the railway company, which was the payee of the note, had not constructed the railway afterwards operated by it, and was neither then following its vocation as a common carrier, nor even prepared to open up and carry on its business. Without a railway track the corporation could not "engage" in the business authorized by its charter, and the undisputed evidence discloses that there was no railway in existence at the time the note was given.

(a) Under the ruling in *Toole v. Wiregrass Development Co.*, 142 Ga. 57, 82 S. E. 514, setting aside in principle the holdings of this court in *Fulwood v. Leitch*, 7 Ga. App. 359, 68 S. E. 987; *Horsley v. Woodley*, 12 Ga. App. 456, 78 S. E. 260; *Rountree & Leak v. Lewis*, 13 Ga. App. 47, 78 S. E. 780; *Ford v. Thomason*, 11 Ga. App. 359, 75 S. E. 269, etc., the amendment to the plea set up no good and valid defense to the contract sued upon; but, in view of the failure by the plaintiff to except to the allowance of the amendment, that question is not passed upon here, and we simply hold that the trial judge was right in finding that the facts did not sustain the allegations of the amended plea.

(b) The decision of the Supreme Court in *Toole v. Wiregrass Development Company*, supra (rendered July 14, 1914), apparently covers so fully the questions involved therein that we assume that the conclusion reached by that court, in direct conflict with previous rulings of this court upon the same question, was reached only after mature deliberation, and perhaps after consideration of the rulings of this court. This court, therefore, will not assume that the Supreme Court would review its decision, so recently rendered, and declines to submit to that court the request to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1490, 1524, 3405; Dec. Dig. §§ 255, 853; Bills and Notes, Cent. Dig. §§ 1800-1806; Dec. Dig. § 516; Courts, Cent. Dig. §§ 1292-1298; Dec. Dig. § 485.]

2. OBJECTION TO EVIDENCE — EFFECT OF ADMITTING EVIDENCE.

The precise objection urged to certain evidence admitted by the court, or the reason why the evidence was "irrelevant, immaterial, and inadmissible" and failed to illustrate the question involved in the defendant's plea, is not pointed out by the exception thereto. Aside from this, however, the evidence complained of, if in fact inadmissible for any reason stated, could not apparently have adversely affected the rights of the defendant, under the plea or pleas interposed by him.

3. APPEAL AND ERROR § 1078—ASSIGNMENTS OF ERROR—ABANDONMENT—BRIEF.

Grounds abandoned in the brief of counsel for the plaintiff in error will not be considered. The evidence authorized the judgment rendered, and the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.]

Error from City Court of Elberton; Wm. Wynne, Judge.

Action by the Elberton & Eastern Railway Company against W. L. Rhodes and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Jas. T. Sisk, of Elberton, for plaintiffs in error. Z. B. Rogers and Geo. O. Grogan, both of Elberton, W. A. Slaton, J. M. Pitner, and I. T. Irvin, Jr., all of Washington, Ga., and W. M. Howard, of Augusta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 449)

SMITH v. SOUTHERN SPRING BED CO.
(No. 5953.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. EVIDENCE § 157—ORAL TESTIMONY—CORRECTNESS OF ACCOUNT—BOOKS OF ACCOUNT.

The first and second grounds of the amendment to the motion for a new trial assign error upon the admission of oral testimony by a witness for the plaintiff as to the correctness of the account sued on. The testimony objected to was as follows: "From my personal knowledge J. Frank Smith, the defendant, is indebted to the Southern Spring Bed Company in the sum of \$60.92, and that invoice represents the account." The admission of this testimony was not erroneous on the grounds assigned, to wit, "that it appeared from the witness' own admissions that all he knew about the correctness and

justice of the account sued was derived from freight bills, books of account of plaintiff, receipts, and other written documents, and that the entire transaction was in writing, and that the books of account and writings were the best and highest evidence of the correctness and justice of said account." The witness, E. H. Boyleston, whose testimony was objected to, testified as follows: "I am cashier for the Southern Spring Bed Company, Atlanta, Ga., and head of the credit department. From my own personal knowledge J. Frank Smith is indebted to the Southern Spring Bed Company in the sum of \$60.92; that invoice represents the account." And on cross-examination he further testified: "I get that knowledge of the amount due on this account because I billed the goods myself. I run the factory and manufactured them—see about the shipments, and the credit department. I know from the receipts I have from the railroad. They are in writing. I know it from seeing these things in the railroad every day; know that they are there from my own personal knowledge, because I check them out and check them in. I know it by my custom and by bookkeeping at the office. Without these things I wouldn't know it at all. These transactions are all in writing, and these receipts are in writing. This account is on my book; the book shows all about it. What I am testifying about, speaking of, is what I have read in the book and receipts and the railroad receipts."

Civ. Code 1910, § 5769, does not say that books of account *must* be put in evidence as proof of such accounts, but merely provides that they *may* be admitted; and, as was said by this court in *Swift v. Oglesby*, 8 Ga. App. 544, 70 S. E. 97: "There is no merit in the contention that the books themselves were not produced or their absence sufficiently accounted for. In the first place, if the testimony stated above had been secondary in its nature, and it had been necessary for the plaintiffs to show the inaccessibility of the books, we would not, under the showing actually made, overrule the exercise of discretion on the part of the trial judge in the admission of the secondary evidence. However, the rule is that the testimony of the parties who have knowledge of the facts from which the books are made up is in itself primary evidence, and the books are admissible only by way of corroboration, except in those cases where, for special reasons, books of account are by statute admitted as direct and primary evidence. While it is true that the witnesses, in referring to the 'bill' and to the 'account,' did not in so many words say (so far as the brief of the evidence discloses) that they were talking about the same account as that sued on, still it is hardly reasonable to suppose that they were talking about any other account."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. § 157.]

2. APPEAL AND ERROR § 1061—REVERSAL OF NONSUIT—EXCEPTION.

Error is assigned on the refusal of the court to grant a nonsuit. An exception upon this ground will not be considered by a reviewing court, where, subsequently thereto, a verdict is rendered against the defendant, and in the motion for a new trial complaint is made that the verdict is contrary to the evidence and is without evidence to support it. *Atlantic Coast Line R. Co. v. Blalock*, 8 Ga. App. 44 (2), 63 S. E. 743.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The pleadings and the evidence raised issues of fact, which were determined by the jury in

favor of the plaintiff. The evidence authorized the verdict, no error of law appears, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by the Southern Spring Bed Company against J. F. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

J. R. Hutcheson, of Douglasville, for plaintiff in error. S. C. Boykin, of Carrollton, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 457)

INTERNATIONAL HARVESTER CO. OF AMERICA v. BOWEN. (No. 5844.)

(Court of Appeals of Georgia. June 12, 1915.)

(Syllabus by the Court.)

1. SALES \S 363—NOTICE OF DEFECTS—WAIVER—QUESTION FOR JURY.

While, under the decision in *McDaniel v. Mallary Bros. Mach. Co.*, 6 Ga. App. 848, 66 S. E. 146, the jury might have been authorized to find that the written notice of defects, as required by the contract, was waived, it was error for the court to charge the jury that the plaintiff, as a matter of law, as a result of the action of the company's agents in regard to the transaction, had waived its right to any written notice of defects from the defendant. This was a question for the jury.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 1064; Dec. Dig. \S 363.]

2. SALES \S 347—ACTION FOR PRICE—DEFENSE—FAILURE OF CONSIDERATION.

If notice of defects had been given as required, or by the acts of the parties it had been waived, the defendant would be let in to his defense of failure of consideration, if the plaintiff failed, after a reasonable time, to send a competent man to put the machine in order; and this would be true without reference to whether he returned the machine. However, if such a man was sent, and the machine was not then "made to work well," as stipulated in the contract, it was incumbent upon the purchaser to show this, and to immediately return the machine to the sender, before he could plead failure of consideration. The fact that the defendant, according to his own testimony, did not return the machine at all, or even offer to return it for more than six months after it was delivered to him, was such a failure to comply with the conditions of his contract to "immediately return it" as to cut him off from the defense of failure of consideration, and the verdict in his favor was unauthorized. The present case is very similar to that of *International Harvester Co. of America v. Dillon*, 126 Ga. 672, 55 S. E. 1034, both in the contract dealt with and the plea, and the ruling on the main question raised is controlled by the decision therein. See, also, *McCormick Harvesting Mach. Co. v. Allison*, 116 Ga. 445, 42 S. E. 778.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 962-972; Dec. Dig. \S 347.]

Error from City Court of Tifton County; R. Eve, Judge.

Action by International Harvester Company of America against B. M. Bowen. Judgment for defendant, and plaintiff brings error. Reversed.

Fulwood & Skeen, of Tifton, for plaintiff in error. Ridgill & Mitchell, of Tifton, for defendant in error.

RUSSELL, C. J. Judgment reversed.

(16 Ga. App. 456)

HOOKE v. MAYOR, ETC., OF CITY OF WRIGHTSVILLE. (No. 6130.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 586, 598—CONTINUANCE—DISCRETION.

Although the evidence introduced in support of the motion for a continuance would have warranted the grant of a continuance, the mayor did not err in overruling the motion, for the reason that it appeared from the counter showing that the witness on account of whose absence the continuance was asked had not been subpoenaed. The mayor was the judge of the credibility of the witnesses, and the grant or refusal of the continuance was a matter within his discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1311, 1335-1341; Dec. Dig. \S 586, 598.]

2. IMMATERIAL ERROR.

Upon the trial in the municipal court, there was no error of sufficient materiality to vitiate the finding.

3. CRIMINAL LAW \S 1179—APPEAL—CONVICTION IN MUNICIPAL COURT—EVIDENCE.

The evidence in behalf of the prosecution is weak and unsatisfactory, but, being sufficient, if credible, to have authorized conviction, and the finding of the inferior judicatory being approved by the judge of the superior court upon certiorari, this court is without jurisdiction to set aside the judgment of the trial court upon the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 3001; Dec. Dig. \S 1179.]

Error from Superior Court, Johnson County; W. W. Larsen, Judge.

Buna Hooks was convicted in the municipal court of Wrightsville. The conviction was approved on certiorari, and defendant brings error. Affirmed.

B. B. Blount, of Wrightsville, for plaintiff in error. B. H. Moye, of Wrightsville, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 448)

HENDERSON v. SWIFT FERTILIZER WORKS. (No. 5949.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. JUDGMENT \S 145—MOTION TO SET ASIDE DEFAULT—DEFENSE—AGREEMENT TO EXTEND NOTE—CONSIDERATION.

Before a motion to set aside a judgment rendered by default can be considered, it must appear that there was a good and meritorious defense to the action, not merely by so alleging, but by setting forth fully the facts which constitute the proposed defense, except in cases where the judgment is absolutely void, when no defense need be shown. Civ. Code 1910, \S 5656; *Pryor v. American Trust & Banking Co.*, 15 Ga. App. 822, 84 S. E. 312 (2); *Moss v. An-*

derson, 10 Ga. App. 784-785, 74 S. E. 299; Ford v. Clark, 129 Ga. 292, 58 S. E. 818; 23 Cyc. 949-951.

(a) The sole defense alleged and set up in the motion to set aside was that: "On or about the ____ day of ____, 1913, petitioner called on the duly authorized agent of the Swift Fertilizer Works, the plaintiff in said case, in Atlanta, Ga., and on said date entered into a valid and binding agreement with the said plaintiff that the note sued upon in said case should be extended until October 1, 1913; that the suit upon which judgment was rendered, as aforesaid, was filed against petitioner on the ____ day of August, 1913, and therefore said suit was prematurely brought, and no valid judgment could be rendered therein." Under the familiar rule that pleadings must be construed most strongly against the pleader, it must be legally presumed that the note was past due on the date when it is alleged that the agreement to extend until October, 1913, was made. No legal consideration was set up to support the alleged agreement to postpone the enforcement of the past-due promissory note, and, had the defendant interposed such a defense in due time, it would have availed him nothing whatever. The allegation that the agreement was "valid and binding" states a mere conclusion. Crawford v. Gaudlen, 33 Ga. 173 (4 and 5); Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940; Davis v. Morgan, 117 Ga. 504-507, 43 S. E. 732, 61 L. E. A. 148, 97 Am. St. Rep. 171.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295; Dec. Dig. § 145.]

2. PROCESS § 155—SERVICE OF SUMMONS—DENIAL—TRAVERSE—PARTIES.

Where service is denied, the return of the officer making the entry of service must be traversed, and the officer himself made a party to the proceeding. This was not done in this case.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 210; Dec. Dig. § 155.]

3. COURTS § 189—CITY COURTS—BILLS AND NOTES—DEFAULT JUDGMENT—ATTORNEY'S FEES.

The suit was based upon an unconditional contract in writing which provided for the payment of attorneys' fees, but collection of such fees was conditional upon the performance of certain legal requirements. The judgment recites that written notice, as required by law, was served on the defendant, and proof was made of the notice and of service thereof. The act of 1913, establishing the city court of Irwin county (Acts 1913, p. 221), not only provides (section 17) that judgment may be entered at the appearance term without the intervention of a jury in all cases founded upon unconditional contracts in writing, and in all cases where suit is brought for a liquidated demand or on account, which is positively verified under oath by the plaintiff, etc., but it further provides in the same section that if a case "is otherwise ripe for trial and there is no issue of fact left among the pleadings, then in like manner the court shall give judgment at such appearance term without the intervention of a jury." This language is broad enough to authorize the rendition of a judgment for attorney's fees, where a case is in default, and where proof of a compliance on the part of the plaintiff with the legal requirements authorizing such a judgment is made to the court sitting as a jury. See Monk v. National Bank of Tifton, 12 Ga. App. 253, 76 S. E. 278; Turner v. Bank of Maysville, 13 Ga. App. 547-548, 79 S. E. 180.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.]

4. JUDGMENT § 143—DEFAULT—GENERAL LEAVE OF ABSENCE—APPLICATION.

Where, upon his application before the commencement of the term of court, a general leave

of absence is granted to a defendant, the leave cannot apply to a case pending against him in that court, which is in default, especially where the defendant alleges, in his motion to set aside a judgment rendered against him in such a case, that he had never been served and had never acknowledged service in the suit, and hence could not have even had in mind this particular suit when applying for the leave of absence. Besides, the presence of the defendant could have availed nothing, since he had no legal defense to interpose.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.]

5. MOTION TO SET ASIDE JUDGMENT.

The court did not err in sustaining the demurrer to the motion to set aside the judgment.

Error from City Court of Irwin County; Philip Newbern, Judge.

Action by the Swift Fertilizer Works against J. A. J. Henderson. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter M. Rogers and H. J. Quincey, both of Ocilla, for plaintiff in error. Tye, Peeples & Jordan, of Atlanta, and R. M. Bryson, of Ocilla, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 452)

SINGER SEWING MACH. CO. v. RICKERSON. (No. 5973.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. REVIEW OF FACTS.

The only question involved in this case is one of fact. The magistrate, upon the trial of the possessory warrant for 13 sewing machines (the property of the Singer Sewing Machine Company, alleged to be held by its agent Rickerson, and of which 6 only corresponded as to serial numbers with the descriptions in the warrant, the remaining 7 being of different numbers), found that the 13 Singer machines taken by the sheriff corresponded in all material respects with those for which the warrant had been sued out, and were in fact the identical machines; the only difference being in the numbers on the heads of 7 of them, the defendant having testified that these 7 machines, although of different numbers, were the same machines sued for, and that occasionally the numbers on the machines got changed. The justice awarded the 13 machines to the plaintiff, who accepted them and gave the bond required by section 5374 of the Civil Code of 1910.

2. APPEAL AND ERROR § 1094—REVIEW—CONFLICTING EVIDENCE.

The question of identity of the property was solved by the magistrate; and, as said in Butler v. Lazenby, 8 Ga. App. 88, 68 S. E. 521. "If the judge [of the superior court, on certiorari] sustains the judgment of the justice, on the conflicting facts, this court will not reverse his judgment; certainly not unless he has manifestly abused his discretion."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.]

Error from Superior Court, Newton County; C. S. Reid, Judge.

Action by H. E. Rickerson against the Sing-

er Sewing Machine Company. Judgment for plaintiff was sustained on certiorari, and defendant brings error. Affirmed.

Rogers & Knox, of Covington, for plaintiff in error. A. D. Meador, of Covington, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 385)

ROBERTS v. LE MASTER. (No. 5898.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. PLEADING \S 356—STRIKING OUT—AMENDMENT TO ANSWER.

Section 4290 of the Civil Code of 1910 specifically provides that the title of a holder of a note cannot be inquired into unless it is necessary for the protection of the defendant, or to let in the defenses which he seeks to make. "The holder of a negotiable note is presumed to be such bona fide and for value; and unless the defendant negatives one or both of these facts, he is shut off from any defense which he might have against the payee." First National Bank v. Messer, 136 Ga. 228 (2), 71 S. E. 148; Johnson v. Cobb, 100 Ga. 139 (3), 28 S. E. 72. On the trial the court refused to allow the defendant to amend his answer, by alleging that "the plaintiff in this case does not own the notes sued on in said cause, but that the real title to said notes is in A. F. Kendrick, the payee in said notes, and that as against the said real owner of said notes this defendant has a good and valid defense." The court also refused to permit the defendant to introduce evidence in support of this allegation in the proffered amendment. The proffered amendment set up new facts and a defense of which no notice had been given by the original answer, and was not verified or accompanied by an affidavit as required by Civ. Code 1910, \S 5640. The trial judge, therefore, did not err in striking the amendment, or in refusing to allow the defendant to introduce evidence solely in support thereof. It is immaterial that the record fails to show upon what ground the court refused to allow the amendment; for, even if the amendment were otherwise good, there was no abuse of discretion in disallowing it, in the absence of the affidavit provided for in the above-cited Code section. Benson v. Marietta Fertilizer Co., 139 Ga. 691, 77 S. E. 1125.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1111-1119; Dec. Dig. \S 356.]

2. DENIAL OF NEW TRIAL.

Under the pleadings and the evidence in this case, the court did not err in overruling the motion for a new trial.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by R. E. Le Master against Columbus Roberts. Judgment for plaintiff, and defendant brings error. Affirmed.

Little, Powell, Hooper & Goldstein, of Atlanta, for plaintiff in error. R. W. Crenshaw and Anderson & Rountree, all of Atlanta, for defendant in error.

PER CURIAM. Judgment affirmed.

BROYLES, J. (concurring). Upon the motion for a rehearing my colleagues are of the opinion that the fact that the trial judge

overruled the demurrer to the original plea, and thereby adjudicated finally as the law of the case that plea to be sufficient, gave the plaintiff in error at least such a technical right to a writ of error as not to subject him to damages for delay. For my part, I can hardly conceive that the learned counsel for the plaintiff in error, after having abandoned their contention in the matter of the attorney's fees included in the suit, can seriously maintain, in the face of the Code sections and the exceedingly numerous authorities applying these principles, that there is in this case any merit in the general grounds of the motion for new trial, or the amendment thereof; and as I cannot discover a good or sufficient reason why this cause was brought here for review, I think that the request of counsel for the defendant in error for the award of 10 per cent. damages for delay should be granted.

(16 Ga. App. 410)

MACK v. STATE. (No. 6456.)

(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

1. BILL OF EXCEPTIONS — MOTION TO DISMISS.

There is no merit in the motion to dismiss the bill of exceptions. As to the first ground of the motion, see Acts 1911, p. 149; Collins v. State, 12 Ga. App. 635, 77 S. E. 1079; Nobles v. State, 14 Ga. App. 480, 81 S. E. 370. As to the second ground, see Bailey & Carney Buggy Co. v. Guthrie, 1 Ga. App. 350, 58 S. E. 103.

2. MASTER AND SERVANT \S 67 — VIOLATION OF LABOR CONTRACT ACT—INTENT TO DEFRAUD—PROOF—NECESSITY.

The evidence was wholly insufficient to show an intent to defraud on the part of the accused, within the meaning of section 715 of the Penal Code of 1910; and for this reason his conviction was not authorized.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 75; Dec. Dig. \S 67.]

Error from City Court of Louisville; W. L. Phillips, Judge.

East Mack was convicted of crime, and brings error. Reversed.

M. C. Barwick, of Augusta, for plaintiff in error. J. R. Phillips, Sol., of Louisville, for the State.

RUSSELL, C. J. Judgment reversed.

(16 Ga. App. 388)

CHICAGO & N. W. RY. v. ELLIOTT.

(No. 5823.)

(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 222—PRESENTATION BELOW—NECESSITY.

"No question as to the sufficiency of the grounds of a motion for new trial, or of the approval of the brief of evidence, or of the filing of such brief or motion can be entertained by the Court of Appeals, where the judge has final-

ly passed upon the merits of the motion for new trial, unless the question was 'first raised and insisted on before the trial judge.' Acts 1911, page 149." *Collins v. State*, 12 Ga. App. 635, 77 S. E. 1079. See, also, *Nobles v. State*, 14 Ga. App. 480, 81 S. E. 370.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1156, 1333-1336; Dec. Dig. ¶222.]

2. JUSTICES OF THE PEACE ¶44—JURISDICTION—AMOUNT INVOLVED.

The case was within the jurisdiction of the justice's court. The plaintiff was not bound to claim all of the damages which were the subject of legal recovery. *Jennings v. Stripling*, 127 Ga. 778, 56 S. E. 1026, and numerous cases there cited.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 157-172; Dec. Dig. ¶44.]

3. DILIGENCE REQUIRED OF CARRIER — INSTRUCTION.

The charge of the court as to the extraordinary diligence required of a carrier in the transportation of goods was sufficiently in accord with section 2712 of the Civil Code of 1910, as applied to the facts of the instant case, to afford no ground for reversal.

4. TRIAL ¶259—INSTRUCTIONS—REQUEST.

The charge of the court complained of in the second ground of the amendment to the motion for a new trial was favorable to the defendant company. If further instructions had been desired, a timely written request therefor should have been made. In the absence of such a request, the charge was sufficiently full.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648-650; Dec. Dig. ¶259.]

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The verdict was supported by evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Laura Elliott against the Chicago & Northwestern Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

W. G. Loving and Homer Watkins, both of Atlanta, for plaintiff in error. C. D. Maddox, of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 392)

McNAIR et al. v. NEWSOME. (No. 5945.)
(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

1. VERDICT SUSTAINED.

The evidence authorized the verdict.

2. NEW TRIAL ¶105 — GROUNDS — NEWLY DISCOVERED IMPEACHING EVIDENCE — DISCRETION.

The only assignment of error, in addition to the usual grounds, being the refusal of the court to grant a new trial on account of alleged newly discovered evidence, and that evidence being impeaching in its character, and the alleged newly discovered witness, as shown in the counter showing, being in the employ of the plaintiffs in error at the time of the trial, and being in actual attendance upon the trial, on subpoena as a witness for the plaintiffs in error,

this court cannot hold that the trial judge abused his discretion in overruling the motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 221-223, 229; Dec. Dig. ¶105.]

Error from City Court of Louisville; H. B. Strange, Judge.

Action between J. E. McNair and others, administrators, and John Newsome. From the judgment, the parties first mentioned bring error. Affirmed.

R. N. Hardeman and Frank Hardeman, both of Louisville, for plaintiffs in error. M. C. Barwick, of Augusta, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 468)

HAWES v. SMITH. (No. 5952.)

(Court of Appeals of Georgia. June 12, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶1045 — HARMLESS ERROR — JURY — FAILURE TO ADMINISTER OATH.

Since the verdict was in favor of the claimant, no possible injury could have resulted to the plaintiff in *fi. fa.* because of the failure to administer to the jury the oath (Civil Code 1910, § 5169) "to give such damages, not less than ten per cent., as may seem reasonable and just, to the plaintiff against the claimant, in case it shall be sufficiently shown that such claim was made for delay only."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4124-4127; Dec. Dig. ¶1045.]

2. APPEAL AND ERROR ¶1005 — VERDICT — CONFLICTING EVIDENCE.

There were some conflicts in the evidence relating to the application of various payments, made by the defendant in *fi. fa.*, to the extinguishment of the purchase-money note which was the basis of the case for the claimant, but there was direct evidence from the defendant in *fi. fa.* himself that he still owed to the claimant "about \$85 on that note for the mule claimed in this case," and there was other testimony to support the conclusion of the jury that the payments had not, either by direction of the defendant or by operation of law, been applied to the retention of title note. Whether or not that note had been paid in full was a question of fact for determination by the jury; and, while the evidence is not altogether clear, there was some evidence to support the verdict, and, since the trial judge approved the finding of the jury, we do not feel authorized to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. ¶1005.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action between R. R. Hawes and A. H. Smith. From the judgment, Hawes brings error. Affirmed.

C. J. Johnson, of Macon, for plaintiff in error. F. & Hugh Chambers, of Macon, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 424)

JONES v. NEWBERRY. (No. 5841.)

(Court of Appeals of Georgia. June 8, 1915.)

(Syllabus by the Court.)

1. EVIDENCE \S 157, 370—EXECUTION \S 194—SALES \S 235—BEST AND SECONDARY EVIDENCE—PAROL—CLAIM OF THIRD PERSON—BURDEN OF PROOF.

Upon the introduction of an execution, with an entry of levy thereon showing that at the time of the levy the property was in the possession of the defendant named in the execution, the burden was upon the claimant to prove his title. The writing offered in evidence, being a bill of sale to personalty, was not required to be recorded, and the record was not constructive or implied notice to any one. Civ. Code 1910, \S 4208. Being in writing, however, it was the best evidence of the sale, and parol evidence was inadmissible to show title. Epping v. Mockler, 55 Ga. 377. The writing having been produced, it would have been admissible in evidence upon proof of its execution; otherwise, it was not so admissible. The claimant having failed to introduce any competent evidence whatever to substantiate the validity of his claim, the court could not have done otherwise than find in favor of the plaintiff in *fi. fa.*

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 460-470, 1538, 1559, 1560, 1562-1578, 1592; Dec. Dig. \S 157, 370; Execution, Cent. Dig. \S 571-574; Dec. Dig. \S 194; Sales, Cent. Dig. \S 681-685; Dec. Dig. \S 235.]

2. DENIAL OF NEW TRIAL.

There was no error in overruling the motion for a new trial.

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Action between W. J. Jones and H. A. Newberry. From the judgment, Jones brings error. Affirmed.

Shannon & Harrison, of Jeffersonville, and Burch & Burch, of Dublin, for plaintiff in error. L. D. Moore, of Macon, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 458)

MEANS v. CONTINENTAL FERTILIZER CO. (No. 5935.)

(Court of Appeals of Georgia. June 12, 1915.)

(Syllabus by the Court.)

COURTS \S 188—JURISDICTION OF CITY COURT—DISMISSAL AND NONSUIT—MOTION TO DISMISS—FORECLOSURE.

A city court has no jurisdiction to foreclose a mortgage on realty, nor has it authority to enter a judgment establishing a special lien on realty in a suit brought on notes secured by mortgage. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453; Lavette v. Brinsfield, 111 Ga. 821, 35 S. E. 637. The present suit was on a note secured by a mortgage, and this fact was pleaded. The prayers of the petition were for both a general judgment on the notes and a special lien on the realty embraced in the mortgage. Exception is taken to the overruling of an oral motion to dismiss the suit, upon the ground that the city court was without jurisdiction to entertain the cause. We see no error in the ruling. That part of the petition which seeks a special lien was subject to demurrer, but the petition as a whole was not; and since

the plaintiff on the trial did not insist upon anything other than a general judgment for the amount of the notes, and abandoned his petition for a special lien, the case amounted to nothing more than an action at common law on the note, of which a city court has jurisdiction. See Lavette v. Brinsfield, *supra*.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 412, 489, 440, 442, 447, 448, 451, 452, 454, 458, 464, 465, 467, 468; Dec. Dig. \S 188.]

Error from City Court of Forsyth; G. Ogden Persons, Judge.

Action by the Continental Fertilizer Company against A. A. Means. Judgment for plaintiff, and defendant brings error. Affirmed.

John B. McDonald, of Yatesville, for plaintiff in error. Willingham & Willingham, of Forsyth, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 408)

COSTIN v. STATE. (No. 6385.)

(Court of Appeals of Georgia. June 8, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1159—APPEAL—VERDICT—EVIDENCE.

No errors of law are complained of, and the verdict of the jury has been approved by the trial judge, who enjoyed the opportunity, denied to us, of observing the demeanor of the witnesses on the stand and the appearance and manner of the defendant during the trial, and especially while making his statement. The identity of the criminal, as well as the consideration of all alleged improbabilities in the evidence, came strictly within the province of the jury, and we may not usurp their functions and set aside their conclusions, supported by evidence from which they were authorized to infer the guilt of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3074-3083; Dec. Dig. \S 1159.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

John Costin was convicted of crime, and brings error. Affirmed.

Twiggs & Gazan, of Savannah, for plaintiff in error. Alex. R. MacDonell, Sol. Gen. pro tem., and W. C. Hartridge, Sol. Gen., both of Savannah, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 387)

COWDREY v. BARKSDALE. (No. 5819.)

(Court of Appeals of Georgia. June 8, 1915.)

(Syllabus by the Court.)

1. GIFTS \S 53, 62, 80 — "DONATIO CAUSA MORTIS"—REQUISITES OF GIFT—DELIVERY—PROOF.

The alleged gift could not be construed as a donatio causa mortis, because the law is well settled that, to constitute a "donatio causa mortis," the gift must not only be made by a person during his last illness, or in peril of death, but must be intended to be absolute only in the event of death (Civ. Code 1910, \S 4154); and

in this case the evidence, as disclosed by the record, did not show these necessary facts. It follows that the gift, if one were made, must be regarded as a gift *inter vivos*. An essential element of a valid gift is the delivery of the article given, or some act accepted by the law in lieu thereof. Civ. Code 1910, § 4144. The delivery, as provided in Civ. Code 1910, § 4147, may be either manual or constructive; and any act which indicates a renunciation of dominion by the donor and the transfer of dominion to the donee is constructive delivery. To establish a valid gift, it is not sufficient to show an intention to give; but this intention must in all cases be followed either by the actual manual delivery or by some act indicating delivery. Nor does any presumption arise from an expressed intention to give. Such a presumption arises only where there is an actual delivery, or where the donee is in exclusive possession. Civ. Code 1910, §§ 4150, 4151; *Burt v. Andrews*, 112 Ga. 465, 37 S. E. 726.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 104, 122-132, 152; Dec. Dig. ¶¶ 53, 62, 80.

For other definitions, see *Words and Phrases*, First and Second Series, *Gift Causa Mortis*.]

2. DELIVERY OF ALLEGED GIFT—NONSUIT.

The plaintiff's evidence clearly showed an intention and desire, on the part of the alleged donor, to give the bonds sued for; but the written and spoken words manifesting the intention to give were not followed by any actual, constructive, or symbolic delivery, either to the alleged donee or to any third person as trustee for her. The possession of the bonds was not changed, but remained in the donor, nor was any dominion over them ever exercised by the plaintiff. It follows that the court did not err in granting a nonsuit.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by Mary Cowdrey against Ida Barksdale. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Rambo & Wright, of Blakely, H. M. Calhoun, of Arlington, and Little, Powell, Hooper & Goldstein, of Atlanta, for plaintiff in error. Glessner & Park and G. D. Oliver, all of Blakely, and Pottle & Hofmayer, of Albany, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 388)

DRAKE v. LEWIS. (No. 5847.)

(Court of Appeals of Georgia. June 3, 1915.)

(*Syllabus by the Court.*)

1. DEFENSE TO NOTE.

The ruling in this case is controlled by the decision in *Drake v. Lewis*, 13 Ga. App. 276, 280, 79 S. E. 167. The suit was upon a note, and the defense was predicated upon an alleged tort. See, also, *Lea v. Harris*, 88 Ga. 236, 14 S. E. 586; *L. & N. Railroad Company v. Spinks*, 104 Ga. 696, 30 S. E. 968.

2. PLEADING ¶352—STRIKING OUT ANSWER—DEFENSE PREDICATED ON TORT.

The court did not err in sustaining the motion to strike the answer of the defendant.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1078-1091, 1125; Dec. Dig. ¶¶ 352.]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by C. M. Lewis against J. W. Drake. Judgment for plaintiff, and defendant brings error. Affirmed.

R. G. Hartsfield, of Bainbridge, for plaintiff in error. A. B. Conger and A. E. Thornton, both of Bainbridge, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 453)

RELIEF DEPARTMENT, ATLANTIC COAST LINE R. CO. v. HICKS.
(No. 5989.)

(Court of Appeals of Georgia. June 11, 1915.)

(*Syllabus by the Court.*)

JUDGMENT OF JUSTICE.

The judge of the superior court did not err in overruling the certiorari, and in sustaining the judgment of the justice's court.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between the Relief Department of the Atlantic Coast Line Railroad Company and Leonard Hicks. From a judgment of the superior court, overruling certiorari and sustaining judgment of the justice's court, the Relief Department brings error. Affirmed.

Shelby Myrick, of Savannah, for plaintiff in error. Oliver & Oliver and W. Spencer Connerat, all of Savannah, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 459)

MORRIS v. HOLSMAN & ALTER.
(No. 5956.)

(Court of Appeals of Georgia. June 12, 1915.)

(*Syllabus by the Court.*)

SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict in the justice's court. There was no material error, and the judge of the superior court did not err in overruling the certiorari.

Russell, C. J., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between B. S. Morris and Holzman & Alter. From the judgment Morris brings error. Affirmed.

C. D. Maddox and Morris Macks, both of Atlanta, for plaintiff in error. P. B. D'Orr and W. O. Slate, both of Atlanta, for defendant in error.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J., dissents.

(16 Ga. App. 452)

SHAPLEIGH HARDWARE CO. v. HUFF.
(No. 5969.)

(Court of Appeals of Georgia. June 11, 1915.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE.**

The evidence authorized the verdict, and no errors of law appearing which require the grant of a new trial, the judgment of the court is affirmed.

Error from City Court of Dawson; M. C. Edwards, Judge.

Action between the Shapleigh Hardware Company and W. D. Huff. From the judgment the Hardware Company brings error. Affirmed.

W. H. Gurr, of Dawson, for plaintiff in error. J. W. Harris, of Cuthbert, and Yeomans & Wilkinson, of Dawson, for defendant in error.

BROYLES, J. Affirmed.

(16 Ga. App. 427)

TISON v. J. B. JEMISON & CO. (No. 5890.)

(Court of Appeals of Georgia. June 11, 1915.)

*(Syllabus by the Court.)***TRIAL — 139—NONSUIT—EVIDENCE.**

The evidence being sufficient to have authorized a verdict for the plaintiff, the court erred in granting a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ¶ 139.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by D. A. Tison against J. B. Jemison & Co., a corporation. Judgment for defendant, and plaintiff brings error. Reversed.

The petition alleges that the defendant "is indebted to plaintiff in the sum of \$55.29, besides interest at the rate of 7 per cent. per annum from August 1, 1913, this being the balance due plaintiff for 48 pieces, $2\frac{1}{2} \times 12\frac{1}{2} \times 37$, 10176 feet of lumber, at \$26 per thousand, less payment of \$209.20, which said car load of lumber was shipped by plaintiff to defendant on the 19th day of June, 1913, and by it received and accepted," and that the defendant neglects to pay said amount due, though payment has been demanded. At the conclusion of the evidence introduced by the plaintiff, the defendant moved a nonsuit, on the ground that the plaintiff had failed to prove his case as alleged, and that the plaintiff testified that the original order was given by the defendant to the firm of Cobb & Tison, and by them accepted. The court sustained the motion, and the plaintiff excepted.

Roscoe Luke, of Thomasville, and Hendricks & Hendricks, of Nashville, for plaintiff in error. Theo. Titus, of Thomasville, for defendant in error.

BROYLES, J. The plaintiff's evidence showed the following facts: Cobb & Tison, a firm composed of D. W. Cobb and D. A. Tison, were engaged in the sawmill business prior to June 9, 1913, and while they were so engaged order No. 1164 for a car load of lumber was placed with the firm by the defendants. The time within which the firm was to furnish this lumber expired. The plaintiff, before the expiration of the time limit in the order, and immediately after the expiration thereof, endeavored to get his partner to join him in the purchase of a bill of lumber, and to ship it, or to permit the plaintiff, for the firm, to ship it to the defendant. Cobb refused to do this, and on June 9, 1913, the firm of Cobb & Tison was, by mutual consent, actually dissolved, though the terms of the dissolution were not reduced to writing and signed by the members of the partnership until June 23, 1913. The plaintiff, after he had failed to get his partner to agree to purchase the lumber, and after the firm of Cobb & Tison had dissolved on June 9, 1913, and after the time limit for furnishing the order had expired, went, as an individual, to one T. H. T. Sutton and purchased the car load of lumber in person, and shipped it out to the defendant as the plaintiff's property, on June 19, 1913. Defendant accepted the lumber, and billed it out in accordance with the invoice exhibited; and afterwards (on June 23, 1913), the terms of the dissolution of partnership of Cobb & Tison were reduced to writing. The invoice is as follows:

Invoice 4430.	Order No. 1164.
Mr. D. A. Tison, Adel, Ga., Sold to J. B. Jemison & Company, Thomasville, Ga.	
Shipped to Atlanta, Ga.	Car initial, CC&O
Price f. o. b. Mill.	Car No. 20319

48 pcs $5\frac{1}{2} \times 12\frac{1}{2} \times 37$, 10176' at \$26.00...\$264.58
Corrected invoice.

The plaintiff further testified that he sold J. B. Jemison & Co. the car load of lumber sued for; that they paid to him 80 per cent. of the purchase price of the lumber; that he had made demand for the balance due, but defendant refused to pay him, notwithstanding it was owing to him and past due; that the order exhibited to him and identified was the original order placed with the firm of Cobb & Tison, who, at the time the order was placed and accepted, were engaged in the sawmill business; that they were unable to cut the lumber and fill the order within the time limit therein specified; he was unable to say whether the writing exhibited to him, which was claimed by defendant to be a copy of the contract of dissolution of Cobb & Tison, was correct, for the reason that he did not have the original with which to compare it, he having mailed his original contract to his counsel; that he purchased the car load of lumber as an individual, to protect himself against any damage flowing to defendant, and for the

purpose of making what profit there was in the car load of lumber; that he was a member of the firm of Cobb & Tison, and that the order for the car load of lumber in question was given to Cobb & Tison; that J. B. Jemison & Co. did not buy the car load of lumber from him, and did not give an order to him individually; and that there was no contract between himself and J. B. Jemison & Co.; that when the dissolution of the firm of Cobb & Tison was reduced to writing, it was therein specified that all moneys due the firm were to be paid to Cobb, but that he did not intend to include the money due for this car load of lumber in this agreement.

The plaintiff identified the following letters received from the defendant:

(1) Letter dated July 23, 1913, addressed to D. A. Tison, Adel, Ga., as follows:

"Replying to your letter of the 22nd, will state that we have not had report on CC&O 20319 shipped by you to N. O. & St. L. Ry., but you may rest assured the very day we receive this report in our office, we will be glad to send you balance due.

"[Signed] J. B. Jemison & Co."

(2) Letter from J. B. Jemison & Co. to D. A. Tison, dated September 9, 1913, as follows:

"Replying to your letter of the 4th, in reference to settlement for the car load of lumber, will say we have passed a good many letters back and forth, both with you and with Mr. Cobb. He seems to make one argument and you another one, and both of you claim to be right in the matter. This, of course, puts us where we really don't know what to do, and the only thing that we can see that we can suggest is that you and Mr. Cobb get together and arrange between yourselves a satisfactory settlement of this matter, and both of you write us a letter agreeing on the same thing, and we will send a check to whoever both of you say. This is about the only way we see that it will be possible for us to arrange the matter to protect ourselves."

(3) Letter from J. B. Jemison & Co. to D. W. Cobb and D. A. Tison, dated August 25, 1913, as follows:

"We have today received final report covering car lumber CC&O 20319, and the same has gone through as billed. We are ready to pay the balance due on this car, \$55.29, but we are not sure as to whom this should be sent. Our files show that on June 28th, Mr. Cobb wrote us that the firm of Cobb & Tison had been dissolved, and an agreement signed by them, he to receive all moneys due the firm of Cobb & Tison. On July 12th our files show that we received a letter from Mr. Tison asking that we send him report covering this car and balance due. We are ready to make payment, but to whom shall check be sent?"

(4) Letter from J. B. Jemison & Co. to Hendricks & Hendricks, attorneys at law, Nashville, Ga., dated September 12, 1913, as follows:

"We are in receipt of your letter of September 9th, in reference to the balance we are due Tison & Cobb, on a car of lumber. We also have a letter from Mr. Tison, advising that he has placed this matter in your hand for collection. We do not deny this account in any way; in fact, we not only admit that we owe this money, but we are anxious to pay it to the proper man at once, and for some time have

been endeavoring to find out who that man is. The trouble is we bought this car of lumber when the firm of Tison & Cobb was in existence and between the time that the lumber was purchased and the balance due on the shipment became due, the firm of Tison & Cobb, it seems, was dissolved, and now they are both writing us letters, claiming that the balance on the shipment is due to each of them. All we want is to get an agreement between the two, as to whom the money shall be paid to, and whenever we get both of them to agree as to how the check should be made out, and to whom the money shall be paid. We will be very much pleased to pay the account, but wish to advise you that we do not propose to do it until that agreement is reached and sent us in writing by them both. We wrote Mr. Tison to this effect under date of September 9th. Mr. Tison makes one argument and Mr. Cobb another, and the only way we can make ourselves safe is to have them both agree as to what disposition should be made of the money. When they mutually agree on this, and write us to that effect, we will not only pay the balance due, but we will pay it with much pleasure, as we are anxious to get this item off of our books. Copy to Mr. Tison and Mr. Cobb."

The plaintiff testified that "the letter under date of September 9, 1913, was addressed [erroneously?] to D. A. Morris at Adel, Ga., the envelope being postmarked September 9, 1913," that this letter and envelope "was, on September 25, 1913, postmarked at Thomasville, correctly addressed to plaintiff, and thereafter received by him in due course of mail."

The plaintiff having rested his case, the defendant moved a nonsuit, on the ground that the plaintiff had failed to prove his case as laid, and because the plaintiff testified that the original order was given by the defendant to the firm of Cobb & Tison and by them accepted. The court sustained the motion and granted the nonsuit, and the plaintiff excepted.

We think the granting of the nonsuit was error. The plaintiff's evidence, showing that he, as an individual, and not as a member of the firm of Cobb & Tison, sold the defendant the car load of lumber sued for; that the defendant received the lumber, and paid him (plaintiff) 80 per cent. of the purchase price, and promised to remit him the balance; and that he had made demand for the balance due, but that the defendant refused to pay him, notwithstanding it was owing to him and past due, in our judgment made out a prima facie case. The fact that the defendant originally placed an order for this lumber with the firm of Cobb & Tison, of which firm the plaintiff was a member, is immaterial, when the evidence shows that this order was not filled by the firm, and that the time limit therein specified for filling it had expired, and that the firm of Cobb & Tison had actually dissolved before the lumber was shipped by plaintiff to the defendant, and that it was shipped by the plaintiff as an individual. The further fact that the agreement for the dissolution of the firm was not reduced to writing until June 23, 1913, and that therein it was stipulated that all money due the firm was to be paid to Cobb, does not

change the situation, for in the evidence it distinctly appears that the selling and the shipping of this lumber to the defendant was not a transaction of the firm, and that the balance due on said transaction by the defendant was not due to the firm but solely to Tison, as an individual.

Under this view Cobb, the plaintiff's former partner, had no interest whatever in this transaction, and no claim on the defendant. After the time for filing the original order (given the firm of Cobb & Tison) had expired, and after the plaintiff as an individual had purchased the lumber from a third person and shipped it to the defendant, and the defendant had received, accepted, and used it, and the defendant had paid to the plaintiff 80 per cent. of the purchase price of the lumber, and after the defendant had written a letter to the plaintiff in which it acknowledged receipt of the lumber and promised to pay the balance, and when the invoice shows that the lumber was billed by D. A. Tison at Adel, Ga., to J. B. Jemison & Co., without any reference to the firm of Cobb & Tison, the defendant will not be heard to deny its liability for this lumber. It seems to us that it would be manifestly unfair to permit the defendant to take the proceeds of this car load of lumber and then refuse to pay the plaintiff for it. If the defendant was really in doubt whether to pay the money to Cobb or to Tison for this lumber, which it had received and used, it could have paid the money into court, and in its answer set forth all the facts as contended by it, and in this way the fullest protection would have been secured.

We do not see how, with all of the facts testified to by the plaintiff admitted, as well as the invoice, the letters from the defendant, the payment by it of 80 per cent. of the purchase money, and all reasonable deductions from this evidence, it can be held that the plaintiff did not make out a prima facie case.

Judgment reversed.

(16 Ga. App. 453)

BIRD v. SAVANNAH ELECTRIC CO.

(No. 5999.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. CARRIERS \S 314—INJURY TO STREET CAR PASSENGER—PETITION—SUFFICIENCY.

The court did not err in sustaining the general demurrer and in dismissing the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. \S 314.]

(Additional Syllabus by Editorial Staff.)

2. CARRIERS \S 303 — DUTY TO ALIGHTING PASSENGERS—SELECTION OF LANDING PLACE—DILIGENCE.

A street car company should use due diligence in selecting a reasonably safe place for

landing its passengers, and should make such selection with reference to passengers getting off the car while it is at rest.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. \S 303.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Mrs. W. H. Bird against the Savannah Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error. Osborne & Lawrence, of Savannah, for defendant in error.

BROYLES, J. [1] The petition alleged that the defendant company's street car, upon which the plaintiff was a passenger, stopped at the intersection of Liberty and Habersham streets. (at about the property line thereof), with the result that the rear end of the car, from which she was compelled to alight, was standing immediately over a sandy portion of Habersham street, making the distance from the step to the ground a long and difficult step, but, inasmuch as the defendant had stopped the car at that point for her to alight, she was obliged to use the only place and the only means afforded her to alight; that the point where the said car was stopped, and over which was the rear step from which she was compelled to alight, was covered with heavy sand, and, in stepping down from the step of the said car onto the roadway of the said street, the middle of her foot struck the top of a large rock imbedded in the sand, with the point thereof sticking up above the surface of the ground, with the result that the heel of her shoe was caught upon the top of said rock, her toe was thrust downward, her ankle turned, and she sustained a severe wrench and strain, and bruised her entire right foot and ankle; that the rock upon which she stepped was six or eight inches in diameter, somewhat triangular in shape, extending upward to a point, the base thereof being imbedded in the sand, so as to present a rather solid obstruction, and the said rock, together with the sandy surface of the street, constituted an improper, defective, and dangerous place, at which she was compelled to alight; that the defendant is responsible entirely for the injuries sustained by her, because of the fact that it did not furnish to her a safe, suitable, and convenient place to alight; that at the time of receiving her injuries she was a passenger, and was in the exercise of all ordinary and reasonable care and diligence for her own safety, and was free from fault.

[2] Generally the duty which the law imposes upon an ordinary railroad company to provide and maintain a safe place for landing its passengers is not applicable to a street

car company operating its line along the public street of a city, and not stopping at regular places selected by it or providing places for passengers to get on and off of its cars, but stopping such cars at street crossings, or various intermediate places, upon signal from a passenger. It is, however, the duty of the street car company to use due diligence in selecting a reasonably safe place for landing its passengers, and to make such selection with reference to the passengers getting off the car while it is at rest. *Turner v. City Electric Railway Co.*, 134 Ga. 869, 68 S. E. 735. See, also, *Macon Ry. Co. v. Vining*, 120 Ga. 511, 513, 48 S. E. 232. As said in *Creamer v. West End Street Ry. Co.*, 156 Mass. 321, 322, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456:

"The street is in no sense a passenger station, for the safety of which the street railway company is responsible. * * * When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or to leave a train have the relation and rights of passengers in leaving or approaching the cars at a station. * * * But one who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights with every other occupier, and over which the company has no control."

The instant case is, in many respects similar to *Wadley Southern Ry. Co. v. Durden*, 142 Ga. 361, 82 S. E. 1055. In that case, Durden, while upon the tracks of the defendant company as a licensee, caught the heel of his shoe between a cross-tie and an iron bar, and, before he could extricate himself, was run over by an engine of the defendant company. He alleged in his petition that between the cross-tie and the iron bar there was a washout, or hole dug out, and that, on account of this hole, the heel of his shoe was caught, as above described. He also alleged that if there had been no hole dug out, and if the track had been kept smooth and level, the accident would not have happened. He further alleged that it was the duty of the defendant to the public, and to him, or to any one else who had a right to be on the track, to have kept the track where he was injured, and all other places of like kind on the road of the defendant, smooth, level, and solid, and in such condition as to prevent washouts, or a hole dug out, but that the defendant company negligently omitted to do so; that the defendant company knew or should have known of the defect in ample time to have repaired it, and to have prevented the injury; that the plaintiff was free from fault, for the reason that the duties assigned to him were such as not to require him to be alert to discover such defects, and nothing came within his observation to prompt him to make an investigation with a view to discover such defects, and his means for knowing of such

defects were not equal to those of the defendant company, he not being an employé of the defendant, as a road hand or otherwise; that he did not know, at the time he sustained his injury, and could not have known by the exercise of ordinary diligence, that the washout, or hole dug out, was in existence at the point where he was injured. In that case the demurrer to the petition was overruled by the trial court, and this judgment was reversed by the Supreme Court, which held that the demurrer should have been sustained and the petition dismissed.

In the instant case it is not alleged in the petition how the rock which caused the plaintiff's injury came to be there, or that the defendant put it there, or that the defendant knew it was there, or how long it had been there, or that the defendant had any opportunity of finding out that it was there. So far as the allegations of the petition are concerned, the rock might have been placed there only a few minutes before the accident. There was no allegation that there was anything about the place to indicate to the company that it was not a reasonably safe place for landing its passengers. The petition alleges that the street was covered with heavy sand, and this would have made it an apparently safe place for persons to alight. The petition did not allege that, by any degree of care, the defendant could have discovered the presence of the rock. In our opinion, there is no material difference between the *Durden* Case, *supra*, and the instant case. It is true, in the *Durden* Case, the defendant was only required to exercise ordinary care, while in this case it was the defendant's duty to exercise extraordinary care. But this makes no substantial difference, because there was no allegation in the petition here that there had been anything to put the defendant upon notice that the place was unsafe, or that, by the exercise of extraordinary care, it could have found out that it was unsafe.

In our opinion, the court did not err in sustaining the demurrer and in dismissing the petition.

Judgment affirmed.

(16 Ga. App. 432)

NORWICH UNION FIRE INS. SOCIETY v.
BAINBRIDGE GROCERY CO.
(No. 5908.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. INSURANCE — 607 — MONEY COLLECTED FROM WRONGDOER—CONTRACT TO PAY OVER—PETITION.

The petition set forth a cause of action, and was not subject to general demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1512, 1513; Dec. Dig. § 607.]

(Additional Syllabus by Editorial Staff.)

2. INSURANCE §138 — "VALUED POLICY" — VALIDITY — "INDEMNITY."

Since insurance is "indemnity," a contract for a fixed sum (a "valued policy") would be illegal and wagering. Such a contract is not favored by the law, and will never be regarded as arising by implication, and no policy will be construed to be a valued policy unless it is clear from the terms of the policy that it was the intention of the parties that it should have this effect.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246-249; Dec. Dig. §138.

For other definitions, see Words and Phrases, First and Second Series, Insurance; Valued Policy.]

3. INSURANCE §606 — SUBROGATION — CLAIM AGAINST WRONGDOER.

An insurer, on paying a loss, is subrogated to the insured's claim against the wrongdoer causing the loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. §606.]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by the Norwich Union Fire Insurance Society against the Bainbridge Grocery Company. Judgment for defendant, and plaintiff brings error. Reversed.

King & Spalding, of Atlanta, and Erle M. Donalson, of Macon, for plaintiff in error. T. S. Hawes and W. V. Custer, both of Bainbridge, for defendant in error.

BROYLES, J. [1] The plaintiff's petition contained the following allegations:

That the Norwich Union Fire Insurance Society had insured the Bainbridge Grocery Company's stock of goods, in its store building, against loss by fire in a sum not exceeding \$1,000, the policy being in force during May, 1907. That on May 22, 1907, the insured property was completely destroyed by fire, through the negligence of the Atlantic Coast Line Railroad Company. That on June 28, 1907, the insurance company paid the grocery company \$990.99 on account of said loss and damage. That, simultaneously with making said payment, the grocery company contracted, in writing, with the insurance company that:

"Whereas it has been agreed that the said party of the second part [the insurance company] shall be subrogated, to the extent of the amount so paid as aforesaid and the interest thereon, to all claims and demands which the said party of the first part [the Bainbridge Grocery Company] has against any person or persons, corporation or corporations, for or on account of said loss or damage: Now, therefore, know ye that the said party of the first part, for and in consideration of the sum to it paid by the party of the second part, has sold, and does hereby assign, transfer, and set over unto the said party of the second part all and singular the claims and demands of every nature and kind which the said party of the first part has against the Atlantic Coast Line Railroad Company, and against all other persons, firms, or corporations whatsoever, for or on account of said loss or damage, or for or on account of any

willful or negligent or other act or omission which led to or caused the said loss or damage, or for or on account of any liability for the said loss or damage, to the extent of the said sum so paid and the interest thereon; to have and to hold the same to the said party of the second part, its successors and assigns forever."

That the Bainbridge Grocery Company recovered from said Atlantic Coast Line Railroad Company \$686.18, and paid out 25 per cent. thereof as attorney's fees to effect such recovery, and has a net balance of \$514.63, which it collected on July 18, 1912, and which it refuses to pay to said insurance company. To this petition the Bainbridge Grocery Company demurred: (1) Generally, as not setting forth a cause of action; (2) because the value of the building, of the stock, and of the fixtures, insured and destroyed by the fire is not stated; (3) because the total amounts of the insurance collected on each item are not stated; (4) because the amounts collected from the Atlantic Coast Line Railroad Company on the building, the merchandise, and the fixtures, separately or as a whole, are not stated; (5) because the expense incurred in prosecuting the suit against the railroad company is not alleged; (6) because it is not alleged what was the net recovery from the railroad company, and it is not alleged that the said net recovery, added to the insurance collected, was equal to the value of the property destroyed by fire; (7) because the time when the alleged cause of action arose is not definitely stated. The court sustained all of the grounds of demurrer and dismissed the petition, and the plaintiff excepted.

[2] In this case it appears that, not as a compromise, but as an ascertainment of the total loss, the insurance company paid the defendant \$990.99, which is less than the face of the insurance policy. According to the law in this state, insurance is indemnity. A contract for a fixed sum (a valued policy) would be illegal and wagering, and therefore will never be regarded as arising by implication, and no policy will be construed to be a valued policy unless it is clear from the terms of the policy that it was the intention of the parties that it should have this effect. Ga. Co-operative Fire Ins. Ass'n v. Lanier, 1 Ga. App. 186, 57 S. E. 910; Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1, 9, 31 S. E. 779; Word v. Southern Mutual Ins. Co., 112 Ga. 599, 37 S. E. 897. Accordingly a loss in Georgia under a fire insurance contract is one which presents an unliquidated claim, which must be ascertained after loss, and is open to dispute and adjustment. Rosser v. Georgia Home Ins. Co., 101 Ga. 720, 29 S. E. 286. In this case the defendant, whose loss occurred on May 22d, received payment on June 28th, and in consideration of the ascertainment, admission of liability, and prompt payment of \$990.99, made an assignment in fee simple of an equivalent interest in any recovery which it might make from the Atlantic Coast Line Railroad Company as the wrongdoer causing the fire, and has collected

from that company a sum, on such cause of action, which has netted it \$514.63, which it refuses to pay over to the plaintiff, notwithstanding its contract.

[3] Under the law an insurer, upon paying a loss, is subrogated to the insured's claim against the wrongdoer causing the same. *Holcombe v. R. & D. R. Co.*, 78 Ga. 776, 8 S. E. 755. As the defendant in this case had transferred to the plaintiff without condition, on the considerations above stated, an absolute right to the sum they might recover from the railroad company for this loss, to the extent of \$990.99 and interest, and as the petition alleged all of these facts and exhibited the contract, and alleged that the defendant had collected and withheld \$514.63 of such funds, it stated, in our judgment, a case in favor of the plaintiff, good against general demurrer.

The lack or failure of consideration of a written evidence of indebtedness is a matter of defense, and want of or illegality of consideration is not a proper matter for demurrer, unless the want or illegality thereof affirmatively appears in the instrument sued on, or from the allegations (not the absence of allegations) of the petition. *Smith v. Ice Delivery Co.*, 8 Ga. App. 767, 768 (4), 70 S. E. 195.

The objection that the petition contained no allegations as to the total amount of insurance, or the total value of the property insured, or the amounts paid thereon, is without merit, as such allegations are immaterial and irrelevant to the cause of action disclosed by the exhibits to this case, together with the averments of collection; the averments being that the property was wholly destroyed, and that the plaintiff insurance company paid, as its loss, \$990.99, which was less than the total insurance. If any facts existed which would relieve the defendant of the obligation of the contract sued on, or the prima facie cause of action set forth in the petition, it was a matter of defense to be pleaded, and not to be anticipated in the

petition. The idea that in stating a prima facie cause of action against the insured, to require him to account to his insurer for moneys collected from the wrongdoer causing the fire, the insurance company must set up its claim on the insured and these payments, and show that the funds so collected from both sources exceed the claim of loss, and that the insurer is entitled to the surplus only, if there be any, is, in our judgment, erroneous. We do not think that it is necessary to set up such matters in the petition. A statement that the assured sustained a loss, which was adjusted and paid by the insurance company, the policy not being fully exhausted, states a prima facie case of full payment of the loss, and a recovery subsequently had by the insured from the wrongdoer is prima facie due to the insurer. If for any reason the insured is not so liable, that is a matter to be pleaded and proved in defense to his prima facie liability.

The cases cited by the learned counsel for the defendant in error do not sustain their contention of what the plaintiff's petition must contain, but only go to the question as to whether the assured can be permitted, by proper pleading, to assert to the contrary, and be allowed so to prove. In our judgment, the petition states a cause of action, good at least against general demurrer; and, as the court sustained both the general and the special demurrers, the judgment must be reversed, for, as was said by this court in *Chappell v. Western Railway*, 8 Ga. App. 787, 789, 70 S. E. 208, 209:

"The rule of decision in cases where the trial judge has sustained both general and special demurrers is for this court * * * to see if a cause of action is set forth; and, if it is found that the court erred in overruling [sustaining] the general demurrer, the judgment will be reversed, leaving the matters in respect to the special demurrers open for further action in the trial court."

See, also, *News Pub. Co. v. Lowe*, 8 Ga. App. 333, 334, 69 S. E. 128.

Judgment reversed.

(16 Ga. App. 436)

SEAWRIGHT v. DICKSON. (No. 5923.)
(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** \S 476—**WANT OF CONSIDERATION—SUFFICIENCY OF PLEA.**

A plea alleging that there was a total want of consideration for the note sued on; that it was executed in part payment for certain shares of stock sold to the maker by the payee, which, as the payee knew at the time of the sale and executing the note, was without market value and wholly worthless, and which has never since had any market value; and that the defendant obtained no benefit from the purchase of the stock and the plaintiff sustained no loss on account of the sale—is a sufficient plea of want of consideration as against a general demurrer.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 1519-1521, 1523, 1557; Dec. Dig. \S 476.]

2. **PLEADING** \S 290—**AMENDMENT—RIGHT TO STRIKE.**

The court did not err in striking an amendment which set up new facts or a defense of which notice was not given by the original plea or answer and which was not verified as required by Civ. Code 1910, \S 5640.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 859-863, 886½; Dec. Dig. \S 290.]

(Additional Syllabus by Editorial Staff.)

3. **CORPORATIONS** \S 60—**"STOCK."**

"Stock" means one share or more, or an interest, in a corporation organized generally for the profit of the shareholders or stock owners, and having a value on the market.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. \S 162; Dec. Dig. \S 60.]

For other definitions, see *Words and Phrases*, First and Second Series, *Stock*.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. D. Dickson against W. C. Seawright. Judgment for plaintiff, and defendant brings error. Reversed.

T. J. Ripley, of Atlanta, for plaintiff in error. Geo. Westmoreland, of Atlanta, for defendant in error.

WADE, J. J. D. Dickson brought suit against W. C. Seawright on a certain promissory note dated March 21, 1913, and due 30 days after date, for the sum of \$700 principal, with interest after maturity, and 10 per cent. attorney's fees. In his petition he alleged that, as collateral security for the payment of the note sued on, the defendant pledged 18 shares of stock in the Guarantee Trust & Banking Company. To the petition was attached a copy of the note, which recited the pledge of these 18 shares as collateral security. The defendant filed a plea admitting the execution of the note, but denying his indebtedness thereon, because the consideration for which it was given had totally failed, and because there was a total want of consideration. The defendant further alleged that the plaintiff practiced a fraud on him when the note was executed, for that it was given, together with \$200

cash, as the purchase price for the 18 shares of bank stock referred to in the plaintiff's petition as having been pledged as collateral security for the payment of the note, which said bank stock—

"was totally worthless when sold to the defendant by plaintiff, and plaintiff knew or ought to have known that the stock was worthless and of no value in the market."

The defendant alleged, further, that he was not indebted to the plaintiff on the note sued upon, because—

"the 18 shares of bank stock sold defendant by plaintiff were utterly worthless when sold him and when the note was executed and plaintiff knew the stock was worthless when he sold it to defendant, and the consideration of said note was the 18 shares of stock alleged to be collateral security, and said stock was without any market value on the 21st day of March, 1913 [the date when the note was executed], and is still without any market value, and has been without any market value for and during the time the note was executed and at present time. Defendant has obtained no benefit from the purchase of said stock, and defendant [plaintiff] has maintained [sustained] no loss on account of said contract."

The defendant prayed judgment for the \$200 cash paid by him to the plaintiff as part of the purchase price of the bank stock alleged to be worthless, and denied any indebtedness for attorney's fees, etc. The note sued upon was dated March 21, 1913, and was due 30 days after date. The suit was filed October 14, 1913, and the original plea filed October 21, 1913.

[1, 2] On June 19, 1914, the case came on for trial, and the defendant filed an amendment to his plea, in which amendment he set out that the 18 shares of stock purchased by him from the plaintiff, for which the note sued upon was given, did not, in fact belong to the plaintiff at the time of the sale to him, but that one Miles was then the true owner thereof, and still actually owned the 18 shares of stock, and that Miles and the plaintiff had practiced a fraud on the defendant by selling to him the stock of Miles, which Miles knew was worthless, and knew he could not personally sell to the defendant, for which reason Dickson, the plaintiff, acted as go-between for Miles, in order to make the sale to the plaintiff and obtain money on the worthless stock; that Dickson and Miles conspired together to sell this worthless stock to the defendant, "and the stock was worthless, and so known to be worthless by Miles, and Dickson had no interest in said stock," except his commission for making this sale for Miles; that—

"the stock was worthless, Miles knew it, or ought to have known it at the time of its sale, Seawright [the defendant] did not know it, because a number of contracts were kept off the books by Miles, and Dickson kept from Seawright the knowledge of the ownership of stock, and the note was obtained by fraud, and the consideration of the note has failed entirely."

This amendment was ordered filed, and was filed, as part of the record, subject to

demurrer or motion to strike, and, on demurrer, the amendment was disallowed; and the original plea itself was likewise stricken on demurrer, on the ground that "it set up no legal defense."

The amendment offered, it is true, alleges fraud on the part of Miles and Dickson, but fails to indicate in what the particular fraud consisted. It is true that in the amendment it is alleged that Dickson and Miles conspired together to sell worthless stock to him, which they knew at the time to be worthless; but it is not alleged that, in order to induce the defendant to purchase the stock, which he asserts was at the time of the purchase worthless, any misrepresentation was made by either Miles or Dickson, and in fact the only definite reason assigned for the conclusion that a conspiracy was formed between Miles and Dickson to perpetrate a fraud upon the defendant is that the stock sold to the defendant was in fact the property of Miles, and not of Dickson, and that Dickson was acting merely as agent for Miles in effecting the transfer. How or in what way this would affect the validity of the transaction we are unable to discover from the pleadings, since it is not suggested that upon the payment of his note the defendant would be for this reason unable to obtain possession of the 18 shares of stock.

The fourth paragraph of the amendment alleges that Seawright did not know at the time of the sale that the stock was worthless, "because a number of contracts were kept off the books by Miles, and Dickson kept from Seawright the knowledge of the ownership of the stock"; but what "contracts" or "books" are referred to, or what facts touching the value of the stock were concealed by keeping the contracts off the books, the plea does not indicate, and we are left to surmise. Besides, the order striking the proposed amendment simply recites that, "on demurrer to this amendment, this amendment is disallowed and stricken," and it appears from inspection that the proposed amendment was not verified as required by section 5640 of the Civil Code, providing that where an amendment, offered after the time allowed for answer has expired, sets up any new facts or defense, notice of which was not given by the original plea or answer, it shall not be allowed—

"unless at the time of filing such amended plea or answer containing the new matter he [the defendant] shall attach an affidavit that at the time of the filing the original plea or answer he did not omit the new facts or defense set out in the amended plea or answer for the purpose of delay, and that the amendment is not now offered for delay, or unless in the discretion of the court the circumstances of the case or substantial justice between the parties require that such amendment be allowed without attaching such affidavit."

The record does not disclose on what ground the amendment was disallowed, and, irrespective of the objections already referred to, it may be that the trial judge rejected it because it was not verified as provided

by section 5640. *Upchurch v. Nichols*, 15 Ga. App. 359 (2), 83 S. E. 273; *Early v. Hampton*, 15 Ga. App. 95, 82 S. E. 669-670; *Edwards v. Boyd Co.*, 136 Ga. 738, 739, 72 S. E. 34; *Benson v. Marletta Fertilizer Co.*, 139 Ga. 691, 77 S. E. 1125.

The original plea alleged, as already stated, that the 18 shares of bank stock were utterly worthless when sold to the defendant and when the note was executed by him, and that the plaintiff knew this fact, and also that the stock was then without any market value, and it has not since had any market value, and that the defendant obtained no benefit from the purchase of the stock, and the plaintiff had suffered no loss on account of his contract of sale. Civil Code, § 5675, is as follows:

"Whenever an action shall be commenced at common law, founded upon any contract, the defendant in such action may plead and give in evidence to the jury, upon the trial thereof, that the consideration upon which said contract was founded has totally or partially failed. Such plea shall only be pleaded in cases between the original parties to the contract, or their privies or assignees, whose title has been acquired with notice, actual or constructive, or by operation of law."

Section 4250 provides that:

"If the consideration, apparently good or valuable, fails either wholly or in part before the promise is executed, such failure may be pleaded in defense to the promise. If it be partial, an apportionment must be made according to the facts of each case."

The suit in this case was based on a contract under seal, and section 4219 of the Civil Code declares that:

"A specialty is a contract under seal, and is considered by the law as entered into with more solemnity, and consequently of higher dignity, than ordinary simple contracts."

It is said in section 4241 that consideration is essential to a contract which the law will enforce, and—

"in some cases a consideration is presumed, and an averment to the contrary will not be received. Such are generally contracts under seal," etc.

The plea in this case alleges a total want of consideration, rather than a failure of consideration; for it appears therefrom that the stock, for the purchase money of which the note sued upon was given, was not only worthless at the time the plea was filed, but was worthless when the sale was made and the note given therefor, so that the note was wholly without consideration at the time of its execution. The expression in *Smith v. Smith*, 38 Ga. 184-190, 91 Am. Dec. 761, that "the solemnity of a sealed instrument imports consideration, or, to speak more accurately, it estops a covenantor from denying a consideration, except for fraud," appears to have been merely an obiter, and a different rule is recognized by the courts of this state at this time. Even in the older case of *Albertson v. Holloway*, 16 Ga. 377, it was held that:

"A plea of failure of consideration, without fraud, may be pleaded to a note which is a joint

and several promise to pay by two, which purports to be over the hand and seal of the makers, and has a seal or scroll affixed to the name of one, the other signing with his own proper hand, as security."

In that case the court said:

"We believe that the rule that a plea of failure of consideration cannot be used as a defense to a specialty applies to no other instruments, save such as were known to the common law as specialties, as deeds, bonds, and instruments executed with like solemnities of sealing and delivery. It has been common for courts to say that such defense cannot be set up to an instrument under seal. But we think that these words were used, or should have been used, with reference to such instruments as were executed with the ceremonies necessary to specialties at common law."

The reasoning of this opinion was criticized in *Sivell v. Hogan*, 119 Ga. 167-170, 46 S. E. 67, 68, and Justice Cobb there said that the Supreme Court was not—

"prepared to adopt the reasoning upon which this decision [*Albertson v. Holloway*, supra] was founded, that the common-law rule related only to such instruments under seal as were known to the common law as specialties, there being no such thing at common law as a promissory note under seal. * * * Our Code defines a specialty to be a contract under seal. Civil Code, § 3634 [Civil Code 1910, § 4219]. We are not, however, to be understood as definitely committing ourselves at this time to the proposition that even want of consideration cannot be pleaded to a promissory note under seal, though this would seem to be true."

In *Van Dyke v. Van Dyke*, 123 Ga. 686-690, 51 S. E. 582, 583, 3 Ann. Cas. 978, it was said:

"It is unnecessary to discuss the exact status of a sealed note. In *Albertson v. Holloway*, 16 Ga. 377, its nature was considered, and it was held that a plea of failure of consideration could be made to a suit based on it. In other cases there have been intimations that a presumption of a consideration arose from the presence of a seal, but that it might be rebutted. * * * In *Sivell v. Hogan*, 119 Ga. 167, 169, 170, 46 S. E. 67, the opinion was strongly expressed, although no direct ruling was made, that a seal raises a conclusive presumption of the existence of a consideration at the time the contract was entered into, but not that it has not since failed, either wholly or partially, and accordingly that want of consideration cannot be pleaded, but failure of consideration may be. Whether the presumption thus raised is disputable or conclusive, the fact of being under seal gives to the note a character which it would not have otherwise. Moreover, the statute of limitations in regard to a note under seal and one without a seal is not the same. * * * Under the strict commercial law prevailing in some jurisdictions, a note under seal and payable to a named person or order is deemed not negotiable, but in this state it is treated as negotiable."

It will be observed that all that was said in that opinion as to whether or not want of consideration can be pleaded to a note under seal was by the express declaration of the court, mere obiter. In *Slaton v. Fowler*, 124 Ga. 955, 53 S. E. 567, it was said that:

"At common law, as a general rule, a seal imported a consideration, and a contract under seal was not open to attack on the ground that it was without consideration. Whether this rule applies to a promissory note under seal, so as to prevent a plea of want of consideration, or whether the seal only raises a presumption

of a consideration, which can be rebutted, has never been definitely decided in this state; but it has been held that failure of consideration could be pleaded to a note under seal."

Later the point was expressly ruled upon by this court in the case of *Sims v. Scheussler*, 5 Ga. App. 850, 64 S. E. 99, where it was said:

"Either want of consideration or failure of consideration may generally be pleaded to a contract under seal."

And in another decision, handed down on the same day, Judge Powell gave an interesting and able discussion of the precise question, and the court held that:

"It is a good defense to an action on a negotiable promissory note under seal, in the hands of the original payee, that it was executed without any lawful consideration."

And it also held that:

"In this state an equitable defense not involving affirmative relief or extraordinary remedy may be filed to any action at law in any of the courts. Hence, to an action in a city court on a note under seal, the defense of lack of consideration may be successfully pleaded." *Lacey v. Hutchinson*, 5 Ga. App. 865 (1) & (5), 64 S. E. 105.

This ruling was approved in *Williams-Thompson Co. v. Williams*, 10 Ga. App. 251-253, 73 S. E. 409, 410, where this court held that:

"At common law a release under seal conclusively imported a consideration, but this is not now true, as respects the American states generally (*Williston-Wald's Pollock on Contracts*, 813), or as respects Georgia in particular."

The decision in *Lacey v. Hutchinson*, supra, was again referred to by this court in *Sasser v. McGovern*, 11 Ga. App. 88, 74 S. E. 797, and in *Strickland v. Farmers' Supply Co.*, 14 Ga. App. 661, 82 S. E. 161, this court said generally that:

"Consideration of a promissory note may be a legitimate subject of inquiry, though the note be under seal," and that "it is no longer an open question in this court" that the fact "that a promissory note, even though executed under seal, was executed without any lawful consideration is a good defense to an action on a negotiable promissory note in the hands of an original payee."

It appears, then, that under the statute law of Georgia a defendant may not only plead failure of consideration to a note under seal, but may also plead want of consideration to such an instrument.

The question remaining for determination is whether the original plea sufficiently set up a plea of total want of consideration to withstand the general demurrer thereto, bearing in mind that it is not absolutely essential to the validity of such a plea (under some of the rulings above cited) that fraud be alleged; for in this plea there is no specific allegation of any act of fraud, nor is there any attempt to allege such concealment on the part of Dickson as to the value of the stock sold to the defendant as might amount to fraud under the provisions of section 4114 of the Civil Code. It is true that the defendant asserts that the plaintiff—

"practiced a fraud on the defendant when he executed said note, in that the 18 shares of bank stock (the consideration of said note) was wholly worthless when sold to defendant by plaintiff, and plaintiff knew or ought to have known that this stock was worthless and of no value in the market."

But it does not appear that the defendant made any direct inquiry as to the value of the stock and that the plaintiff evaded the truth, or that any confidential relation existed between the plaintiff and the defendant whereby the defendant had the right to expect full communication of the facts from the plaintiff, or that the defendant was laboring under any delusion with respect to the property sold, "or the condition of the other party," and the plaintiff knew this and yet kept silence, or that the concealment was of intrinsic qualities, or that the actual value of the article could not by the exercise of ordinary prudence and caution have been discovered by the other party. The issue presented, therefore, is whether, as against a general demurrer, a total want of consideration was sufficiently pleaded by the allegations that the stock purchased by the defendant, and for which he executed the note sued upon, was without market value and wholly worthless when sold to him by the plaintiff and when the note was executed, and that it ever since remained without any value, that the plaintiff at the time of the sale knew that it was wholly worthless, and that the defendant obtained no benefit from the purchase of said stock and the plaintiff sustained no loss on account of the contract alleged to be without consideration.

[3] As the defendant did not seek to show that a consideration originally valuable had become totally worthless, it was not incumbent upon him to show how or for what reason it had lost its value. He asserted simply that the stock was worthless, and since "stock," as the word is ordinarily used, means one share or more, or an interest, great or small, in a corporation or company organized generally for the profit of the shareholders or stock owners, and generally having a value on the market, or being at least salable to some limited number of persons interested in corporations or stock companies of that particular character, an assertion that when the stock for which the note was given was sold to the defendant by the plaintiff it was worthless and of no value in the market, and that it was still without market value, and had never had any such value from the time it was purchased, is a sufficient plea of want of consideration, in the absence of a special demurrer requiring a further statement of fact to back up and sustain the allegation that the stock was worthless. Had the consideration been some piece of machinery, or an agricultural implement, sold for a particular purpose, and the defendant desired to plead total failure of consideration, it would be necessary, of

course, to allege how, in what particular, or why the object purchased was not reasonably suited for the purposes intended or the consideration had failed; but here, where the thing sold was an intangible interest in a corporation, a plea setting up that this interest, represented by certain shares of stock, was absolutely worthless and unsalable at the time the defendant gave his note therefor, and was still worthless and unsalable in the market, certainly alleged a want of consideration. As was said in *Pidcock v. Crouch & Son*, 7 Ga. App. 299 (2c), 86 S. E. 971:

"Where a defendant sets up that the property purchased is wholly worthless, and that the consideration of the note given for the purchase price has wholly failed, the plea is sufficiently definite as to the extent of the failure, and, if proved, would authorize a total abatement of the purchase price."

The case of *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 86 S. E. 32, is quite different from the present case on the facts. That case went to trial, and the evidence not only developed that the defendant had bought the stock in question from an agent upon his representations as to its future market value, which depended upon the success of the enterprise, but it did not show that the stock was in fact worthless, even if it was not worth as much as the seller represented it to be. In the opinion it was said that the defendant knew that the statement of the agent as to the future value of the stock was a mere speculation upon the success of the enterprise, and that he took his chances when he purchased the stock; but, as also said in that opinion, "if the article sold be entirely worthless, the seller cannot collect the purchase price." In *McMillan v. First National Bank*, 13 Ga. App. 23, 78 S. E. 734, it was said as to a note given for the purchase price of mining stock:

"In order to sustain a plea of failure of consideration [the purchaser] must show that the payee of the note acted in bad faith, that the stock was worthless at the time the note was given, and that the payee knew this fact when the sale was negotiated."

In the present case the allegation is made that the payee knew at the time that he sold the stock that it was worthless, and it is alleged that by reason of the sale of this worthless stock to the defendant, when the plaintiff knew or ought to have known that it was worthless, he practiced a fraud on the defendant; in other words, acted in bad faith towards him. The plea appears, therefore, to come up to the measure prescribed in the *McMillan Case*, *supra*. In the *Pidcock Case*, *supra*, it was said that the plea—

"having alleged that the stallion was wholly worthless, and that therefore the consideration had totally failed, was sufficiently definite. If only a partial failure of consideration had been set up, it would have been necessary that the plea should be more specific as to the extent of the failure, and as to the facts from which the jury should calculate the amount by which the purchase price was to be abated."

Enough can be found in the original plea of the defendant in this case to make at least a clear and definite statement that the stock for which the note was given was altogether without value, and that the seller was aware of this fact at the time of the sale. What the proof may show, and how the case may finally present itself, is, of course, a matter which the future will alone develop; but the court erred in sustaining the demurrer and striking the original plea.

Judgment reversed.

(16 Ga. App. 545)

HILL PLANING MILL CO. v. HARDWOOD LUMBER CO. (No. 6197.)

(Court of Appeals of Georgia. May 17, 1915.
Rehearing Denied July 2, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1001—JUDGMENT—REVERSAL.

No error of law is complained of, there was evidence to support the judgment rendered, and this court cannot arbitrarily set that judgment aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3922, 3928-3934; Dec. Dig. \S 1001.]

Error from Municipal Court of Atlanta.

Action between the Hill Planing Mill Company and the Hardwood Lumber Company. From the judgment, the Hill Planing Mill Company brings error. Affirmed.

Dean E. Ryman, of Atlanta, for plaintiff in error. Hewlett, Dennis & Whitman, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 502)

McIVER v. STATE. (No. 6349.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

DENIAL OF NEW TRIAL.

The evidence, though weak as to the defendant's criminal intent, was sufficient to authorize the verdict, and, the trial court having approved it, his judgment refusing a new trial is affirmed.

Error from Superior Court, Liberty County; W. W. Larsen, Judge.

Carlos McIver was convicted of crime, and brings error. Affirmed.

Ben A. Way, of Hinesville, for plaintiff in error. W. F. Slater, Sol. Gen., of Savannah, for the State.

BROYLES, J. Affirmed.

(16 Ga. App. 401)

BONDS v. STATE. (No. 6372.)

(Court of Appeals of Georgia. June 3, 1915.)

(Syllabus by the Court.)

1. HIGHWAYS \S 166—USE OF MOTORCYCLES—REGULATION—OPERATION OF STATUTE.

The act of 1910 (Acts 1910, p. 90), amended in 1913 (Acts 1913, p. 75), regulating "the

running of automobiles, locomobiles, and other vehicles and conveyances of like character propelled by steam, gas, gasoline, electricity, or any power other than muscular power, upon the public and private roads of the state of Georgia," and providing for the registration and numbering of the same, the use of lights thereon, and regulating the running and speed thereof, etc., includes a motorcycle propelled by gasoline.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 457; Dec. Dig. \S 166.]

(Additional Syllabus by Editorial Staff.)

2. HIGHWAYS \S 166—"AUTOMOBILES"—VEHICLE OF LIKE CHARACTER—MOTORCYCLE.

The word "automobile" is derived from the Greek word "autos" meaning self, and the Latin word "mobilis," freely movable, signifying self-moving or self-movable, changing its own place or able to effect a change of its own place. The term "automobile" is applied generally to a self-moving vehicle designed to travel on common roads, and specifically, to a wheeled vehicle for use on roads without rails, which carries in itself a mechanical motor with its source of power. A "motorcycle" is a vehicle "of like character" with an automobile within the meaning of Acts 1910, p. 90, as amended by Acts 1913, p. 75, regulating the running of automobiles and other vehicles of like character.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 457; Dec. Dig. \S 166.]

For other definitions, see Words and Phrases, Second Series, Automobile.]

Error from City Court of Polk County; F. A. Irwin, pro hac, Judge.

Armstead Bonds was charged with violating Acts 1910, p. 92, \S 5, 6, regulating the running of automobiles, locomobiles, and other vehicles and conveyances of like character, and, a demurrer to the accusation being overruled, he brings error. Affirmed.

Wm. W. Mundy, of Cedartown, for plaintiff in error. J. A. Wright, Sol., and E. S. Ault, both of Cedartown, and I. F. Mundy, of Rock Mart, for the State.

WADE, J. Armstead Bonds was tried under an accusation charging him with a violation of the provisions of sections 5 and 6 of the act of 1910 (Acts 1910, p. 90), regulating the running of—

"automobiles, locomobiles, and other vehicles and conveyances of like character propelled by steam, gas, gasoline, electricity or any power other than muscular power, upon the public and private roads of the state of Georgia."

The accusation specifically charged that the accused, on a day named—

"with force and arms did then and there operate a motorcycle, same being a conveyance of like character to an automobile, being propelled by gasoline, on a public highway in said county, being the road leading to Rock Mart to Antioch in said county, and did then and there approach a sharp curve on said road, where one W. W. Carmichael was there with a team on said road, without then and there having said machine under control, and then and there operating same at a speed greater than six miles per hour, and did then and there approach upon said highway a team of mules then and there being driven by W. W. Carmichael on said public highway, without then and there giving any of the signals required by law, and did then and there fail to give

any warning whatever to prevent frightening said team of animals driven as aforesaid."

To this accusation the defendant demurred on several grounds, which amount altogether to a contention that a motorcycle is not a vehicle or conveyance "of like character" to an automobile, and therefore is not subject to the regulations relating to automobiles and conveyances "of like character," propelled by steam, gas, gasoline, electricity, "or any power other than muscular power, upon the public and private roads of the state of Georgia," and that the accusation failed to show or allege in what way or manner the motorcycle was "of like character" to an automobile, since no facts were stated to establish any similarity, and the statement in the accusation that it was "of like character to an automobile" was a mere conclusion. The court overruled the demurrer, and the defendant excepted. Section 1 of the act of 1910 aforesaid provides that it shall be unlawful for any person or persons, except in accordance with the provisions of that act—

"to run, drive, or operate any automobile, locomobile, or other vehicle or conveyance of like character, propelled by steam, gas, gasoline, electricity, or any power other than muscular power, and which said vehicle shall hereafter be called machines in this act, upon or along any public road, street, alley, highway, avenue, turnpike, or any private road or way generally used by the public of this state, except and until such person or persons shall comply with the provisions of this act."

Section 5 provides that:

"No person shall operate a machine on any of the highways of this state as described in this act at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property, and upon approaching a bridge, dam, high embankment, sharp curve, descent or crossing of intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than six miles per hour."

This court held in *Carter v. State*, 12 Ga. App. 430, 78 S. E. 205 (decided February 24, 1913), that so much of the act of 1910 regulating the use of automobiles as undertakes to make penal the operation of an automobile on the highways of this state "at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property," is too uncertain and indefinite in its terms to be capable of enforcement. In *Empire Life Insurance Co. v. Allen*, 141 Ga. 413, 415, 81 S. E. 120 (decided February 26, 1914), the Supreme Court rendered a decision to the same effect. The provision limiting the rate of speed to six miles per hour under certain circumstances has been recognized and declared valid as a penal provision. Section 6 of the act provides that:

"Upon approaching a pedestrian in a roadway or highway as described in this act, or a horse or horses or other draft animals being ridden or driven thereon the person operating

the machine shall give reasonable warning of its approach by the use of a bell, horn, gong, or other signal and use every reasonable precaution to insure the safety of such person or animal, and in the case of horses or other draft animals, to prevent frightening the same."

It is interesting to note that while section 1 of the act of 1910 expressly refers to "any automobile, locomobile, or other vehicle or conveyance of like character, propelled by steam, gas, gasoline," etc., and the title also sets forth that the act is intended to regulate the running of automobiles, locomobiles, and "other vehicles and conveyances of like character, propelled," etc., the amending act of 1913 (Acts 1913, p. 75) purports to amend the act of 1910 "regulating the running of automobiles, and other vehicles and conveyances, propelled by steam, gas, gasoline, electricity, or other power other than muscular power on the public and private roads of the state of Georgia," and the words "of like character" are omitted. However, whether the omission in the amending act of the words "of like character" be a straw which indicated the trend of the legislative mind, is immaterial, since it appears that the meaning of the act can be readily reached without resorting to "straws." According to Webster's New International Dictionary 1911, not only would a motorcycle be a vehicle or conveyance "of like character" with an automobile, but such a vehicle would itself be included under the term "automobile." "Automobile—an automobile vehicle or mechanism; especially a self-propelled vehicle suitable for use on a street or roadway." The same authority defines "motorcycle" as "a bicycle having a motor attached so as to be self-propelled." It is true the New Standard Dictionary (1913) defines "automobile" to be "a self-propelling four-wheeled vehicle which travels on roadways or streets," but it will be found, from an examination of the authorities hereinafter referred to, that in the construction of statutes, and in the interpretation generally of the term "automobile" by the courts, a motorcycle is ordinarily included, as is also any other self-propelled vehicle or conveyance not running on tracks; or, in other words, it appears that while the most usual and ordinary meaning attached to the word "automobile" is a self-propelled vehicle having four wheels, not running on tracks, such a vehicle carrying freight and passengers, may be in contemplation of law an "automobile," regardless of whether it has two, three, four, or more wheels.

[1, 2] The word "automobile" is derived from the Greek word "autos," meaning self, and the Latin word "mobilis," freely movable, signifying self-moving or self-movable, changing its own place, or able to effect a change of its own place.

"The term automobile, therefore, is derived from the Greek and Latin, and in modern English is applied generally to a self-moving vehicle designed to travel on common roads, and specifically, to a wheeled vehicle for use on roads without rails, which carries in itself a mechanical motor with its source of power."

Berry on Automobiles, 1; Century Dict., Automobile.

"Automobile is the generic name which has been adopted by popular approval for all forms of self-propelling vehicles for use upon highways and streets for general freight and passenger service. However, this definition should not include such self-propelling machines * * * as require tracks for their operation. In popular meaning, or as commonly understood, an automobile is a motor vehicle usually propelled by steam, electricity, or gasoline, and carrying its own motive power within itself. Concerning the use of highways, as provided in some laws, the automobile falls within the appellation of 'carriage' and 'vehicle.' Automobiles are distinguishable from locomotives and [ordinary slow-moving] traction engines by carrying loads instead of drawing them in other vehicles." Berry on Automobiles, 2.

In the same work (page 2, § 3) it is said that the term "automobile" as used therein, while it excludes the steam road roller, and such vehicles as run only on tracks or rails, as well as the flying machine, "includes the automobile bicycle and automobile tricycle."

"Unless expressly excluded, the motorcycle falls within the definition of the 'automobile' as the term has been used by the various state Legislatures, and also within the general definition as heretofore given. * * * The number of wheels of an automobile may be two, and then the term 'bicycle' is applied, or 'automobile bicycle,' as sometimes called, or three, when it is called 'tricycle' or 'automobile tricycle,' or four or more. Those with four wheels is the most usual form." Id. 5, §§ 5, 6.

"An automobile may be defined as a wheeled vehicle, propelled by steam, electricity, or gasoline, and used for the transportation of persons or merchandise. The courts, without making clear distinctions, have generally used the term 'automobile,' 'motor vehicle,' 'motor car,' and in the earlier cases, 'horseless carriage,' as being synonymous with each other. Except where special provision is made to the contrary, a motorcycle is considered as falling within statutes which use such terms." 2 Ruling Case Law, 1167, § 3.

This court, in *Carter v. State*, supra, said:

"The term 'automobile' has a definite popular significance, and is understood to refer to a wheeled vehicle, propelled by gasoline, steam, or electricity, and used for the transportation of persons or merchandise."

Passing from the discussion as to whether a motorcycle is included under the generic term "automobile," we come to the consideration of the precise point raised by the demurrer: Is a motorcycle a vehicle "of like character" with an automobile, as charged in the accusation? In the first place, regard must be had, as in construing any other act of the Legislature, to the intention actuating the lawmakers. While it has been said that:

"An automobile is not classified with dangerous instrumentalities, such as dynamite, gunpowder, ferocious animals, and the like, so as to make the owner liable for injury occurring from the running of the automobile, on the same basis that an owner of such an instrumentality would be liable for an injury occasioned by it" (*Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618 [1])—

it is said in the same case (139 Ga. 511, 77 S. E. 619) that:

"Owing to the nature and construction of the machines and the employment of steam, gaso-

line, or electricity as a motive power, certain dangers naturally arise from their use and operation, and those who operate them must exercise that degree of care which is commensurate with the dangers naturally incident to such use."

See, also, *O'Dowd v. Newnham*, 13 Ga. App. 220-229, 80 S. E. 36.

And in *Williams v. Raper*, 139 Ga. 811-813, 78 S. E. 253, 254, the Supreme Court said:

"It is urged that the use of the phrase, 'it being a dangerous machine,' was prejudicial and calculated to impress the jury that because of its dangerous quality the defendant was bound to exercise a greater degree of care than the law imposed. We do not think so. The General Assembly, in recognition of the character of the machine, its power and capabilities of speed, and possible danger to pedestrians and horse-drawn vehicles in its operation, have seen fit to enact a statute regulating the speed and manner of operation of automobiles on the public highways. Acts 1910, p. 90. The statement by the court of a reason for the enactment of the law, though not commended, was not so improper as to require a new trial, under the facts of the case."

This court in *Sheppard v. Johnson*, 11 Ga. App. 280-282, 75 S. E. 848, 849, said:

"The great object and purpose of the act of 1910, was to require the drivers of automobiles to so handle their motors as to protect pedestrians and other persons on the highway. The act recognizes that the driver of an automobile has an equal right to the public highway with any other person, but it is provided that this right shall be exercised only in the manner and upon the terms and conditions prescribed by that act."

In *Elsbery v. State*, 12 Ga. App. 86, 76 S. E. 779, this court again said:

"The purpose of the act approved August 13, 1910, regulating the use of automobiles, is to protect pedestrians and others lawfully on the highways of this state against the consequences of the negligent and improper operation of automobiles."

It is therefore clear that the intention of the General Assembly, in passing the act of 1910, regulating the use on the public highways of this state of automobiles and other vehicles of like character, was to protect pedestrians and others traveling upon such highways from the dangers incident to the careless use of such self-propelled vehicles; or, in other words, the object of the statute was to protect the public at large from the dangers incident to a reckless, ignorant, or careless use of vehicles recognized as dangerous under certain circumstances. The danger to others which arises from the use of an automobile or vehicle of like character depends in part upon the rapid rate of speed at which such vehicles ordinarily travel, or of which they are at least generally capable, the noise usually accompanying their operation, which is calculated to frighten horses or other animals traveling along the public highways, and the difficulty with which they may be guided and controlled when running at a high rate of speed, so as to avoid collisions with persons or teams on the high-

way. It is a matter of common knowledge that a motorcycle propelled by gasoline is capable of as high or a higher rate of speed than may be attained by a four-wheeled automobile; and it is equally well known that a motorcycle is even more noisy and is a more alarming object to country-bred domestic animals than is a larger type of automobile.

We may easily conclude that since the primary purpose of the Legislature was to protect pedestrians and others on the highways, a motorcycle is a vehicle "of like character" with an automobile, so far as the act of 1910 is concerned; as the use of a motorcycle on the public highways without check or regulation would bring about or produce the identical dangerous situations and possibilities that the use of the four-wheel automobile might produce. It is immaterial, so far as frightening a horse on the roadway is concerned, whether the self-propelled machine which approaches at an unlawful rate of speed, wrapped in a cloud of smoke, emitting and accompanied by the vile smell of exploding gasoline, runs on two wheels or four; for it may not be imagined that a horse which would take fright at a four-wheel vehicle would not be equally frightened at the too rapid approach of a two-wheel vehicle "of like character," so far as its capacity for rapid movement, its noise, and its smell are concerned. Again, pedestrians and others might be in equally great or greater danger from a gasoline-propelled motorcycle than from an automobile, conceding that they both make the same amount of noise, if either approached at a rapid rate of speed around a sharp curve in the road, as charged in the indictment in this case.

It would be fruitless to multiply words further, as the matter may be summed up in the simple statement that since (according to repeated rulings of this court) the object of the Legislature in passing the act of 1910 was to protect pedestrians and others from automobiles and other vehicles of like character propelled by gasoline, etc., a motorcycle—a vehicle which is propelled by gasoline, and which, when not regulated in accordance with law, is, according to common knowledge (of which this court must take judicial cognizance), more dangerous to the general public traveling on the highways than ordinary horse-drawn vehicles or others propelled by muscular force would be, is, in contemplation of law, a vehicle "of like character" with an automobile, also propelled by gasoline, also capable of high and dangerous speed, likewise noisy and calculated to frighten teams, and difficult to guide or arrest quickly when traveling at a too rapid rate of speed. We, therefore, hold that the court did not err in overruling the demurrer to the accusation.

Judgment affirmed.

(16 Ga. App. 459)

SIMMONS v. NEWSOME. (No. 5996.)
(Court of Appeals of Georgia. June 12, 1915.)

(Syllabus by the Court.)

PLEADING ~~§~~354—**STRIKING OUT ANSWER—ACTION ON NOTES.**

The court did not err in striking the answer and in rendering judgment in favor of the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. ~~§~~354.]

Error from City Court of Springfield; Wm. M. Farr, Judge.

Action by S. O. Newsome against W. S. Simmons. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Smith, of Eden, for plaintiff in error.
Paul E. Seabrook, of Savannah, for defendant in error.

BROYLES, J. S. O. Newsome sued W. O. Simmons on nine promissory notes aggregating the sum of \$270 principal. When the case came on for trial counsel for plaintiff made an oral motion to strike the defendant's answer, on the ground that it set up no valid defense. The court sustained the motion, and rendered judgment against the defendant; whereupon the defendant excepted. The plaintiff's petition alleged:

"(2) That W. S. Simmons is indebted to said S. O. Newsome in the sum of \$270, besides interest thereupon at 6 per cent. per annum from November 19, 1910, and besides 10 per cent. on the whole amount as attorney's fees; said sum representing the aggregate principal of nine promissory notes, copies of which are hereto attached marked Exhibits A, B, C, D, E, F, G, H, and I, respectively.

"(3) That all of said nine promissory notes are past due, and the said W. S. Simmons refuses to pay them or any one of them.

"(4) Petitioner further shows that ten days' notice to collect attorney's fees has been given defendant, a copy of which is hereto attached marked Exhibit J, and made a part of this petition."

The defendant answered as follows:

"(2) Defendant admits the execution of the notes named in paragraph 2 of plaintiff's petition, but denies that he is due plaintiff any sum on said notes, for the reason that plaintiff, by false and fraudulent representations, induced defendant to sign and deliver to plaintiff said notes, said notes being signed by defendant and delivered to plaintiff in part payment for 206 shares of stock in the Effingham Telephone & Telegraph Company, which said stock plaintiff represented was free from any and all incumbrances and liens of any kind, and upon said false and fraudulent representations induced defendant to purchase said 206 shares of stock at the par value of \$10 per share, the said representations being false and fraudulent, the said plaintiff well knowing at the time said representations were made that the Citizens' Bank of Guyton, Ga., held a lien, mortgage, or other evidence of debt over and on said stock to the amount of \$8 per share; wherefore defendant should not be called upon to pay said notes or any part thereof, said notes having been thus fraudulently obtained from defendant.

"(3) Defendant admits paragraph 3 of plaintiff's petition.

"(4) Defendant admits paragraph 4 of plaintiff's petition.

"(5) And for further plea and answer in his behalf defendant invokes the equitable intervention of this honorable court, and for equitable plea and answer says:

"(6) That in the month of November, 1910, plaintiff proposed to sell defendant 206 shares of the stock of the Effingham Telephone & Telegraph Company at and for the par value of \$10 per share or a total of \$2,060, for said 206 shares of stock; that at the time plaintiff offered to sell defendant said stock plaintiff represented and told defendant that said stock was clear of debts and free from all incumbrances, and that there were no claims or demands against the same outstanding except current operating expenses, and that the net earnings of said telephone company was \$100 per month, and that the stock plaintiff offered to defendant was earning from \$30 to \$40 per month; that defendant told plaintiff he did not have the available funds sufficient to purchase said stock, and plaintiff then and there told defendant that, if he (defendant) would raise \$800 and pay \$800 cash, he (plaintiff) would make easy monthly payments on the balance, so that the earnings of said stock would take care of the payments accruing on the deferred payments.

"(7) That, acting on these representations of plaintiff, defendant bought said 206 shares of stock from plaintiff, and paid plaintiff \$800 cash, and executed and delivered to plaintiff 42 promissory notes for \$30 each, payable in installments every 30 days.

"(8) That said plaintiff gave defendant a conditional bill of sale to said 206 shares of stock, retaining title in himself until said notes were all paid, the said transaction being closed up during the month of December, 1910.

"(9) That plaintiff then and there delivered to W. O. Roberts, cashier of the Effingham County Bank, the certificates for said 206 shares of stock in said company.

"(10) That defendant in good faith, relying on plaintiff's said representations, paid said \$800 in cash and gave said 42 notes for the said deferred payments, and was well and truly in good faith paying said notes as they fell due, when this defendant discovered and learned that said stock was indebted, pledged, and incumbered to the Citizens' Bank of Guyton, Ga., to the extent of \$6 per share, and that the 206 shares that defendant had bought from plaintiff was liable to said Citizens' Bank of Guyton, Ga., for the sum of \$1,236.

"(11) That defendant, upon learning of this indebtedness and incumbrance on said stock, immediately notified and told plaintiff of his discovery, and demanded that plaintiff remove, discharge, release, and free said 206 shares of stock from said indebtedness to said bank, and plaintiff then and there agreed and promised defendant that he would do so, and told defendant he would give defendant a discount on said unpaid notes to meet the said debt at said bank.

"(12) That defendant, in good faith, and relying on plaintiff's said representations and promises, got up the money to pay said debt at said bank, and was ready to take up said indebtedness to said bank and settle with plaintiff, whereupon plaintiff informed defendant, when defendant made demands for the return of said unpaid notes, he said plaintiff informed defendant that he had traded off said notes, and no longer held them. * * *

"(14) That by reason of this statement of plaintiff that he had traded off said notes, and the fact that said notes then presented afterwards were presented by the Merchants' & Farmers' Bank of Boston, Ga., this defendant paid said notes thus in the hands of innocent parties.

"(15) That in July, 1914, plaintiff told defendant that he had regained possession of the remaining balance of said notes, having again

become the owner of said notes, and that since which time plaintiff informed defendant that he was the holder of said notes again defendant has refused to pay any more of said notes for the reasons herein stated.

"(16) That defendant, by reason of the false and fraudulent representations made by plaintiff to defendant as herein stated, has wrongfully and fraudulently induced, caused, and influenced defendant to sign said nine notes as sued upon, and in equity and good conscience defendant should not be called upon to pay the same, except by way of accounting, in arriving at the amount that defendant should recover from plaintiff by reason of his false and fraudulent representations.

"(17) That defendant, by reason of the said false and fraudulent representations made by plaintiff to defendant as herein related, has wrongfully and fraudulently caused and forced defendant to contribute and to pay the said indebtedness of \$6 per share, or a total of \$1,236, to the Citizens' Bank of Guyton, Ga., in order that said stock would be free from said debt, and that in equity and good conscience defendant should have judgment and recover from plaintiff said \$1,236, less the sum represented by said 9 notes as sued upon, to wit, \$270, leaving a balance of \$966 that defendant has been actually defrauded out of by plaintiff by reason of said false and fraudulent representations as made by plaintiff, and for which amount, to wit, \$966, defendant prays that he have judgment for against plaintiff in excess and over any amount he may be due plaintiff on said notes; and that.

"(18) Plaintiff be required to produce and surrender in the registry of the court the certificates to said 106 shares of stock as now held by him," etc.

It will be seen, from the above pleadings, that the notes sued on represent the balance due on the purchase price of 206 shares of capital stock in the Effingham Telephone & Telegraph Company, which were sold to the defendant by the plaintiff, the full purchase price being \$2,060, upon which \$800 was paid in cash at the time of the transaction, to wit, November 19, 1910, and the remainder, \$1,260, being represented by 42 notes for \$30 each, the last maturing August 1, 1914. It will be seen, therefore, that the length of time intervening between the purchase of this stock and the maturity of the last note is three years and nine months, and it will also be noted that all of the 42 notes originally given have been paid, except the 9 which are involved in this suit; and, so far as the pleadings show, the 33 notes were paid without any complaint. In paragraph 2 of the defendant's plea it is alleged that the purchase of the 206 shares of stock was induced by the false and fraudulent representations of the seller; who at the time well knew "that the Citizens' Bank of Guyton, Ga., held a lien, mortgage, or other evidence of debt over and on said stock [the time referred to being November 19, 1910]." It would seem that unless the answer alleged that the Citizens' Bank of Guyton now held such lien, mortgage, or other evidence of debt upon said stock, and was specific as to the nature of the lien, and that by reason of it the plaintiff was unable now to deliver said stock, this allegation would not be defensive against a suit now instituted upon

these remaining 9 notes. It is alleged in paragraph 8 of the answer that:

"The said transaction was closed up during the month of December, 1910."

And in paragraph 9 that:

"Plaintiff then and there delivered to W. O. Roberts, cashier of the Effingham County Bank, the certificates for said 206 shares of stock in said company."

This would indicate, to our minds, that, if the Citizens' Bank of Guyton had a lien or mortgage on the 206 shares of stock on November 19, 1910, this lien must have been discharged during the month of December, 1910, to have enabled the plaintiff to deliver the stock to Roberts, the cashier of the Effingham County Bank. The Citizens' Bank of Guyton, if, in fact, it had a lien upon the certificates of stock, must also have held physical possession of them, because the law is well established that, when a bank holds a lien, mortgage, or other evidence of debt over and on certificates of capital stock, it is also presumed to hold possession of the stock as collateral security for the debt. Especially is this conclusion justified when, in paragraph 10 of the answer, the defendant says that:

"Said stock was indebted, pledged, and incumbered to the Citizens' Bank of Guyton, Ga."

In the same paragraph the defendant alleges also that:

"The 206 shares that defendant had bought from plaintiff was liable to said Citizens' Bank of Guyton, Ga., for the sum of \$1,236."

But he fails to suggest how it was liable, or when the discovery was made by him that it was so liable. In paragraph 17 it is alleged by the defendant that by reason of the said false and fraudulent representations made to him by the plaintiff he was forced to contribute and pay the said indebtedness of \$6 per share, or a total of \$1,236, to the Citizens' Bank of Guyton, in order that said stock would be free from said debt; but it is not alleged when this payment was made, how it was made, or whether the payment released the stock, and, if so, to whom it was released by the bank. Neither does the defendant anywhere in his answer plead that the alleged indebtedness of \$1,236 was an indebtedness of the plaintiff, or an indebtedness which the defendant was called upon to pay to enable the plaintiff to deliver the certificates of stock upon the payment of the purchase price. In paragraph 18 the defendant prays that:

"Plaintiff be required to produce and surrender in the registry of the court the certificates of said 206 shares of stock, as now held by him."

Giving every reasonable construction to the answer, it, in our opinion, fails to establish that at the time of the maturity of the notes sued upon the plaintiff was unable to deliver the stock on payment of the notes; nor is it shown that the alleged \$1,226 was a debt due by the plaintiff, and one

which it was necessary for the defendant to pay in order that the plaintiff might be enabled to deliver the stock. It will also be seen that the alleged representations set out in paragraph 6 of the answer, as to the earning capacity of the stock, are nowhere alleged to be untrue, and that the only representation of which the defendant complains is the representation that the stock was clear of debt and free from incumbrances, and that there was no claim or demand outstanding against it, except current operating expenses. This representation was made nearly four years prior to the maturity of the notes sued upon, and the defendant alleges that, in order to free the stock from an indebtedness of \$1,236, he, at some time unknown, had to pay that amount to the Citizens' Bank of Guyton, and yet, by the express allegation of the defendant himself, the stock is now in the hands of the plaintiff, and the defendant asks that the plaintiff be required to deposit it in the registry of the court.

In the absence of allegations in the answer that the indebtedness of \$1,236 alleged to have been paid by the defendant to the Citizens' Bank of Guyton, was an indebtedness of the plaintiff, and that the said indebtedness was secured by this stock, so that before the plaintiff could deliver it to the defendant it was necessary to pay this indebtedness, or that the payment was authorized by the plaintiff, the law will assume that the alleged payment by the defendant to the bank was a voluntary act upon his part, unauthorized by the plaintiff, and not demanded by the law, and that it could not be considered or applied as a credit upon the notes sued on.

In our judgment, the answer does not set up a good defense to the suit, and it was properly stricken by the court; and there was no error in awarding judgment to the plaintiff.

Judgment affirmed.

(16 Ga. App. 425)

BRINSON RY. CO. v. EXCHANGE BANK OF SPRINGFIELD et al. (No. 5876.)

(Court of Appeals of Georgia. June 11, 1915.)

(Syllabus by the Court.)

1. BILLS AND NOTES — 335 — RAILROADS — 18, 145 — RIGHTS OF HOLDER — NOTE EXECUTED FOR UNAUTHORIZED PURPOSE — NOTICE — DONATION.

The powers of a corporation organized under the general railroad law are such only as the statute confers. A corporation thus created may do all things necessary for the legitimate execution of the purposes for which it was chartered. Civil Code 1910, § 2216. As indicating the legislative policy in this regard as to corporations generally, see Civil Code, § 2823, par. 5. And see *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13, 54, 55; *Screven Hose Co. v. Philpot*, 53 Ga. 625-627. "Every corpora-

tion must act according to its nature; a trading corporation must trade, a manufacturing corporation must manufacture, a banking corporation must bank, a transportation corporation must carry," etc. *Harriman v. First Bryan Baptist Church*, 63 Ga. 186, 195, 36 Am. Rep. 117.

(a) It was beyond the powers of the president of a railway company incorporated under the general laws of Georgia as a common carrier, either with or without the consent of its board of directors, to donate funds belonging to the corporation, or to execute in the corporate name a note to be discounted in behalf of or to raise funds as a recognized donation for the erection of a public school, or for the purpose of building up or promoting the town in which the school is situated, even though the school or town be located on the line of the company's railway and its transportation business might thereby be increased. A note executed for such a purpose could not bind the corporation, where the president of the bank to which it was made payable, who "O. K.'d" it and authorized his bank to accept and discount it, had full notice of the purpose for which it was given and that it was a mere donation, and the cashier of a branch of the said bank, who actually accepted and discounted the note for the bank (the original payee), was directed at the time by the president of the railway corporation, who executed the note in its name or behalf, to place the proceeds thereof to the credit of a certain school, on the books of the payee bank, and the payee therefore had full notice of the unauthorized purpose for which the note was given. See *Military Interstate Association v. Savannah, etc., Railway*, 105 Ga. 420, 31 S. E. 200, where the Supreme Court treated as ultra vires and void a subscription by a railway corporation to the capital stock of a corporation organized to furnish amusement to the public at a point on the line of the railway, and which therefore might incidentally increase the transportation business of the railway. See, also, *Savannah Ice Co. v. Canal-Louisiana Bank*, 12 Ga. App. 818, 79 S. E. 45.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 817; Dec. Dig. ¶¶ 835; *Railroads*, Cent. Dig. §§ 39-44, 456, 457; Dec. Dig. ¶¶ 18, 145.]

2. BILLS AND NOTES ¶¶ 348, 367—NOTE PAYABLE ON DEMAND—DEFENSES—ULTRA VIRES.

"Bills, notes, or other paper, payable on demand, are due immediately." Civil Code 1910, § 4292. "The purchaser of such a note, even if the same is by its terms a negotiable instrument, takes it subject to the equities between the original parties." *Hotel Lanier Co. v. Johnson*, 103 Ga. 605 (3), 30 S. E. 558.

(a) The plaintiff acquired the note sued upon by transfer "without recourse" from the original payee (Sardis Branch of Citizens' Bank of Sylvania), and, since the note was payable on demand, took it subject to all equities between the original parties, including the defense of ultra vires interposed by the railway company.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 870-877½, 947, 948; Dec. Dig. ¶¶ 348, 367.]

3. DIRECTION OF VERDICT AND DENIAL OF NEW TRIAL DISAPPROVED.

The court therefore erred in directing a verdict in favor of the plaintiff, and also in overruling the motion for a new trial.

Error from City Court of Sylvania; H. A. Boykin, Judge.

Action by the Exchange Bank of Springfield and others against the Brinson Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Hitch & Denmark, of Savannah, and *White & Lovett*, of Sylvania, for plaintiff in error. *J. W. Overstreet* and *E. K. Overstreet*, both of Sylvania, and *Paul E. Seabrook*, of Savannah, for defendants in error.

WADE, J. Judgment reversed.

(143 Ga. 512)

MORRIS v. MOORE. (No. 365.)

(Supreme Court of Georgia. June 17, 1915.)

(Syllabus by the Court.)

BROKER'S COMMISSION.

This case is controlled by the decision in the case of *Toole v. Wiregrass Development Co.*, 142 Ga. 57, 82 S. E. 514.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Miss Willie A. Morris against G. R. Moore. Judgment for defendant, and plaintiff brings error. Reversed.

Miss Willie A. Morris brought suit against G. R. Moore, a real estate agent, on an alleged contract, by the terms of which he agreed to pay her 50 per cent. of the commission that was paid to him on sales of real estate, where the plaintiff helped in making such sale. In the instant case it was alleged and proved that the plaintiff was instrumental in bringing about the sale of the property the commissions on which are in controversy. The defendant answered and averred, among other things, that the plaintiff had not paid to the ordinary of Fulton county a license tax as required of a real estate agent in Fulton county, and therefore was not entitled, under the law, to commissions on real estate sales effected by such agent. At the conclusion of the testimony for the plaintiff, which was in support of her petition, the court granted a nonsuit, on the ground that the plaintiff had failed to register with the ordinary of Fulton county as a real estate agent, and to pay the tax required of such agents. To this judgment the plaintiff excepted.

Etheridge & Etheridge, of Atlanta, for plaintiff in error. *Brantley, Jones & Brantley*, of Atlanta, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(143 Ga. 516)

S. L. MITCHELL AUTOMOBILE CO. et al. v. McDANIEL. (No. 368.)

(Supreme Court of Georgia. June 18, 1915.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF ¶ 58—SERVICE—RIGHT TO OBJECT—WAIVER.

An acknowledgment of service on a bill of exceptions, without reserving the right to object to the sufficiency of service, is a waiver of the right to urge a dismissal of the writ of error because it was not served or the acknowledgment of service obtained thereon within the period allowed by statute. Acts 1911, p. 149,

§ 4: Jones v. Patterson, 138 Ga. 862, 76 S. E. 378.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100-105; Dec. Dig. ¶ 58.]

2. EVIDENCE ¶ 258, 317—DECLARATIONS OF AGENT—HEARSAY.

This suit was brought against the S. L. Mitchell Automobile Company and Frank Mitchell. The defendant company was not declared to be either a corporation or a partnership. Its name imported a corporation, and, having made answer to the petition, in the decision of this case it will be deemed to have been a corporation. The court allowed in evidence certain declarations of a person whom the witness said was pointed out to him as the general manager of the corporation, made pending negotiation for a compromise of a proposed suit for damages, and embracing certain admissions as to liability on the part of the corporation. This agent was not shown to have authority to bind the corporation; and it was error to receive such declarations made after the injury. The admission of such evidence against the other defendant (against whom a verdict was also returned) was error, because as to him it was purely hearsay; it not being pretended that the declarant had authority to represent in any way the other defendant. This ruling covers other assignments of error objecting to certain testimony because not shown to have been statements made by one authorized to bind the defendants.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007, 1174-1192; Dec. Dig. ¶ 258, 317.]

3. EVIDENCE ¶ 258—AUTHORITY OF AGENT.

The fact that one is authorized to sign a replevy bond for a corporation is not proof that he has authority to represent the corporation in making an admission of liability with respect to a tort alleged to have been committed by it; and the allowance of such bond in evidence for that purpose, over objection, is error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. ¶ 258.]

4. NEW TRIAL GRANTED.

The errors pointed out require the grant of a new trial.

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by Phoebe McDaniel against the S. L. Mitchell Automobile Company and another. Judgment for plaintiff, and defendants bring error. Reversed.

W. H. Payne, of Chattanooga, Tenn., for plaintiffs in error. W. E. Mann, of Dalton, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(101 S. C. 280)

STATE v. ROGERS. (No. 9117.)

(Supreme Court of South Carolina. June 8, 1915.)

1. EVIDENCE ¶ 576—EVIDENCE AT FORMER TRIAL.

The rule in civil cases is that the evidence of a witness who has been examined on a former trial may be introduced on a second trial, where the point in issue is the same, where the witness is dead, insane, beyond seas, or where the court is satisfied that he has been kept away by the contrivance of the opposite party; but

such exceptions do not extend to the evidence of a witness whose only excuse for not testifying was that he was too unwell to make the trip.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2401-2405; Dec. Dig. ¶ 576.]

2. CRIMINAL LAW ¶ 662—TRIAL—CONFRONTATION OF WITNESSES.

The admission of such evidence does not contravene the constitutional provision that in all criminal prosecutions the accused shall be confronted with the witnesses against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538-1548; Dec. Dig. ¶ 662.]

3. CRIMINAL LAW ¶ 1170½—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for malicious injury, a mode of cross-examination enabling the state indirectly to introduce in evidence the testimony of witnesses on the former trial, which was inadmissible, was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. ¶ 1170½.]

Appeal from General Sessions Circuit Court of Marlboro County; John S. Wilson, Judge.

Walter Rogers was convicted of malicious injury, and he appeals. New trial.

The assignments of error were as follows:

"First. Because his honor erred in allowing a copy of a transcript of the testimony of a witness, John Johnson, taken at a former trial, to be put in evidence upon the trial of the defendant; it being respectfully submitted that it was error on the part of the trial judge to admit this testimony for the following reasons: (1) The testimony of a witness at a former trial is inadmissible in a subsequent trial in this state. (2) The proper foundation was not laid under the law in those states where such testimony is permitted. (3) A copy of a transcript of the testimony is inadmissible unless it should be shown that the original transcript has been lost, or is beyond the reach of the court.

"Second. (1) Because his honor, the presiding judge, committed error in allowing the attorney for the state on a cross-examination to read from the transcript of the testimony of Ike Dudley, a witness at the former trial, who was present at court, but who was incompetent as a witness by reason of the fact that he was disqualified; it being respectfully submitted that it was error to permit the attorney for the state to bring before the jury testimony which was inadmissible and incompetent and to allow the state in this indirect way to get incompetent testimony before the court. (2) Because his honor committed error in allowing the attorney for the state to read from the transcript of the testimony of Hattie Rogers, a witness who testified at the former trial, and who was present in court, and whose testimony could have been obtained by the state; it being respectfully submitted that the reasons assigned for not placing this witness upon the stand were invalid and that the state could not in this way impeach the testimony of their own witness at a former trial by creating the impression that if this witness would go upon the stand she would swear falsely, because of the facts stated by attorney for the state; it being the presumption of law that a witness will testify to the truth, and it being further submitted that the state could not in this indirect way secure the testimony of this witness, Hattie Rogers, and thus deny the defendant the right of the full and complete cross-examination.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"Third. Because the testimony of John Johnson, Ike Dudley, and Hattie Rogers were improperly admitted in evidence."

J. K. Owens, of Bennettsville, for appellant. J. Monroe Spears, Sol., of Darlington, and D. D. McColl, Jr., of Bennettsville, for the State.

GARY, O. J. The defendant was convicted under an indictment charging him with malicious injury, and appealed to the Supreme Court, which reversed the judgment of the circuit court and remanded the case for a new trial. 96 S. C. 350, 80 S. E. 620. Upon his second trial, the defendant was again convicted, and he has appealed to this court on two assignments of error, which will be reported.

[1, 2] First Exception. The well-established rule in civil cases in this state is that the evidence of a witness who has been examined on a former trial, and where the point in issue is the same, may be introduced on a second trial: (1) Where the witness is dead, (2) insane, (3) beyond seas, and (4) where the court is satisfied that the witness has been kept away by the contrivance of the opposite party. *Wells v. Drayton*, 1 Nott & McC. 409, 9 Am. Dec. 718; *Petrie v. Railroad*, 29 S. C. 303, 7 S. E. 515; *McCall v. Alexander*, 84 S. C. 187, 65 S. E. 1021. This rule does not contravene the constitutional provision that in all criminal prosecutions the accused shall be confronted with the witnesses against him. *Cooley's Con. Lim. c. 10*, p. 387. In the case of *State v. Campbell*, 1 Rich. 124, it was held that the testimony of a witness, examined on a coroner's inquest, in the absence of the prisoner, though taken down in writing by the coroner, signed by the witness, and returned to the clerk, was not competent evidence against the prisoner, on a trial for murder, after the death of the witness; but the reason why such testimony was not admissible was because the defendant did not have the opportunity of subjecting the witness to a cross-examination. The authorities elsewhere are conflicting, as will be seen by reference to the numerous cases cited in the notes to *Cline v. State*, 61 Am. St. Rep. 850, and *State v. Heffernan*, 25 L. R. A. (N. S.) 873. The testimony of the witness in the present case did not fall within any of the exceptions that rendered it admissible, and this assignment of error is sustained.

[3] Second Exception. This exception must be sustained for the reason that the mode of cross-examination therein mentioned enabled the state to introduce in evidence, indirectly, the testimony of witnesses on the former trial, which, as already shown, was inadmissible.

New trial.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

SHOOK v. ENGLISH LUMBER CO.

(No. 548.)

(Supreme Court of North Carolina. May 19, 1915.)

Appeal from Superior Court, Buncombe County; Cline, Judge.

Action by Joyce Shook against the English Lumber Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Walter E. Moore, of Sylva, Zeb F. Curtis, of Asheville, and S. Brown Shepherd, of Raleigh, for appellant. Flowers & Jones, of Charlotte, for appellee.

PER CURIAM. Upon an examination of the record, evidence, and assignments of error in this case, the court is of opinion that the motion to nonsuit was properly allowed.

Affirmed.

(76 W. Va. 431)

WAIT v. HOMESTEAD BUILDING ASS'N et al. (No. 2698.)

(Supreme Court of Appeals of West Virginia. June 1, 1915.)

(Syllabus by the Court.)

1. CORPORATIONS — 288 — OFFICERS — FIDELITY BOND — DEFAULTS COVERED.

The fidelity bond of an officer or agent of a private corporation, conditioned generally for faithful performance of the duties of his office or employment, is construed to cover defaults in such duties as are annexed to the office or employment at the time of the execution thereof and such additional ones as shall be subsequently annexed to it in the exercise of corporate power.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1248; Dec. Dig. — 288.]

2. PRINCIPAL AND SURETY — 79 — OFFICERS — FIDELITY BOND — LIABILITY OF SURETIES.

The sureties are deemed to have known such additional duties could and might be annexed, and to have contracted with reference thereto.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 125; Dec. Dig. — 79.]

3. CORPORATIONS — 57 — PRINCIPAL AND SURETY — 79 — OFFICERS — AMBIGUOUS BY-LAW — FIDELITY BOND — LIABILITY OF SURETIES.

Interpretation of an ambiguous by-law of a private corporation is a function within the province and power of the board of directors, and, in so far as such power affects the liability of the sureties of an officer or agent of the corporation, they are deemed to have been cognizant of it, and to have contracted with reference thereto.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 157-159; Dec. Dig. — 57; *Principal and Surety*, Cent. Dig. § 125; Dec. Dig. — 79.]

4. CORPORATIONS — 57, 397 — BY-LAWS — CONSTRUCTION BY DIRECTORS — AUTHORITY OF OFFICERS.

No formality is essential to the devolution of power or authority upon a corporate officer by the board of directors, or to their construction of an ambiguous by-law. Such results may arise from conduct and methods of transacting business.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 157-159, 1585, 1586, 1588, 1589, 1596-1601; Dec. Dig. — 57, 397.]

5. BUILDING AND LOAN ASSOCIATIONS ⚡5—
AMBIGUOUS BY-LAW—CONSTRUCTION.

By-laws of a building association requiring weekly meetings of the board of directors for the purpose of receiving dues and other demands from the stockholders and attendance of the treasurer thereat, but not expressly inhibiting him from receiving dues at other times and places, is ambiguous and subject to construction by the directors and officers of the corporation.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 5; Dec. Dig. ⚡5.]

6. BUILDING AND LOAN ASSOCIATIONS ⚡23—
AUTHORITY OF TREASURER—ACQUIESCENCE
OF DIRECTORS.

The authority of the treasurer of an association operating under such a by-law to receive dues, premiums, interest, and fines, for and on its behalf, at times and places other than those of the weekly meetings, is established by proof of his having done so for a long period of time, with the knowledge and acquiescence of the board of directors.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 27-31; Dec. Dig. ⚡23.]

7. PRINCIPAL AND SURETY ⚡42, 123—
DEFAULT OF OFFICER—CONSTRUCTIVE NOTICE—
DUTY OF CORPORATION—SURETIES.

Mere constructive notice to a corporation of a default on the part of an officer or employee imposes no duty upon it to give notice thereof to his sureties or dismiss him from its service. Nor does such notice impose duty to make the default known to persons who are about to become his sureties in a subsequent bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 86-90, 304-311; Dec. Dig. ⚡42, 123.]

8. PRINCIPAL AND SURETY ⚡42—FIDELITY
BOND—NOTICE OF DEFAULT.

Admission of a shortage by the treasurer of a corporation to directors and other officers thereof, accompanied by an explanation exculpating him from personal fault and dishonesty, and followed by his representation that he had fully made it good, is not sufficient to prove the directors and officers had reason to believe the treasurer fraudulently procured persons to become his sureties in bonds subsequently given by him to guarantee faithful performance of his prospective duties as such treasurer.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 86-90; Dec. Dig. ⚡42.]

9. COMPROMISE AND SETTLEMENT ⚡23—COR-
PORATE OFFICERS—SETTLEMENT OF DEFAULT
—PRESUMPTIONS.

A settlement of such default is not inferable from mere payments on account thereof and representation by the defaulting officer that he had fully made up the shortage.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 91-94; Dec. Dig. ⚡23.]

10. PRINCIPAL AND SURETY ⚡105—OFFICERS
—FIDELITY BOND—RELEASE OF SURETIES.

A loan of money to the defaulting officer, secured by a deed of trust and credited on his shortage, is not an extension of time releasing the sureties in his bonds.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 191, 192, 196, 201-210; Dec. Dig. ⚡105.]

11. CORPORATIONS ⚡288—OFFICERS—TERMS
OF BONDS.

Bonds given annually by a corporation officer annually elected and conditioned for faith-

ful performance of duty during the term and until the election and qualification of a successor hold only during the terms and for reasonable times thereafter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1248; Dec. Dig. ⚡288.]

12. CORPORATIONS ⚡548—DEFAULTING OF-
FICER—EQUITY—ISSUES.

It is not error to dismiss out of a suit to wind up a corporation and enforce liability of the sureties of the treasurer the settlement of the accounts of the trustees in an assignment made by the treasurer for the benefit of his creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2516; Dec. Dig. ⚡548.]

13. LIMITATION OF ACTIONS ⚡180—FIDELITY
BOND—CORPORATE OFFICER—DEMURRER TO
BILL.

A demurrer to so much of a bill as applies to a bond, liability on which is barred by the statute of limitations, is properly sustained.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675, 681; Dec. Dig. ⚡180.]

Appeal from Circuit Court, Wood County.

Suit by Bettie O. Wait, executrix, etc., against the Homestead Building Association and others. From decree for plaintiff, the defendant Union Trust & Deposit Company appeals. Reversed in part and remanded.

F. P. Moats, of Parkersburg, for appellant. V. B. Archer, of Parkersburg, for appellee Bettie O. Wait. Reese Blizard, of Parkersburg, for appellee J. T. Peadro. William Beard, of Parkersburg, for appellee Abram Smith. W. M. Straus, of Parkersburg, for appellees Straus and Smith.

POFFENBARGER, J. The complainant on this appeal is the special receiver appointed in the cause of Lamp v. Homestead Building Association, instituted under the circumstances and for the purposes disclosed in the opinion of this court, filed on the appeal in that cause, and reported in 62 W. Va. 56, 57 S. E. 249. The decree complained of now was made and entered in the cause of W. H. Wolfe v. Homestead Building Association et al., the purpose of which was the relief of said Wolfe as surety on several bonds given by Fischer as treasurer of the association. With leave of the court, the special receiver intervened in that suit and filed an answer and cross-bill, for the purpose of holding Fischer and his sureties to alleged liabilities for defalcations on his part, amounting to something like \$70,000. By elaborate pleadings which it is unnecessary to set forth in detail, the issues just indicated were fully developed, and a great deal of testimony taken. Pending this suit Wolfe died testate, and Bettie O. Wait was appointed the executrix of his will. Fischer made an assignment for the benefit of his creditors to W. M. Straus and Abram Smith, trustees. He afterwards died, and J. T. Peadro qualified as the executor of his will. Straus and Smith were sureties in some of the bonds as well as trustees in the assignment. The decree ap-

pealed from relieves the estate of Wolfe and the other sureties from liability on the five bonds, each in the penalty of \$10,000, and perpetuates an injunction restraining and inhibiting the defendants from prosecuting any suit or suits against him or his estate on said bonds, and, according to Fisher, his trustees and executors, the benefit of the statute of limitations denies all relief against them.

As will appear by reference to the opinion in *Lamp v. Building Association*, the Homestead Building Association was organized in 1874, and did business until early in the year 1905. In January of that year an auditing committee was appointed, and, upon their report, the stockholders adopted a resolution to discontinue the association and surrender its charter and franchises. They also adopted a resolution appointing the Commercial Banking & Trust Company trustee for the purpose of winding up its affairs under the orders and direction of the board of directors then in office. The occasion of the dissolution was the revelation of insolvency of the association due to the alleged defalcations of the treasurer.

The fidelity bonds given by Fischer were dated, respectively, June 29, 1894, May 27, 1895, August 16, 1898, June 2, 1899, and July 12, 1900. Another bond alleged to have been given by him in June, 1896, has not been established by the evidence, and it is not disclosed that any bond was given in 1897. One of the grounds upon which the trial court absolved the sureties from liability, receipt of money from stockholders at Fischer's private place of business, his shoe store, and at times other than the dates of the meetings of the board of directors, relieves as to all of them, if good as to any, for this practice obtained throughout the whole period of his service as treasurer. This defense is founded upon the rule requiring strict construction of the contract of suretyship in favor of the surety; the by-laws of the association, prescribing the duties of the treasurer, being regarded as part of the contracts. They made it his duty to "receive all moneys as soon as paid into the association," giving proper receipts therefor, "pay all orders drawn on him" and signed by prescribed officers, deposit the moneys received by him in some bank in Parkersburg, W. Va., and be present at all meetings of the board of directors. They further prescribed stated meetings of the board of directors to be held each week, at such place as they should appoint, "for the purpose of receiving from the stockholders their weekly dues, interest, premiums, fines, etc." The condition of each of the bonds was that the treasurer should "well and truly perform the duties of the said office of treasurer of said association during his term of office or until his successor be duly elected and qualified," and "well and truly comply with the laws and constitution of the said association" in that behalf made and provided. All were made

payable to the association by its corporate name.

[1] That the building association itself is not liable to stockholders for dues paid to its treasurer or other collecting agent, at a place other than that prescribed by the by-laws, is the expressed opinion of some of the courts. *Morrow v. James*, 4 Mackey (D. C.) 59; *Sachs v. Duckworth B. & L. Ass'n*, 6 Ohio Dec. 254. From the digest of these cases, found in the note to *Louchheim v. Building Ass'n*, 3 Ann. Cas. 728, this view seems to have been carried into actual decision. Though not necessary to the disposition of the case, it was stated as a ground of the decision in *Van Wagenen v. Savings Ass'n*, 88 Hun (N. Y.) 43, 34 N. Y. Sup. 491. Lack of a provision in the by-laws inhibiting payment or receipt of dues, except at the weekly meetings, justified payment elsewhere, in an action between a stockholder and the association, in the opinion of the court in *Schutte v. B. & L. Ass'n*, 146 Pa. 324, 23 Atl. 336. The provision of the association constitution relied upon in that case was very general and indefinite in its terms, however, and the court construed it as merely fixing "the amount of the dues, and when payable," evidently meaning the amount of dues and maturity thereof, the time within which they must be paid to prevent forfeitures or penalties. The conclusion of the court, however, was founded solely upon its construction of the by-laws. It held the association bound by the interpretation its own officers had placed upon them, right or wrong—a perfectly sound legal proposition, as applied between the parties to the action. *Tyler v. Building Association*, 87 Ind. 323, an action by the association on the bond of the treasurer, does not say whether payments elsewhere than at the meetings were valid or not. The sureties were held liable on the theory that the secretary had received the money in his official character, whether paid at the times required or not.

The rule *strictissimi juris* invoked here is not a rule of construction. It is operative only in the application of the contract after its meaning has been ascertained in the manner in which the intent of the parties to other contracts is found. *Brandt on Sur. & Guar.* § 107, citing ample authority. There is no liability beyond the meaning of the words used. *State v. Wotring*, 56 W. Va. 394, 49 S. E. 365; *State v. Barnes*, 52 W. Va. 85, 43 S. E. 181; *State v. Enslow*, 41 W. Va. 744, 24 S. E. 679. In all of these cases the laws under which the bonds were given were read into them as parts thereof, and the liability of the sureties carried, on the one hand, and limited, on the other, to that which fell within the terms; the words of the contract so read.

Like bonds of public officers and guaranties, these bonds are collateral undertakings. They are not contracts to pay money at all hazards and in any event. Being collateral,

there is no liability on them, unless the contract to which they are collateral has been broken. Unlike bonds of public officers, the principal obligation to which they are collateral is created by contract, and not by law. Moreover, the principal in the bonds, though called an officer, was really an agent. He was not a public officer charged with the performance of duties imposed by law. Therefore resort cannot be had to the law for the collateral undertaking. To hold the sureties liable as for acts done under color of authority because Fischer assumed to act as treasurer in the receipt of money for the association at his place of business would be obviously inconsistent with the fundamental proposition just stated and applied. Only public officers can do acts *colore officii*, and their bonds differ radically from these. Their purpose is to guarantee the good conduct of the officer in the general sense of the terms. Such a bond is payable to the state, from necessity and for convenience, so as to allow any person injured by the wrongful act of the officer in the performance of his official duty to sue on it in the name of the state. *Lammon v. Feusler*, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337. It being impossible to know who will be so injured, the bond cannot be made payable to him or them. The law protects the citizen from wrongful acts done in the execution of the office, abuse or perversion of its power, and the law is a part of the undertaking guaranteed by the bond. The condition of the bond is that the officer will faithfully execute his office. His abuse of power breaks the condition, violates the letter of his undertaking, and likewise the letter of his bond. Nobody can sue on a bond guaranteeing the performance of a private contract but the obligee or his assignee or personal representative. It does not protect strangers to it, as does the bond of a public officer. It is not made on behalf of the public or for the benefit of every citizen, like a bond guaranteeing faithful performance of public duty, but only for the benefit of the immediate parties thereto. Color of office can have no place in it, for there is no office. Application of the rule giving indemnity for acts done under color of office would extend the contract beyond its terms by implication, in flagrant violation of the basic principle of the law of suretyship and guaranty. Agreeably to this view, it has been held the bond of a treasurer of a private corporation is not broken by his exposure of corporate property to be attached, refusal to furnish bills to assist a collector, or action with others in an effort to dissolve the corporation. *Literati v. Heald*, 141 Mass. 326, 5 N. E. 147.

For the same reason it is impossible consistently to say the money was received by virtue of the treasurer's office, in the sense of the phrase *virtute officii* as defined in the reported cases. All of the judicial declarations respecting acts done *colore officii*

and *virtute officii* and making the distinction between them pertain to public offices and officers. The position involved here was not in any sense such an office. In so far as it was an office at all, it was a private one, like an agency. It was representative, not of the public, but of a private corporation—an artificial citizen. Its functions did not concern or affect the stockholders or anybody else as citizens. They had interests in the corporation, the treasurer's employer, his principal, but not as proprietors or owners of its property or funds. Each owned shares of its capital stock. Formally, primarily, and legally the fidelity bonds were obligations to the corporation, and no one else. It alone could sue on them. In them the stockholders had no legal interest. Their equitable rights respecting them come through the legal right of the corporation whose representative the treasurer was to the extent of the authority conferred upon him, as other agents are representative of their principals.

[2] Bonds of agents and officers of private corporations are governed by principles altogether different from those applicable to official bonds, as regards the liability of the sureties; and yet a sort of analogy appears. The powers and duties of a public officer may be enlarged or diminished by legislation from time to time, and the rights and liabilities of the sureties in his bond contract and expand in conformity with the variations of his powers; for the law enters into the contract, and the surety is presumed to have known, contemplated, and foreseen the possibility of such variation and contracted with reference thereto. In like manner the surety of an agent or officer of a private corporation is presumed to have known the stockholders and board of directors might diminish or enlarge the scope of the authority of such agent or officer, and are deemed to have obligated themselves for the care, diligence, skill, and honesty of the principal in the bond respecting the performance of the duties imposed upon him at the time of the execution thereof, and also such duties as may subsequently be devolved upon him in the exercise of corporate power. In *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. (U. S.) 40, 73, 7 L. Ed. 47, Mr. Justice Story expounded the law of the subject as follows:

"The bond of the cashier must be construed to cover all defaults in duty which are annexed to the office from time to time by those who are authorized to control the affairs of the bank; and sureties are presumed to enter into the contract with reference to the rights and authorities of the president and directors under the charter and by-laws."

In agreement with this principle are the decisions in *Collier v. So. Express Co.*, 32 Grat. (Va.) 718; *Allison v. Bank*, 6 Rand. (Va.) 294; *Dyrkin v. Bank*, 2 Pat. & H. 277; *Railroad Co. v. Kasey*, 30 Grat. (Va.) 218; *Melville v. Doidge*, 6 Man. G. & S. 450;

Bank v. Lamkin, R. M. Charl't. (Ga.) 29; and *Fidelity, etc., Co. v. Bank*, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440. See, also, *Bank v. Auth*, 87 Pa. 419, 30 Am. Rep. 374, and *Bank v. Elwood*, 21 N. Y. 88. In each instance there must be authority in the principal conferred by the state, in the form of law, when the bond of a public officer is involved, and by the employer, by way of direction, prescription, assent, order, or the like, when the question of liability of the surety on the bond of a private officer or agent arises. No reason why this element of liability on an official bond should not be required in the case of a private bond is perceived; but one or two decisions found apparently dispense with it. *Tyler v. Building Ass'n*, 87 Ind. 323; *Pendleton v. Bank*, 1 T. B. Mon. (Ky.) 171. In the first of these two cases there seems to have been no evidence of any authority in the secretary of the association to receive dues elsewhere than at meetings. In the other the sureties on a cashier's bond were held liable for money given to him on the street for deposit, and there was no evidence of his authority so to receive it. The court observed:

"We view a cashier as holding his office at every time and place, and if, at any time different from the hours of banking, or at places far remote from the banking house, he shall convert the funds of the bank to his own use, the institution has the right to recover such funds on his official bond."

But no authority for the proposition was cited. Mr. Morse, in his work on Banking, explains it as not asserting right in the cashier to receive the money under such circumstances, but only as asserting liability on account of subsequent ratification of the unauthorized act. Morse, Banks and Banking, § 25. If this view is sound, it justifies the decision in *Tyler v. Building Ass'n*, for the association adopted the unauthorized act of its secretary by its action on the bond for the money.

This suggestion of the theory of ratification is ordinarily not possible in the case of official bonds, for there only the Legislature has the power of ratification. As the scope of the officer's power and authority is defined by law, his unauthorized act could be ratified only by a retrospective, retroactive law which the Legislature alone may pass, and laws of that class are not often made. But all private principals or employers may, and often do, ratify voidable acts of their agents and servants, and the ratification may be implied as well as express. Moreover, the adoption of the unauthorized act by ratification relates back to the time of the act, making it the same in legal effect as if it had been previously authorized. The suggestion of liability as the result of ratification seems to be consistent with the principle adopted in *Minor v. Bank*. If the surety is deemed to have bound himself, not only as to acts within the principal's authority at the date of the obligation, but also as to acts within

the limits of authority which he knew could and might be subsequently conferred, as held in that case, the view that he knew the employer had power to ratify unauthorized acts and might do so, and therefore contracted with reference to such power in him and the probability of its exercise, and so bound himself for unauthorized, but ratified, acts, as well as authorized acts, is clearly within the general principle. The difference lies only in the time and manner of validation of the act, and, if the surety is deemed in the one case to have anticipated grounds of liability and covered them by his contract, it is difficult to find any reason for saying he did not do so in the other.

From these conclusions it results that the contract of suretyship was not collateral to a special or specifically defined main contract. The principal in the bonds was an agent with powers and duties indicated only in a general way. The condition of each of the bonds recited the election of Fischer to the position of treasurer, and bound him to "well and truly perform the duties of the said office during his term or until his successor be duly elected and qualified," and to "well and truly comply with the provisions of the by-laws and constitution." Observe that it does not limit his duties to those prescribed by the by-laws. The terms are general. The second clause is not a limitation of the first. It is additional. His duties were such as his employer had already prescribed for him and such additional ones as it might subsequently impose upon him. The limits of his potential authority were those of the corporation itself, respecting matters pertaining to the treasurer's functions, such as the receipt and custody of its funds. Rules governing the liability of sureties in bonds collateral to clearly defined and limited contracts, undertakings to do specific acts applied in *Ware v. Calvert*, 2 Nev. & Per. 126, *Ryan v. Morton*, 65 Tex. 258, *C. & A. R. Co. v. Higgins*, 58 Ill. 128, *Charles Brown Co. v. Vasson*, 113 Ky. 414, 68 S. W. 404, *Insurance Co. v. Loewenberg*, 120 N. Y. 44, 23 N. E. 978, and *Insurance Co. v. Johnson*, 120 Ill. 622, 12 N. E. 205, are therefore not applicable.

[3-6] Upon the inquiry as to what authority could have been and was given the by-laws are to be considered, of course. As against the corporation, the board of directors could not impose duties or functions inhibited by the by-laws, but nothing in them forbade payment or receipt of dues elsewhere than at the board meetings. Section 2 of article 9 prescribed stated meetings for the purpose of receiving dues, etc., and section 3 of article 6 required the treasurer to attend such meetings and receive all moneys as soon as paid into the association; but neither of these provisions, in terms or by necessary implication, prohibited the payment of dues to any officer at other times or places. Being indefinite and silent as to that, they were susceptible of interpretation, a function clearly

within the province and power of the board of directors as a managing and governing body. The general principle stated as determinative of questions arising on bonds of the class to which these belong bring this power of interpretation within the contract. The sureties bound themselves for the treasurer's faithfulness and skill as to all duties the board had power to impose, in so far as they should be actually imposed, and determination of the extent of its powers involved interpretation of the by-laws when necessary. This function, from necessity, falls, in the first instance, into the hands of the board itself, for there is no other body to whom it can go, unless it would be the stockholders, who ordinarily hold only one meeting a year, and always delegate the management of the corporate business to the directors. If they have a power of supervision or review of the action of the board, the latter manifestly has power and authority to act in the first instance, and its action stands unless annulled. Courts recognize and adopt the construction of an ambiguous by-law placed upon it by the corporation itself. *Morawetz, Cor. § 497; State ex rel. v. Conklin, 34 Wis. 21, 29; Breneman v. Franklin, etc., Ass'n, 3 Watts & S. 218.*

All of the depositions were excepted to because the notice referred to in the certificate is not annexed, the certificate does not show they were read by the witnesses, and none of them bear the signatures of the witnesses. The first objection is obviated by the appearances of the parties, and the second by the statute dispensing with signatures to depositions taken in shorthand and transcribed (Code c. 130, § 33, serial sec. 4890).

Many of the books of the association, fully identified by witnesses, were put in evidence, but have not been brought up on the appeal. Among them are blotters and cashbooks. A daughter of the secretary assisted him for several years prior to June or July, 1899, and she details the method of transacting business at the weekly meetings, which the directors presumptively attended, because they were required by the by-laws to do so under penalties of small fines for failures and forfeitures of their offices for absence for four successive meetings. Collections in large amounts were made at Fischer's shoe store and reported at the weekly meetings. In the tabulation thereof on the blotters the collections at the meetings and at the store were distinguished; the former being entered in black ink, and the latter in red. From this blotter the accounts of the members were entered in what was termed the rollbook. The reports of these large store collections at the weekly meetings, and presumptively in the presence of the directors, cannot reasonably be deemed to have been unknown to them. They seem to have been far greater than the collections at the meetings. Each stockholder had a passbook. Such of them

as paid dues at the store never came to the meetings, of course, nor were their books there. It was not reasonable to suppose they would pay their money without obtaining receipts in their books. Their absence, the absence of the books, and the reports of the collections constituted conclusive evidence of the practice of the treasurer. From these facts the directors must have known, not only that he was receiving dues elsewhere than at the meetings, but also receipting for them in the passbooks. If, having accepted the money, he had brought it to the meeting and receipted the books there, his action would have imported agency for the stockholders. But his report of it as collections, together with his action in receipting for it elsewhere, could have suggested nothing short of exercise of the powers of his office at his store. Obviously, the acquiescence of the directors in this practice was a construction of the by-laws. They tacitly assented to it, believing the by-laws did not inhibit it. Assuming their construction to have been wrong, it was corporate action valid and binding between the treasurer and the corporation, unless annulled by the stockholders. And their tacit approval of the action of the treasurer under the by-laws was tantamount to authorization of subsequent acts of the same kind, as well as ratification of antecedent ones. To confer authority upon a corporate agent for transactions of the kind involved here no formality is necessary. It may arise out of the conduct of the parties. *Minor v. Bank, 1 Pet. (U. S.) 46, 72, 7 L. Ed. 47.*

[9] Three results are said to flow from a transaction on the part of Fischer with the association on or about January 10, 1898. He borrowed \$5,000 from it in the usual manner, securing payment thereof by a deed of trust, and took the withdrawal value of certain shares of its stock held by him, amounting to about \$1,300, both of which sums he left in the treasury and took credit therefor on his account as treasurer. At about the same time he delivered to some representative of the association a certificate for certain shares of stock in another corporation. These facts evidence the existence of a shortage in his accounts at that time. It is claimed a settlement was then made, which bars right of action on the first two bonds given in 1894 and 1895. The other contentions are that the loan constituted a binding contract of extension of time working a release of the sureties on said first two bonds, and that the knowledge on the part of the directors of the defalcation necessarily incident to the settlement imposed a duty upon them in favor of the sureties in the subsequent bonds, which, having been omitted, rendered such bonds voidable.

No settlement is established by the evidence relied upon. No witness says any adjustment took place between the treasurer and the board of directors. The witness who

speaks on the subject knew only what Fischer had told him about the shortage and what he had done by way of making it good. The dead secretary may have had something to do with it, as he and the treasurer gave the association affairs more attention than anybody else did, but whether he made any investigation such as characterizes a settlement does not appear. What are relied upon as evidence of a settlement are the ex parte acts of the treasurer. He borrowed \$5,000 from the association and placed that with the withdrawal value of certain shares of stock to his credit as payments upon what he owed. These items, together with others the treasurer represented he had turned in, made about \$10,000, which he claimed would make up the amount due. There was no admission of any dishonesty. The shortage was attributed to a loss in the bank in which the treasurer kept his association money deposited by means of a defalcation of an employé of the bank. Neither the witness nor any one else, except the treasurer, so far as his evidence discloses, ever knew the extent of the shortage or made any effort to ascertain it, or knew whether it had been made good. The representations of the secretary and the treasurer were accepted as to the existence of the shortage, its amount, and the adjustment thereof. All the directors did about the matter was to make the \$5,000 loan. The president had actual knowledge of the application thereof to the shortage, and some of the directors may have had, but it does not appear that they did. After the treasurer said he had made good the shortage the annual statement of the association was prepared and given out, representing it to be in a prosperous and sound condition. This was a statement to the stockholders, not a settlement with the treasurer. No inference of a settlement can arise from these facts.

[10] Nor did the loan constitute an extension of time. It merely changed the character of the \$5,000 from a debt due from Fischer as treasurer, secured by his bonds, to one due from him individually and secured by a deed of trust, and operated as a payment to the association on the shortage as treasurer.

[7, 8] Lack of uniformity in the authorities as to the right of persons about to become sureties to rely upon the silence of the obligee in the instrument as a representation of the trustworthiness of the principal gives an opportunity for argument of which counsel for the appellees have availed themselves. The decisions of the Indiana and Minnesota courts tending to sustain their positions do not seem to be in accord with the weight or tendency of the current of authority, nor with the views of this court as expressed by Judge Green in *Warren v. Branch*, 15 W. Va. 21. Judge Green's opinion, concurred in by the other members of the court, disapproves the broad doctrine of *Lord Campbell in Rawlton*

v. Matthews, 10 Cl. & Fin. 934, and adopts the more restricted views expressed in *Owen v. Haman*, 3 Man. & G. 378, 4 H. L. Rep. Cas. 1035, making it the duty of the creditor to warn the surety of the unworthiness of the principal only when the dealings are such as fairly to lead a reasonable man to believe fraud must have been used in the procurement of the suretyship. The tendency of the courts generally is to adopt the principle applied in *Railway Co. v. Shaeffer*, 59 Pa. 350, founded upon considerations stated by Judge Sharswood as follows:

"Corporations can act only by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, become responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation who knew and connived at his infidelity ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound."

As to the effect of the rules and regulations of the corporation and the consequences of omission to enforce them, he adopted the conclusion of Mr. Justice Story, in *U. S. v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199, respecting the reliance of sureties upon the enforcement of the federal laws, and stated in the following terms:

"It is admitted that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature, between private individuals. Such is the clear result of the authorities. Why, then, should a more rigid principle be applied to the government—a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence? It is said that the laws require that settlement should be made at short and stated periods, and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has * * * the same means of judgment as the government itself, and the latter does not undertake to guaranty such fidelity."

In *Fidelity, etc., Co. v. Bank*, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440, the question was whether a stipulation in a surety bond requiring the bank, upon discovery of fraud or dishonesty on the part of the guaranteed employé, to give notice to the surety, and also, immediately after

knowledge by the bank of any act on the part of the employé involving a loss to the surety of more than \$100, to notify the surety of the same. In disposing of it, Justice Lumpkin said:

"As naturally incident to a contract of this nature, the company stipulated that the bank should gain no benefit thereunder if it continued in its service an employé known to be unworthy of trust, without prompt notice to the company after he had been discovered by the bank to be untrustworthy. There is not a syllable in the contract, however, bearing the construction that the bank should exercise any degree of diligence in inquiring into or supervising the conduct of Redwine in order that the company might be saved from loss through his misconduct. The bank did not undertake to exercise reasonable care and diligence to find out if Redwine had been untrustworthy; but, as to this matter, the company, in effect, invited the bank to repose in peace; for it guaranteed that Redwine would remain honest and faithful. Only after knowledge had actually come to the bank that he was, or had become, otherwise, was it under any duty to the company; and then it was * * * required to immediately notify the company of what it had ascertained. * * * The 'knowledge' referred to meant actual knowledge. Constructively, whenever Redwine—he being an employé of the bank handling its money—misapplied the same, the bank itself would have immediate notice of the fact; for his knowledge, as a servant of the bank, would, if the doctrine of constructive notice were applicable, be its knowledge. Surely, the contract cannot be construed as contemplating any such result as this. Again, suppose another employé was colluding with Redwine in concealing his shortage; the knowledge of such other employé would be, constructively, the knowledge of the bank. Or suppose Redwine and another employé, also under bond, were both misappropriating the bank's funds, and each found the other out; could it be said in defense to a suit on Redwine's bond that the other employé's knowledge was the knowledge of the bank, or, when suit on the other employé's bond was entered, that Redwine's knowledge was constructive notice to the bank, and the legal equivalent of the 'knowledge' referred to in the company's bond? In the absence of any guaranty on the part of the bank that its other employés would be honest and faithful, and in view of the purpose of the condition inserted in the bond, it would seem that the better construction of it would be that the bank only obligated itself to act in good faith and impart only actual knowledge on its part. The bond would, indeed, be of no practical protection if, in order to realize its benefits, the bank had to insure, not only the honesty and fidelity, but the faithful and conscientious attention to duty, of a dozen others of its employés. Stupidity of an employé in not comprehending ordinarily apparent facts and circumstances which would be equivalent to actual knowledge if within the knowledge of the bank itself might lead to a forfeiture of the bond; while forgetfulness or mere negligent inattention to duty on the part of such employés would bring about the same result."

Likewise the Supreme Court of the United States denies any duty on the part of the employer to exercise diligence to ascertain whether the employé has defaulted or done any act indicative of untrustworthiness, to the end that the sureties may be protected, and repudiates the view that the doctrine of constructive notice applies to the subject. In *Fidelity, etc., Co. v. Courtney*, 186 U. S. 842, 22 Sup. Ct. 833, 46 L. Ed. 1193, the

trial court instructed the jury that the cashier's knowledge of the infidelity and fraud of the president of the bank was not notice to the bank of which the sureties could avail themselves as a ground of discharge. A stipulation of the bond required the bank to observe or cause to be observed due and customary supervision over the employé for the prevention of default, and absolved the surety from liability in case of the condonation by the employer of any dishonest act or default or continuation of the employé in service after such default without written notice to the company. After having approved and adopted the views expressed in *Railway Co. v. Shaeffer*, cited, Mr. Justice White, delivering the opinion of the court, sustained the ruling of the trial court, and went even further, saying:

"The provision is not that a minority in number of the board of directors or that subordinate officers or agents would exercise due and customary supervision, and would not condone a default of the bonded employé or retain him in his employment after the commission of a default, but the agreement is that the bank would do or not do these things. This in reason imports that the things forbidden to be done or agreed to be done were to be either done or left undone by the bank in its corporate capacity, speaking and acting through the representative agents empowered by the charter to do or not to do the things pointed out."

The inquiry here is not the correctness, in all respects, of the propositions and observations just quoted, but only whether the sureties are discharged by reason of the failure of the association to give them such knowledge as it possessed concerning the previous irregularity in the conduct of their principal as its treasurer. Under the rule announced in *Warren v. Branch*, 15 W. Va. 21, it was under no duty to inquire or give warning, unless the circumstances were such as would have induced belief on the part of a reasonable man that the treasurer had fraudulently procured the sureties to join him in the execution of the bonds. From what has been said concerning the defalcation, it is obvious that none of the directors had any actual knowledge of dishonesty on his part or of any loss by his negligence. Admitting his shortage, he attributed it to the bank in which he kept his deposits, and represented that he had fully replaced all that had been lost. Beyond this, there may have been grounds for fear or suspicion, but not any knowledge of any fact casting reproach upon the honor of the treasurer. Having no knowledge of any fraud on his part against their association, the directors could not consistently assume or suspect any fraud in his transactions with those who became, or were about to become, his sureties. Of course, a thorough and exhaustive investigation of the books and accounts of the association would have revealed the error of the treasurer's opinion as to the cause of his embarrassment or the untruthfulness of his statement, but the documentary evidence of his pay-

ments on account of a shortage, as and for the full amount thereof and more, read in the light of his explanation, was no evidence of fraud or dishonesty. Under the decisions to which reference has been made, declaring the prevailing rule, with which Warren v. Branch is believed to be in agreement, the directors were not bound to make an investigation to the end that they might be able to advise the sureties. Mere constructive notice of a default is not enough to impose duty to a surety. Actual knowledge is required.

[11] That some of the bonds involved were given after the defalcation is immaterial. The duty to a new surety cannot, in the nature of things, be greater than that due to an existing or continuing one. Brandt, Sur. & Guar. § 477. If the subsequent bonds had been given to cover past transactions, and the association knew of an existing default not made good, its acceptance of the new bonds to cover it would have been a fraud on its part, according to authorities cited and analyzed in Warren v. Branch; but these bonds were all prospective only.

A written opinion of the chancellor expresses his inability to determine with sufficient certainty to enable him to make a finding the amount of the default within the period covered by any one of the five bonds involved, they being annual and successive, from 1898 to 1900. The two prior bonds established were executed in 1894 and 1895. As to whether any bond was given in the year 1896 an issue has been made and decided in favor of the sureties. None was given in 1897. With the exception of the year 1897, the treasurer was elected annually up to and including the year 1900. Each bond was conditioned for faithful performance of duty during the term of office and until the successor should be elected and qualified. Failure to elect for year 1897 raises a question as to liability on the preceding bonds. If no bond was executed in 1896, one question is the extent of the liability on the bond of 1895. Obviously, none of these bonds were given as continuing obligations. In each case the election of a successor and procurement of a new bond was contemplated. Under such circumstances, the bond continues only for a reasonable time after the date on which the election and qualification of the successor should have taken place. Brandt, Sur. & Guar. § 187, citing numerous authorities sustaining the text.

As the evidence makes it fairly clear that portions of the collections made at the store never reached the bank in which the treasurer's account was kept, and that all the losses were from those collections, no difficulty in ascertaining liabilities with reference to the periods of the several bonds is perceived. Immediate deposits of the collections in some bank were required. All of those made at the weekly meetings were so deposited, and weekly deposits were made of

sums derived from the other collections, but, in some way not disclosed, large discrepancies between such collections and the deposits therefrom occurred.

[12, 13] Individual liability of Fischer was held to have been barred by the statute of limitations. He was not such a trustee as could have been sued only in a court of equity for money due from him as treasurer. To prevent the application of the statute of limitations to a trust two characteristics are essential: The trust must be express; and the cause of action cognizable only in equity. Beecher v. Foster, 51 W. Va. 605, 42 S. E. 647; Rowen v. Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796; Newberger v. Wells, 51 W. Va. 624, 42 S. E. 625; Thompson v. Whittaker Iron Co., 41 W. Va. 574, 23 S. E. 795. This is not such a trust. It is express, but an agent may be sued at law for an accounting. He is not like a guardian or personal representative having the legal title to the ward's property or the decedent's estate, in consequence whereof the ward, distributee, or legatee, having no legal title or right, must resort to equity for lack of a remedy at law. Assumpsit by the principal against the agent for money had and received by the latter to the use of the former lies for money collected or received by the agent. English v. Deverro, 5 Blackf. (Ind.) 588; Seidel v. Peschkow, 27 N. J. Law, 427; Eaton v. Welton & Co., 32 N. H. 325. Of course, an action at law on the bond of such an agent or officer for money misappropriated or withheld would lie at any time.

How the trial court, under the operation of the five-year statute of limitations, wholly relieved the estate of Fischer from liability, is not perceived. The cross-bill, having for one of its purposes an accounting from him, was filed October 12, 1907. From that date five years would go back to October 12, 1902. But the bill filed in Lamp's suit brought August 5, 1905, sought an accounting from Fischer as treasurer. Surely that suit suspended the statute as to his individual liability, and from that date five years would run back to August 5, 1900. Besides, his estate is liable on the bonds, in so far as they cover his defalcations, and that liability goes back ten years from October 12, 1907, and beyond, unless the statute of limitations has been, or shall be, invoked against it. The Lamp bill was not a suit on the bonds. As to them, it merely sought the appointment of a receiver with power and authority to sue on them.

The demurrer to the cross-bill and answer was properly overruled. It was not foreign to the subject-matter of Wolfe's bill for relief from liability. The question of his liability was the very essence of his bill. Denying it, he sought a discharge. Affirming it, the receiver sought a decree for the amount thereof. Hence the subject-matter of the cross-bill and that of the bill were iden-

tical. Variance between the prayers characterizes every bill and cross-bill. If they had to be the same, a cross-bill would be unnecessary, as well as impossible. There could be no cross purposes in the suit.

There may be some inadmissible evidence in the record, but, as this is an equity suit in which the chancellor, and not a jury, passes upon the evidence and makes the findings of fact, the good can be separated from the bad, and the presence of inadmissible testimony does not preclude consideration of such portions as are admissible. It is said the blotter kept by the secretary from which the accountants made up their statement is not a book of original entry. That may be, but there was a cashbook kept by Fischer himself, in which the footings of receipts differ but slightly from those in the blotter. The balance founded on the figures taken from the blotter may be too large, but, if the statement had been made from the cashbook, there would have been a balance due. Hence, though inadmissible testimony may be found in the record, and the shortage may not have been correctly ascertained by the accountants, the chancellor will undoubtedly be able, by resort to the cashbook, to see that there is a liability. In pronouncing the decree of dismissal the court made no examination of the evidence pertaining to the question of shortage. The dismissal rests entirely upon other and untenable grounds. The evidence is amply sufficient to establish a prima facie case of liability.

Further complaint is made of a decree of March 10, 1908, dismissing W. M. Straus and Abram Smith, trustees in the Fischer assignment, from so much of the cross-bill as required them to settle their accounts, as such, in this suit, and of another decree of June 20, 1908, sustaining the demurrer of Fischer to so much of the cross-bill as is predicated on the bond of June 9, 1895, on the ground of preclusion of right to relief respecting it by the statute of limitations. No error in either of these decrees is perceived. The forum in which the accounts of the trustees shall be settled is unimportant. A proper settlement, wherever made, will disclose the amount of the estate in their hands, and, if none is made, they can be compelled to discover and pay it over. If an improper ex parte settlement should be made, it may be corrected. As right of action on the bond of June 9, 1895, is clearly barred, and the bar of the statute may be invoked in a chancery cause against a purely legal demand by demurrer (*Maxwell v. Wilson*, 54 W. Va. 295, 46 S. E. 349), the decree of June 20, 1908, is not erroneous.

The decree of March 10, 1908, and June 20, 1908, will be affirmed, and the decree of May 6, 1914, reversed and the cause remanded.

MILLER, J., absent.

(76 W. Va. 412)

HARRISON et al. v. HARMAN et al.
(two cases).

(Supreme Court of Appeals of West Virginia.
June 1, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 801—MOTION TO DISMISS—AFFIDAVITS—FILING OF APPEAL BOND.

On a motion to dismiss an appeal on the ground that the appeal bond was not filed with the clerk of the circuit court within a year and two months from the date of the decree appealed from, it may be shown, by affidavits filed in this court, in resistance to said motion, that bond was filed with said clerk in time and approved by him, and was subsequently lost or mislaid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. \Leftrightarrow 801.]

2. LIMITATION OF ACTIONS \Leftrightarrow 6—OPERATION OF STATUTE—RETROACTIVE EFFECT.

Statutes of limitations will not be given a retroactive effect, unless by express terms, or by necessary implication, it clearly appears that the Legislature intended that they should so operate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. \Leftrightarrow 6.]

3. LIMITATION OF ACTIONS \Leftrightarrow 6—REVIEW—TIME FOR FILING—OPERATION OF STATUTE.

Section 5, c. 133 (serial sec. 4951) Code 1913, as amended by chapter 40, Acts 1909, does not limit the right of a person under disability to file a bill of review to one year after the removal of such disability, if the decree complained of was pronounced before the statute as amended took effect. In such case, a person under disability has three years after the removal thereof in which to file a bill of review.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. \Leftrightarrow 6.]

Williams, J., dissenting.

Appeal from Circuit Court, McDowell County.

Suits by Joseph Harrison and others and by Hattie Harrison against George W. Harman and others. From the decree, plaintiffs appeal. Reversed in part, affirmed in part, and remanded.

J. Powell Royall, of Tazewell, Va., M. O. Litz, of Welch, and Sanders & Crockett, of Bluefield, for appellants. A. W. Reynolds, of Princeton, Jos. S. Clark, of Philadelphia, Pa., Anderson, Strother & Hughes, of Welch, and S. M. B. Coulling and J. W. Chapman, both of Tazewell, Va., for appellees.

POFFENBARGER, J. In the year 1887 D. G. Sayers, G. W. Harman, and Henry Harrison conveyed to Henry Bowen nine tracts of land in McDowell county, W. Va., known as the Burkhart lands. Bowen took and held the same for himself and others as follows: One-fourth for himself, one-fourth for J. S. Gillespie, one-fourth for A. P. Gillespie, and one-fourth for J. G. Watts. Sayers, Harman, and Harrison had acquired title thereto by

virtue of a proceeding instituted by the commissioner of school lands.

In 1889 William H. Burkhardt and others, heirs at law of George J. Burkhardt, deceased, brought a suit in the Circuit Court of the United States for the District of West Virginia against the school commissioner, Henry Bowen, D. G. Sayers, G. W. Harman, and others to annul the school commissioner's proceedings and the deed made by him pursuant thereto. Bowen notified two of his grantors, Sayers and Harman, to defend that suit and protect his title; Harrison, the other grantor, having died before the suit was brought. They did make defense, and notwithstanding the court decreed that the Burkhardt heirs had title to the land, annulled the conveyances from the school commissioner to Sayers, Harman, and Harrison and from them to Bowen. An appeal was taken to the United States Circuit Court of Appeals by Sayers and Harman, which resulted in an affirmance of the decree of the lower court.

Henry Bowen then brought an action on behalf of himself and the two Gillespies in the circuit court of Tazewell county, Va., against his two surviving grantors, Sayers and Harman, Harrison being dead, to recover damages for breach of their covenants of title, claiming the right to recover three-fourths of the purchase money which they had paid, together with interest thereon, and the costs and expenses incurred by Bowen in defense of the Burkhardt suit. (J. G. Watts, the other joint purchaser with Bowen, had conveyed to one G. W. Lambert his one-fourth interest before the Burkhardt suit was brought, and it is in no wise involved and has no bearing on the question to be decided.) Recognizing their liability, Sayers and Harman did not suffer the Bowen suit to proceed to judgment, but compromised it by executing their bond to Henry Bowen, J. S. Gillespie, and A. P. Gillespie, bearing date on the 15th February, 1898, for the sum of \$5,187.39. Thereupon Sayers and Harman, treating their bond as a novation and payment of the joint liability of themselves and Henry Harrison, deceased, upon the covenants in their deed of conveyance, brought a suit in equity, to November rules, 1898, in the circuit court of McDowell county against the administrator and heirs at law of said Henry Harrison, deceased, for contribution, claiming the right to recover from his estate a sum equal to one-third of the amount of the bond. By decrees rendered in that cause Harrison's estate was held liable for such sum; and the interest of certain ones of the heirs in two of several tracts of land of which Harrison died seised, situate in McDowell county, were sold to pay the same, and were purchased by said George W. Harman and later conveyed to him by a commissioner acting under order of court.

Henry Harrison resided in Tazewell county, Va., at the time of his death, and died

intestate leaving 12 children as his heirs at law, 4 of whom were infants when the last-mentioned suit was brought, the plaintiff and appellant in the present suit, Hattie Harrison, being the youngest, and one of the 6 heirs whose interest had been sold. Six of the heirs had aliened their interests in the McDowell county lands before the institution of the suit and such interests were held not liable to sale.

In July, 1905, two of the heirs, to wit, Joseph Harrison and Belle Sayers (née Harrison) filed a bill of review, in which they prayed to have the decrees and proceedings in that suit reviewed and annulled, and the deed which the special commissioner had made to Harman canceled, alleging numerous grounds therefor, one of which was that the bill of Harman and Sayers showed no right in them to sue, that it did not show that they had any right to demand payment of any sum of money from Harrison's estate and therefore were not his creditors, and had no right to have the lands subjected to sale. Numerous other errors in the proceedings were averred in the bill. Hattie Harrison, then an infant, was made a party defendant to the bill of review, and on March 7, 1910, after attaining her majority, she filed her answer which, by order of court, was treated as a petition and bill of review. It contained practically the same allegations as the plaintiff's bill, and prayed for the same relief. At August rules, 1910, she also brought an independent suit, making defendants to her bill practically the same parties that were defendants to the bill of review filed by Joseph Harrison and Belle Sayers, and some additional parties against whom no relief is prayed, and prayed for the same relief as in her answer and petition. On February 24, 1911, a number of the defendants filed demurrers to the bill, assigning grounds therefor, and the court took time to consider the question arising thereon. On the 13th of September, 1912, the two causes were heard together, and on motion of the defendants George W. Harman and W. F. Harman, Hattie Harrison was compelled, over her objection, to elect which one of said causes she would prosecute, and she elected to prosecute her last suit. Thereupon counsel for Joseph Harrison and Belle Sayers appeared in open court and admitted that all matters arising in their suit had been settled except those arising on the petition and cross-bill answer of Hattie Harrison; and the court dismissed that suit, together with the cross-bill answer, to which action of the court she objected and excepted. The court then took further time to consider of the demurrers to her original bill, and at a subsequent term, on February 11, 1913, entered a final decree, sustaining the demurrer and dismissing her suit. From those two decrees she has appealed.

[1] A preliminary question is presented by

a motion to dismiss the appeal on the ground that it was not perfected in time by the filing of an appeal bond. Section 17, c. 135, serial sec. 4997, Code 1913, requires the appeal to be dismissed whenever it appears that 1 year and 2 months have elapsed since the date of the decree and no bond, as required, has been given. The statute is mandatory, and this court is bound to dismiss for failure to file the bond in the time prescribed. *Scott v. Coal & Coke Ry. Co.*, 70 W. Va. 777, 74 S. E. 992. Resisting the motion, appellant insists that bond was filed with the clerk of the circuit court within the required time, and that it was approved by him, but that it was afterwards lost or misplaced and cannot be found, and tenders in this court the affidavits of the circuit clerk and other witnesses to prove these facts. The truth of these affidavits is not controverted, but counsel for appellees insist that this court is without jurisdiction to consider them; that the question is one of original jurisdiction, and should first have been presented to the lower court. The clerk's office of the circuit court is made the repository for the appeal bond for the purpose of convenience. The bond cannot be filed until after the appeal has been allowed and the amount of the bond fixed by the Court of Appeals, or the judge granting the appeal. Consequently it cannot be regarded as a part of the record of the cause in the court below. Why, then, may this court not hear evidence to determine the disputed fact as to the filing and subsequent loss of the bond? It was held in *Hannah v. Bank*, 53 W. Va. 82, 44 S. E. 152, that affidavits could be considered by this court to ascertain the value of property levied on, and claimed by a third party, under the provisions of section 152, c. 50, Code 1913 (sec. 2706) for the purpose of determining whether the value was sufficient to give jurisdiction of the appeal, the record of the lower court failing to show the value. Upon like principle evidence to prove loss of appeal bond may be considered. See, also, *Dryden v. Swinburn*, 15 W. Va. 250. The appeal bond is no part of the record; it is no part of the judicial proceedings in the lower court, and is filed after final decree or judgment therein, and after the matters appealed from have passed beyond the control of the lower court. The fact that the bond is required to be filed with, and approved by, the clerk of the circuit court, and a copy certified by him to the clerk of this court, does not make it any more a proceeding in the circuit court than a proceeding in this court; the law simply makes the circuit clerk the custodian of the bond and the judge, in the first instance, of the sufficiency of the security, and requires him to record it in his office. It would be a very great hardship upon an appellant to dismiss his appeal for want of a bond, after he has done all that the law requires of him by executing a sufficient bond and placing it

in the hands of the circuit clerk. He might not thereafter know that his bond had been lost and no copy thereof certified to the clerk of the Court of Appeals until his time of appeal had expired. It would then be too late to supply proof of its loss by proceedings in the lower court, in order to prevent dismissal of his appeal. The affidavits prove that sufficient bond was filed within the required time, and we overrule appellees' motion.

[2, 3] A vital question raised by the demurrer to plaintiff's bill is whether the statute of limitations is a bar to her suit. Section 5, c. 133, serial section 4951, Code 1913, as it was formerly, gave three years from the entry of a final decree in which to file a bill of review, and contained the following exception in favor of persons under disability, viz.:

"Except that an infant, or insane person, or a married woman in a case not relating to her separate property, may exhibit the same within three years after the removal of his or her disability."

That statute was amended and re-enacted by an act passed on the 17th of February, 1909 (Act 1909, c. 40) which took effect 90 days thereafter, so as to read as follows:

"A court or judge allowing a bill of review may award an injunction to the decree to be reviewed. But no bill of review shall be allowed to a final decree, unless it be exhibited within one year * * * after such decree, except that an infant or insane person, or a married woman in a case not relating to her separate property, may exhibit the same within one year after the removal of his or her disability. Provided, that if such decree was pronounced before this section as amended takes effect, such bill of review may be exhibited within three years after such decree."

The decree which plaintiff sought to have reviewed was made in 1901, long before the statute was amended. She became of age on the 15th of October, 1908, and filed her answer and cross-bill in the suit of Joseph Harrison and others against Sayers and Harman on the 7th March, 1910, which was within one year after the new act took effect, and more than one year and less than three after she attained her majority. She filed her original bill in the nature of a bill of review, at August rules, 1910, which was more than a year after the new act took effect and likewise more than a year, but within three years, after she became of age. Under no interpretation of the new statute of limitation was her answer and cross-bill filed too late, but it is strenuously insisted that her bill of review was. In order to bar it, the argument makes the statute retroactive to the extent of repeal of the saving made in the older statute in favor of persons under disability, or reduction of the period from three years to one. A statute is always presumed to have been intended to operate prospectively only, unless a contrary intention appears on its face in some way. "A cardinal rule in interpreting statutes is to construe them as prospective in operation in every in-

stance, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which would be inoperative otherwise than retrospectively." *State v. Mines*, 38 W. Va. 126, 18 S. E. 470; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. About 15 or 20 years ago, litigation predicated upon the idea of retrospective action of statutes seems to have been rife in this state. It brought forth, in a single volume of our reports, no less than four reiterations and applications of the rule just stated. *Rogers v. Lynch*, 44 W. Va. 94, 29 S. E. 507; *Casto v. Greer*, 44 W. Va. 332, 30 S. E. 100; *Walker v. Burgeas*, 44 W. Va. 399, 30 S. E. 99, 67 Am. St. Rep. 775; *Burns v. Hays*, 44 W. Va. 508, 30 S. E. 101. It is general and universal in its application and does not vary with the nature of the subject-matter of the statute. Both substantive and remedial rights come under its operation. It has been repeatedly applied to statutes dealing with limitations of rights of action. As will be shown, the construction contended for would contravene other universally recognized rules of interpretation. No statute will be so construed as to make it unconstitutional, if such construction can be avoided. *Conley & Avis v. Coal & Coke Ry. Co.*, 67 W. Va. 129, 67 S. E. 613. Nor will a statute be so construed as to work out unjust or absurd results, unless its terms are such as preclude any other construction. *Building Association v. Sohn*, 54 W. Va. 101, 46 S. E. 222; *Dickey v. Smith*, 42 W. Va. 805, 26 S. E. 373. Of two permissible constructions of a statute, one working manifest injustice and the other equity and fairness, the latter is to be adopted, upon the presumption that the Legislature did not intend the results flowing from the former. *Hasson v. City of Chester*, 67 W. Va. 278, 67 S. E. 731.

If the construction contended for were adopted, the statute would reduce the three-year saving in favor of the appellant and others situated as she was when it became effective to five months, provided she were accorded the benefit of the one-year saving made in so much of it as pertains to the period of limitation, and to nothing if she were not allowed the benefit of that saving. She was 21 years and 4 months old when the statute was passed and 21 years and 7 months old when it took effect. She could not get in under the saving clause of the new act, if the old saving clause was repealed, because the decree was about 8 years old, when the new act was passed. Not a word in the act is made expressly applicable to this valuable right which is said to have been taken away by it. Neither the saving clause of the old act nor the effect of past decrees upon persons under disability is anywhere or in any way mentioned. Search for any such terms will be made in vain. That the first clause of the limitation provision, standing

alone, would be purely prospective in operation, and would not take away the saving of the old act, is admitted. That the proviso wholly ignores these persons and the saving previously made for them is also admitted. In terms, it puts all past decrees on the same basis, allowing only three years from the dates of the decrees for bills of review. It just as plainly says, by way of inference or implication, that no allowance for disability shall be made, in the case of the past decrees, as the statute, read as a whole, says, in like manner, but not otherwise that one year after removal of the disability shall be allowed. On this subject, nothing but inconclusive inference pointing in opposite directions, affirming and denying, giving and taking away, can be found. That every word in the act may operate intelligently without curtailment of the saving allowed by the old statute is perfectly plain. As to future decrees, the limitation clause so operates. Not a word need be rejected. As applied to past decrees, every word of the proviso may have effect, without abatement of the saving. The construction contended for puts in a negative by mere inference and baldly unnecessary and strained implication. Such interpretation is most emphatically and specifically condemned by the rules to which reference has been made. "Every reasonable doubt is resolved against a retroactive operation of the statute." *Stewart v. Vandervort*, 34 W. Va. 524, 530, 12 S. E. 736, 12 L. R. A. 50. "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied." *U. S. v. Heth*, 8 Cranch, 413, 2 L. Ed. 479; *Chew Heong v. U. S.*, 112 U. S. 559, 5 Sup. Ct. 255, 28 L. Ed. 770. To put retroaction into a statute by implication, the language must be such that it cannot operate at all otherwise than retrospectively. *State v. Mines*, 38 W. Va. 126, 18 S. E. 470; *Casto v. Greer*, 44 W. Va. 332, 30 S. E. 100. Every word in this act can operate otherwise.

Supposing the appellant to have been 21 years 11 months and 29 days old when the act took effect, and the decree to have been more than 3 years old, the act would have left her but 1 day in which to sue, a palpably unreasonable period, wherefore it would have been, as to her, manifestly unconstitutional. No court will give a statute such a construction if any other is possible under its terms. This conclusion cannot be avoided by saying the terms mean one thing when applied to her and something else when applied to others. It either gives one year after maturity to all of the class or to none, and, in the case supposed, the court would be bound to declare it void, if it meant that.

Why should the Legislature have discriminated between persons *sui juris* and persons under disability to the detriment of the lat-

ter, who are universally acknowledged favorites in legislation? The construction preserves the three-year saving to persons *sui juris*, but not the three-year saving after removal of disability, regarded and treated in the old statute as its legal equivalent. The latter is reduced to one year, if three years have elapsed since the date of the decree and less if, in addition, the disability had been removed before the act took effect. Applied here, the construction allowing only five months would be inconsistent with legislative opinion as to what period is requisite, reasonable, or fair in such cases. The old act allowed three years, the new act allows one, this construction only five months and, in cases that may have existed, nothing at all. So the construction is unreasonable, unjust, and condemnatory of expressed legislative opinion and will respecting the subject-matter. Hence the rules of interpretation applying the standard of justice and equity and the process, *reductio ad absurdum*, respectively, both reject it with equal clearness and emphasis.

Under its erroneous view of the statute, the court below sustained demurrers to the bill of review and dismissed it. For this error, the decree will have to be reversed. Whether the court erred in requiring the appellant to dismiss either it or her cross-bill, thus causing the dismissal of the latter, it is unnecessary to say, for the bill of review and cross-bill were identical in substance and purpose. Since all the relief she may be entitled to can be given on the bill of review, she suffers no injury by reason of the loss of her cross-bill, and the question raised by the assignment of error in the dismissal of the latter has become merely academic. The other errors assigned need not be noticed. When the decree was entered, none of the defendants had answered, and the merits of the case have not been developed. All we need now say is that plaintiff's bill and exhibits present a good cause, calling for a review of the final decrees complained of, and was filed in proper time.

A decree will be entered here affirming the decree of September 13, 1912, and reversing the decree of February 11, 1913, and overruling the demurrers to plaintiff's bill of review, and remanding the cause for further proceedings, with leave to defendants to answer.

Reversed in part, affirmed in part, and remanded.

WILLIAMS, J. (dissenting). This decision is rendered upon a rehearing. At first I was of the opinion the statute should be construed as the majority opinion has construed it. But, after the rehearing was granted, I have made a more careful examination of the authorities than I had before, and am now convinced that such construction is wrong. In fact I think the lan-

guage of the statute is too plain to admit of construction, and the only question to be determined is whether it can be applied to the case in hand without violating a constitutional right. I do not controvert the proposition that a statute of limitations is not to be given a retroactive operation, unless the legislative intent that it should so operate clearly appears. But when such intent does appear, whether expressed in terms or arising by necessary implication, then it is the duty of the court to give effect to it, if possible. The power of the Legislature to make retroactive laws, with certain exceptions not affecting the question under discussion, is universally recognized. The opinion does not question this legislative power. That the act of February 17, 1909, shortened the period of limitation, for a bill of review, from three years to one year, in case of persons *sui juris*, and likewise shortened the period of saving to persons under disability to a like period, after the removal thereof, is not questioned. That it was intended to apply to past, as well as future, decrees clearly appears from the proviso which reads:

"Provided, that if such decree was pronounced before this section as amended takes effect, such bill of review may be exhibited within three years after such decree."

The terms, "such decree," refer to the final decree mentioned in the body of the statute, and show that it was intended to embrace, and does embrace, any final decree, whether made before or after the statute was passed. But the opinion, in effect, says it is retroactive only so far as it affects the rights of persons *sui juris*, and that the saving of three years to persons under disability, provided in the old statute, is not repealed by the new. I have not been able to find any authority in the books for such construction. There is no rule of construction which will justify the inference that, because the Legislature preserved to persons *sui juris* the same limitation, as to past decrees, they previously had that it thereby intended to preserve to persons under disability the same period, after the removal thereof, that they previously had. Such was not the legislative purpose, because it has expressly provided a different period of saving to such persons. The saving to them is now expressly made one year after the removal of the disability. The statute is not made retroactive in part only. Being retroactive as to persons *sui juris*, it is likewise retroactive as to persons under disability; and the three years preserved, as to past decrees, applies to all classes of persons. It cannot be said that, because the Legislature expressly preserved the old limitation as to past decrees, it thereby meant to preserve the old limitation in the exception as to disabled persons. That is a non sequitur. How can the court say that it was not one of the chief purposes of the Legislature, by the amendment, to shorten the period of saving which it had theretofore

allowed, as to past decrees? It was not obliged to make any exception whatever in favor of persons under legal disability; and, when no such exception is made, a statute of limitations runs against them as well as others. *Jones v. Lemon*, 26 W. Va. 629. Nor have the courts power to read such an exception into a statute. 2 *Lewis' Suth. Stat. Const.* § 705; 36 *Cyc.* 1113, and 19 *A. & E. L.* 212 and 236.

I do not find any authority for saying that the saving in the old statute is not repealed. When a statute is changed, the parts that are left out are necessarily repealed. 1 *Lewis' Suth. Stat. Const.* §§ 237, 246. If the saving in the old statute is not repealed by the new, then we have two inconsistent statutes; the old allowing three years saving and the new allowing only one. A statute, shortening a period of limitation, repeals a former statute which gave a longer period to assert the same right. *Rodebaugh v. Traction Co.*, 190 Pa. 358, 42 *Atl.* 953; *Spees v. Boggs*, 204 Pa. 504, 54 *Atl.* 346; and *Voigt v. Gulf W. T. & P. R. R.*, 94 *Tex.* 357, 60 *S. W.* 658. That a Legislature may shorten a period of limitations, provided it does not unduly cut off vested rights, cannot be denied. 2 *Lewis' Suth. Stat. Const.* § 706, and numerous cases cited in note; *Gilman v. Cutts*, 23 *N. H.* 376; *Odum v. Garner*, 86 *Tex.* 374, 25 *S. W.* 18; *Parker v. Kane*, 4 *Wis.* 12, 65 *Am. Dec.* 283; and *Howell v. Howell*, 15 *Wis.* 55.

If the clear and unambiguous language of the statute is to be taken as expressing the legislative intent, the amended statute reduces both the limitation and the exception in favor of person under disability from three years to one year as to future decrees, and, as to past decrees provides that the limitation shall be three years as to all persons, and reduces the saving in favor of persons under disability to one year. The question is, as I see it, Can the new period of limitation be applied in this case, without unduly cutting off appellant's right of action? If it can, then it should be applied, according to all the authorities I have been able to find on the subject. If she has not had a reasonable time, since the amendment of the statute, to assert her rights, then it would be unconstitutional to apply it. Its inapplicability to all cases, however, does not render the statute void. 2 *Lewis' Suth. Stat. Const.* § 706. Her right to have the decree pronounced when she was an infant reviewed within three years after she became 21 years of age was a vested property right which the Legislature could not constitutionally take away from her. 2 *Lewis' Suth. Stat. Const.* § 706. It cannot, by shortening the period of limitation, cut off an existing right not then barred. *Rankin v. Schofield*, 70 *Ark.* 83, 66 *S. W.* 197; *Pinkum v. City of Eau Claire*, 81 *Wis.* 301, 51 *N. W.* 550; *Cassady v. Grimmelman*, 108 *Iowa*, 695, 77 *N. W.* 1067; *King v. Belcher*, 30 *S. C.* 381, 9 *S. E.* 359; *Brig-*

ham v. Bigelow, 12 *Metc. (Mass.)* 268; *Sanford v. Hampden, etc., Co.*, 179 *Mass.* 10, 60 *N. E.* 399; and *Berry v. Ransdell*, 4 *Metc. (Ky.)* 292. But it is competent for the Legislature to shorten periods of limitation, even as to existing causes of action, subject only to the qualification that a reasonable time be allowed for suit. 19 *A. & E. L.* 169; *Sanford v. Hampden, etc., Co.*, supra; and *Berry v. Ransdell*, supra. The rule is, not to hold such a statute unconstitutional because it contains no express saving of rights not then barred, but to hold it inapplicable to the particular case, unless the party complaining has had a reasonable time after its passage in which to assert his right. 25 *Cyc.* 904, 905; *Sanford v. Hampden, etc., Co.*, supra; *Parker v. Kane*, 4 *Wis.* 12, 65 *Am. Dec.* 283; *Dale v. Frisbie*, 59 *Ind.* 530; *Fiske, Adm'x, v. Briggs*, 6 *R. I.* 557; *Holcombe v. Tracy*, 2 *Minn.* 241 (*Gil.* 201); *Sohn v. Waterson*, 17 *Wall.* 596, 21 *L. Ed.* 737.

Appellant's cause of action accrued October 15, 1908. As the law then was, she had three years in which to file her bill of review. Within that time, by statute passed February 17, 1909, to take effect in 90 days, the period was reduced to one year. If time is to be computed from the passage of the act, there were eight months, less one day, but if only the time after it took effect is to be reckoned, there were only five months, less a day, until the year next succeeding her majority expired. The decisions are not uniform as to which is the proper date from which to reckon; but a majority of the courts hold that the time should be counted from the passage of the act, regarding its passage as notice to parties to be affected by it. This, I think, is the correct rule. 25 *Cyc.* 987, 988; 19 *A. & E. L.* 170-176.

So far as I can find, the courts of but two states, North Carolina and Texas, have adopted definite rules for determining what is a reasonable time in such case. The rule in the former state is, to regard as reasonable—

"the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute." *Culbreth v. Downing*, 121 *N. C.* 205, 28 *S. E.* 294, 61 *Am. St. Rep.* 661.

And the rule adopted in the latter state is to allow such time, under the new statute, as the ratio of time, not elapsed under the old, bears to the whole period. For example, if a limitation of three years is reduced to one year, and at the time the new act is passed there remains but one year of the prior limitation, a reasonable time is one-third of a year; and, if only six months of it remains, then one-sixth of a year, or two months, is reasonable. *Odum v. Garner*, 86 *Tex.* 374, 25 *S. W.* 18. The only good feature I can see in the Texas rule is certainty as to the time to be applied in any given case. Such rule, in some cases, might give an unreasonably short time. Indeed, its applica-

tion in the case above cited required the court to hold about one month to be a reasonable time in which to apply for a writ of error. The North Carolina rule would operate, in many cases, to give more time than is reasonably necessary. I do not think a hard and fast rule can be reasonably applied in all classes of cases; in some a shorter period would be as reasonable as a longer period in others. Says Justice Van Devanter, in *Lamb v. Powder River Live Stock Co.*, 132 Fed. 432, 65 C. C. A. 570, 67 L. R. A. at page 564 in the latter book:

"Each limitation must therefore be separately judged in the light of the circumstances surrounding the class of cases to which it applies, and, if the time is reasonable in respect of the class, it will not be adjudged unreasonable merely because it is deemed to operate harshly in some particular or exceptional instance; as where the person against whose right the limitation runs is under some disability, out of the state, or unavoidably prevented from suing within the time prescribed."

What is a reasonable time is primarily a legislative question; but where, as in this case, the Legislature has failed to provide any time whatever, it is necessary for the court to determine whether the time remaining, after the passage of the act, is reasonable, before it can apply the new statute. This question must be determined by general principles of equity and justice, and by analogy to the limitation fixed by law in similar cases, and not by any mathematical rule. Thirty days has been held to be unreasonable (*Berry v. Ransdall*, supra), and six months to be reasonable (*Parker v. Buckner*, 67 Tex. 20, 2 S. W. 746). Section 7, c. 132, Code 1913 (sec. 4941) allows an infant six months after coming of age to show cause against a decree. Reasoning by analogy to this statute regulating the time for asserting a right similar to the one here involved, I think eight months in which appellant could have filed her bill of review was a reasonable time; and, not having done so in that time, I think she is barred.

(76 W. Va. 469)

TAYLOR et al. v. TAYLOR et al.
(Supreme Court of Appeals of West Virginia.
June 8, 1915.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT §59 — DISCONTINUANCE—NEGLECT OF DUTY BY CLERK OF COURT.

When a chancery cause has been matured for hearing and presented to the court for decision, the failure of the clerk to keep it on the court docket until finally disposed of, caused solely by his negligence, will not prejudice the rights of litigants.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 153-159; Dec. Dig. § 59.]

2. ACTION §70—DISMISSAL AND NONSUIT §59—DISCONTINUANCE—WHAT CONSTITUTES.

A cause which has been submitted to the court for final decision, whether it is kept on

the court docket or not, is not discontinued by failure to enter any orders of continuance therein for a period of eleven years; nor does such failure prove an abandonment of the cause.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 752-755; Dec. Dig. § 70; Dismissal and Nonsuit, Cent. Dig. §§ 153-159; Dec. Dig. § 59.]

3. CONTINUANCE §3 — PENDING SUIT IN EQUITY—WHAT CONSTITUTES.

A chancery cause, which has been submitted for decision, is a pending suit, if no order has been made dismissing it, notwithstanding 11 years have elapsed without the entry therein of orders of any kind. Section 12, c. 114, Code 1913 (sec. 4615), operates to continue it from term to term without an order of court.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 3; Dec. Dig. § 3.]

4. ACTION §70 — DISMISSAL AND NONSUIT §59—DISCONTINUANCE—ABANDONMENT.

The failure of a plaintiff, after submitting his cause for decision, to have any further orders made therein for a period of 11 years, does not prove a discontinuance or abandonment of the suit.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 752-755; Dec. Dig. § 70; Dismissal and Nonsuit, Cent. Dig. §§ 153-159; Dec. Dig. § 59.]

5. EQUITY §302—PLEADING—SUPPLEMENTARY ANSWER.

A supplemental answer setting up matters which have arisen since the issues were made and the cause submitted for decision, not responsive to the bill, is properly rejected.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 594-598, 600, 601; Dec. Dig. § 302.]

6. QUIETING TITLE §30—PARTIES — LESSEE OF OIL AND GAS LEASE.

The petition of an oil and gas lessee, showing the lease was made pending a suit to determine the title to the leased premises, by a party to such suit, asking to be made party and to have its rights adjudicated, is properly rejected.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 64-66; Dec. Dig. § 30.]

7. TRUSTS §101 — CONSTRUCTIVE TRUST — PURCHASE FROM TAX PURCHASER.

A person receiving money from the owner of land under promise to redeem it from a tax sale, who, instead of redeeming takes an assignment of the purchase from the tax purchaser and procures a tax deed to be made to himself, will be treated as a trustee holding the legal title for such owner. The law implies a trust relation between the parties in such case.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 152; Dec. Dig. § 101.]

8. TAXATION §517—TAX SALE—FORFEITURE OF OWNER'S TITLE—PAYMENT OF TAXES BY TRUSTEE.

In such case payment of taxes by the trustee prevents a forfeiture of the owner's title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 963½; Dec. Dig. § 517.]

9. EQUITY §427—SCOPE OF RELIEF—PLEADING AND PROOF.

If the specific relief prayed for cannot be granted, the court may, if there is a prayer for general relief, grant any appropriate relief warranted by the averments in the bill and the proof.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.]

10. TRUSTS \hookrightarrow 363—ESTABLISHMENT—JURISDICTION—POSSESSION OF LAND.

Possession of the land by a plaintiff is not essential to jurisdiction in a suit to establish a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 563, 564; Dec. Dig. \hookrightarrow 363.]

11. ABATEMENT AND REVIVAL \hookrightarrow 61—SUIT TO ESTABLISH TRUST—DEATH OF LIFE TENANT.

A suit by the life tenant and remaindermen to establish a trust in land does not abate on the death of the life tenant.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 314-319; Dec. Dig. \hookrightarrow 61.]

12. VENDOR AND PURCHASER \hookrightarrow 232—NOTICE TO PURCHASER—POSSESSION BY TENANT.

Possession by a tenant is sufficient notice to a purchaser of land to put him upon inquiry concerning the tenant's right.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. \hookrightarrow 232.]

13. TRUSTS \hookrightarrow 356—TRUST IN LAND—DEALINGS WITH NOTICE—EFFECT.

The quality of trust being once stamped upon land, no subsequent dealings therewith, by persons affected with knowledge of the trust, will defeat it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529-538; Dec. Dig. \hookrightarrow 356.]

14. TRUSTS \hookrightarrow 312—TRUSTEE—PAYMENT OF TAXES—RIGHT TO REIMBURSEMENT.

A trustee, although denying the trust and claiming in his own right, should be reimbursed on account of taxes paid on the trust property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 431; Dec. Dig. \hookrightarrow 312.]

Appeal from Circuit Court, Roane County.

Suit by Michael Taylor and others against J. E. Taylor and others. From decree for plaintiffs, defendants Henry Young and others appeal. Modified and affirmed and remanded.

Pendleton, Mathews & Bell, of Pt. Pleasant, for appellants. Ryan & Boggess and Harper & Baker, all of Spencer, and Hogg & Hogg, of Pt. Pleasant, for appellees.

WILLIAMS, J. By this appeal Henry Young and the Louis F. Payne Oil Company seek reversal of two decrees made by the circuit court of Roane county on the 30th and 31st days of January, 1914, in a suit brought in the year 1898, by Michael Taylor and the heirs of Nancy Taylor, deceased, against J. E. Taylor and others. The ostensible purpose of the suit is to avoid, as a cloud on plaintiffs' title to 52 acres of land, a tax deed made on the 8th of December, 1896, by G. W. Hundley, clerk, and H. B. Hughes, to J. E. Taylor, and also a deed for the same land made on the 21st of June, 1897, by said J. E. Taylor to appellant, Henry Young. In addition to the special prayer, there is a prayer for general relief.

By the first of said decrees the court rejected the supplemental answer, tendered by Henry Young, and the petition tendered by the Louis F. Payne Oil Company; and, by the second, it decreed that said Young was the holder of the legal title, as trustee for

the heirs of Nancy Taylor, deceased, and decreed that he convey the land to them, and that they pay to him \$55.90, taxes and interest thereon paid by said Young on the land for the years 1895, 1896, and 1897. The decree rejecting the pleadings made them parts of the record.

The rejection of Henry Young's supplemental answer and affidavit tendered in support of it is assigned as error. Said answer avers facts which have arisen since the issues were made on the original pleadings, and depositions were taken by both plaintiffs and defendant and the cause submitted for decision. It pleads plaintiffs' laches in failing to prosecute their suit diligently as showing their abandonment of it. It also avers a forfeiture of their title to the state for omission of the land from the land books and failure to pay taxes thereon for a period of more than five years, by virtue of section 3, art. 13, of the state Constitution, because of his possession and payment of taxes for a period of more than ten years.

The last order in the case, prior to the decrees complained of, was made on December 3, 1903. That was an order submitting the case to the court for decision, in vacation, and was made upon agreement of the parties. Four similar orders had been previously made, submitting it to the predecessors in office of the judge to whom it was submitted in December, 1903, all of whom, apparently, either resigned or completed their terms of office without deciding it. The order, made in August, 1903, recites that the cause had been inadvertently omitted from the docket, and reinstated it. Some time thereafter it was again omitted from the docket, and the court, by order made the 21st of January, 1914, again reinstated it. That order recites that it had been inadvertently left off the docket by the clerk.

[1] Does the long period of time from 1903 to 1914, within which no order of any kind, not even an order of continuance, was made, and the omission of the case from the docket, work a discontinuance, or show plaintiffs' abandonment of their suit? The effect of previous decisions of this court and the court of Virginia is to say that it does not. It is not contended plaintiffs did not use reasonable diligence, after the issues were made, to take their proof and present their case to the court for decision. It had been presented for decision four times. What more could reasonably be required of a litigant? Assuming, but not deciding, that it was the clerk's duty to keep the case on the court docket, after it had been submitted to the court, and until finally disposed of, plaintiffs cannot be held responsible for his omission of official duty. Both the orders reinstating the cause on the docket recite that it had been inadvertently left off by him. There is no intimation in the record that his neglect was caused by, or contributed to, by plain-

tiffs, and hence no reason to attribute to them the negligence of that officer. His neglect of official duty in that regard could not prejudice the rights of the parties to the suit. *O'Brien v. Camden*, 3 W. Va. 20, and *Garrett v. Mayfield Woolen Mills*, 153 Ala. 602, 44 South. 1026.

[2-5] Nor does the lapse of time, and failure to have any orders made showing proceedings taken, prove abandonment by plaintiffs. It would be otherwise at the common law. Numerous terms of court having passed, and the record showing no order made, or proceeding taken, would create a chasm in the proceedings and work a discontinuance, at the common law, and plaintiffs would have to begin anew. 3 Blk. Com. 296; 6 Enc. Pl. & Pr. 923; and *Bouv. Law Dic.*, title "Discontinuance." But section 12, c. 114, Code 1913 (sec. 4615), modifies the common law, and operates to dispense with the entry of orders of continuance, in causes which are ready for hearing, but have not been determined before the end of the term. The statute continues a cause, which is ready for hearing, from one term until the next, without the entry of an order of continuance by the court, and hence prevents the occurrence of a chasm in the proceedings. This court has frequently held that the failure, even for many years, to take any proceedings in a cause, does not show a discontinuance or abandonment of it by plaintiff, provided there has been no order made dismissing it, which the court may do by virtue of section 8, c. 127, Code 1913 (sec. 4839), for want of prosecution for four successive years. *Buster v. Holland*, 27 W. Va. 510; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445; and *Central District Printing, etc., Co. v. Parkersburg, etc., R. Co.*, 85 S. E. 65. Hence the cause was a pending suit at the time the decrees complained of were made, notwithstanding a period of more than ten years had elapsed since the date of the last order. Therefore defendant's supplemental answer, setting up matters which arose after the case had been submitted for decision, was properly rejected. His rights were determinable by the state of facts that existed when the suit was brought.

[6] Nor was it error to reject the petition of the *Louis F. Payne Oil Company*. It acquired its lease mediately from defendant *Henry Young*, during the pendency of the suit and some time after it had been submitted for decision. The petition sets up the interest it claimed by virtue of its lease and the discovery of oil and the operation of a well thereunder. It avers that it purchased the lease without notice of the pendency of the suit or knowledge of plaintiffs' claim of title to the land, and further avers that plaintiffs are estopped because of their standing by and seeing it expend large sums of money in developing the property, and asserting no claim thereto, and making no objection to the development. The oil company could not acquire any interest in the land

from a party to the suit, during its pendency, which would defeat any decree the court might properly make. It was a pendente lite purchaser indirectly from a party to the suit, the subject-matter of which was the title to the land on which the lease was executed. It would therefore be as much bound by the court's decree as a party to the cause. That it may have acquired its interest without any actual notice of plaintiffs' claim, or of the pendency of the suit, can make no difference. The rule *lis pendens* does not rest upon the principle of notice, but is a rule of public policy founded on necessity. Were it not so, the control of the court over the subject-matter of suit would be uncertain and, in many cases, would be defeated altogether. For a clear and forceful exposition of the doctrine of *lis pendens*, we refer the reader to the opinion by Judge Green, in *Newman v. Chapman*, 2 Rand. 102, 123, 14 Am. Dec. 766. See, also, *French v. Successors of Loyal Co.*, 5 Leigh (Va.) 627, and *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. The rule sometimes operates harshly, and it may do so in this instance; but we know of no exception to it. However, its application is limited to cases where the interest is acquired in the subject-matter of controversy, and mediately, or immediately, from a party to the suit. *French v. Successors, etc.*, *supra*. In such case section 13, c. 139 of the Code 1913 (sec. 5105), requiring notice of *lis pendens* to be recorded in certain cases, does not apply. Pendente lite purchasers are affected with notice of all the facts which the record of the suit discloses at the date of their purchase. Hence it was not necessary to admit petitioner to the suit, and the court properly rejected its petition. *Stout v. Philippi M. & M. Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; *Lynch v. Andrews*, 25 W. Va. 751. It acquired no greater right than its assignor had; the rule applies to all persons subsequently dealing with the subject-matter of suit.

It may be, however, that plaintiffs are estopped to deny the validity of the lease. This question we cannot, and do not, now decide. Therefore, in order to make it clear that the rejection of the petition was not intended as an adjudication upon the merits of the estoppel therein averred, the decree of dismissal should have so stated. The petition presented a case wholly foreign to the cause alleged in the bill, and for that reason it was properly dismissed.

[7] According to the theory on which relief was granted, there had been no forfeiture of plaintiffs' title. The decree finds that defendant *Henry Young* purchased the land from *J. E. Taylor* with knowledge of the facts, or its equivalent, which constituted *J. E. Taylor* a trustee for plaintiffs. In such case the tax deed did not constitute an adverse title to theirs, and the payment of taxes on the land by the trustee inured to their benefit and prevented a forfeiture of

their title. *Lynch v. Andrews*, 25 W. Va. 751. It is insisted by counsel for appellants that by their allegations and prayer of their bill plaintiffs specifically asked for a cancellation of the deed as a cloud upon their title, and thereby establish a case of conflicting titles, showing the necessity for plaintiffs' keeping the land on the land books in their own name, to prevent a forfeiture. Notwithstanding the bill does pray for such specific relief, it also prays for general relief, and the court could just as appropriately give one kind of relief as the other, provided the facts averred and proven warranted it. *Castle Brook Carbon Black Co. v. Ferrell et al.*, 85 S. E. 544 decided at the present term; *Hall v. Pierce*, 4 W. Va. 107; *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223; and *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

[10] Plaintiffs do not aver possession, but it appears from a petition in the record, signed by Henry Young by his counsel, praying for an injunction restraining certain of plaintiffs from cutting and removing the timber from the land, that they were in actual possession at that time; the petition so alleges. There is no order filing that petition, or showing that it was acted on by the judge in vacation, and it may be a fugitive paper and no part of the record. But, however that fact may be, it was not material to aver possession, to entitle plaintiffs to the relief granted. The suit can just as consistently be treated as a suit to establish a trust, and get in the legal title, as one to remove cloud, and in the former possession in plaintiffs is not essential to jurisdiction, as it is in the latter. *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183.

[11] The death of Michael Taylor did not abate the suit. He had only a life estate by the curtesy, and no revivor was necessary; no interest in the subject-matter of suit passed from him to any one.

[7, 8] In respect to the merits of the case the testimony is conflicting. The land was sold in November, 1895, for delinquent taxes assessed thereon for the year 1894, in the name of Nancy Taylor, the owner of the fee, who died in 1893. H. B. Hughes became the purchaser at the price of \$5.64. There does not appear to be any irregularity in the tax sale proceedings. The land is proven to be worth \$500 at that time. Michael Taylor, the husband of Nancy Taylor, having a life estate in the land, had a right to redeem. He testified that he was illiterate and did not know how to proceed about redeeming it, and employed the defendant J. E. Taylor, his neighbor, a man experienced in business, to redeem it for him, and placed in his hands \$13 with which to do it; that this was within the year next succeeding the sale; that after the time of redemption had passed J. E. Taylor told him he had redeemed it; and that he did not know he had not done so, but

had taken a deed for it to himself from Hughes and the clerk of the county court, until he heard J. E. Taylor had deeded it to Henry Young. J. E. Taylor did not testify, nor did he answer the bill which averred those facts. A number of other witnesses testified to conversations with J. E. Taylor, and conversations between him and others, had in their presence, in which he admitted Michael Taylor had furnished him money with which to redeem the land. Some of them, however, say J. E. Taylor said it required two or three dollars more than he had received, to redeem it. This extra amount was occasioned by the cost of the tax deed which J. E. Taylor took to himself. The amount of taxes for which the land was sold shows that even less than \$13 was required to redeem. If those facts are true (and there is ample evidence to prove them), they establish a constructive or implied trust in favor of Michael Taylor and the heirs of Nancy Taylor, deceased. It being the duty of the life tenant to pay the taxes (section 54, c. 29, Code 1913 [sec. 938], and *State v. Mathews*, 68 W. Va. 89, 69 S. E. 644), payment by him inures to the benefit of the remaindermen. So, likewise, a redemption by him inures to their benefit. The same principle applies here that is applicable in case money is supplied by one person to another, under an agreement that the latter shall purchase land with it and have the title conveyed to the former, and he violates the agreement and takes title himself. In such case an implied or resulting trust arises, and equity treats the holder of the legal title as a trustee for the person supplying the consideration. *Bank of the U. S. v. Carrington et al.*, 7 Leigh (Va.) 677; *Pumphry v. Brown*, 5 W. Va. 107; *Hamilton & Co. v. Steele*, 22 W. Va. 348; and *Seller v. Mohn*, 37 W. Va. 507, 16 S. E. 496.

Defendant took the depositions of a number of witnesses who testified concerning statements made by Michael Taylor, which are not consistent with his own testimony; but we think he has sustained the burden of proving the allegations of his bill respecting the alleged agreement with J. E. Taylor for the redemption of the land. He exhibited with his bill a writing dated November 25, 1896, just two days before the expiration of the redemption year, signed by J. E. Taylor alone, in which he agreed to make to Michael Taylor a deed for the land "against 1st of April, 1896" (which date as to the year is evidently a mistake, and should be 1897). That writing contains this proviso: "Providing he pays fees for making and recording deed and amount of money I am out in buying said land from court." Counsel for appellant Young insist that this writing proves a conditional purchase by Michael Taylor; that the condition as to time was essential and was not complied with; and that, not being complied with, it gave the

vendor the right to disregard the contract. They also urge that it informed Michael Taylor that J. E. Taylor had bought the land, instead of redeeming it. But Michael Taylor testified that he could not read, and did not read the paper, and understood from J. E. Taylor that it simply gave him from that time, until the first of the next April, to pay him the balance due for redeeming it. Moreover, the writing does not state the facts as they must necessarily have been at the time. J. E. Taylor had not bought the land from the court, and he certainly had not then spent any money for the deed and its recordation, for it could not have been lawfully made until the redemption year expired, which would not be until the 27th of November, two days after the writing was given, and was not in fact made until the 8th of December, following. Furthermore, the writing is not wholly inconsistent with plaintiffs' claim of a redemption of the land from Hughes. Hughes' assignment, indorsed on the back of the sheriff's receipt, bears the same date, November 25, 1896, and recites that, in consideration of \$15.81, he "assigns all (his) rights in the within purchase to J. E. Taylor." The sheriff's receipt shows that Hughes paid \$5.64 for the land, which was the amount of taxes, interest, commissions, and expenses of publication due at the time of sale. That amount, plus 12 per cent. interest for a year, making a total of \$6.32, was all that was required to redeem, and Michael Taylor had furnished J. E. Taylor \$13—more than twice that amount. Both Michael Taylor and J. E. Taylor were present when the assignment by Hughes was made. Hughes testified as a witness for defendant, and, when it is remembered that Michael Taylor was illiterate, that it required only \$6.32 to redeem, and that J. E. Taylor then had \$13 of his money for the purpose of redemption, Hughes' statement, that the reason Michael Taylor did not himself purchase and take an assignment from him was because he said he did not have enough money to do so, tends strongly to prove that Michael Taylor was deceived as to the amount of money necessary to redeem. But, on this point, appellant's counsel contend that Michael Taylor was working a scheme to get complete title in himself, and thus defeat the heirs. We do not think the evidence supports this theory; nor is it probable he would seek to defraud his own children. The law would not permit him thus to take advantage of his own neglect of duty to pay the taxes. Moreover, the theory is not a reasonable one. Michael Taylor had already supplied J. E. Taylor with more than enough money to redeem. Why then should he have made such a statement to Hughes, if he was not deceived as to the amount of money necessary to redeem? It is not material to know why J. E. Taylor paid Hughes \$15.81 for his interest, which was worth, at most, only \$6.32.

Michael Taylor could have tendered him that amount, and, if he refused to accept it, he could have deposited it with the clerk. But he did not know what his rights were.

[12, 13] The next important inquiry is: Did Henry Young, at the time of his purchase from J. E. Taylor, know of his trust relation, or have knowledge of such facts as would put a prudent person on inquiry, which would lead to a disclosure of such relation? We think the evidence abundantly shows that it was his duty to make inquiry of Michael Taylor concerning his claim to the land. In the first place, the deed from J. E. Taylor and wife to him, upon its face, casts suspicion on J. E. Taylor's title. It bears date on the 21st of June, 1897, and contains this recital:

"Said land was sold to Henry Young, December 28, 1896, provided Michael Taylor did not pay said J. E. Taylor amount of money it cost him, which was about \$30, against April 1, 1897, and as said Taylor has not redeemed such or nothing paid on the same, said land is conveyed to said Young as per agreement."

This called attention to some interest Michael had in the land; yet he never went to see him to inquire concerning his claim, until after he had bought the land. It also shows that Young had conditionally bought the land at a time when his grantor recognized the superior right, for a time at least, of Michael Taylor; thus disclosing eagerness on J. E. Taylor's part to get rid of the land. Michael Taylor's right of redemption from J. E. Taylor is recognized by the paper. It thus disclosed a substantial interest in Michael Taylor, amounting to more than a mere option to buy it. Such right to redeem was not forfeited by failure to pay at the time specified. It also revealed the fact that J. E. Taylor, according to his admission in the recital, recognized that he was holding the title only as security for what he claimed he had advanced in the purchase of the land for Michael Taylor. This of itself was sufficient notice that he had not bought the land for himself, and if he had consulted Michael Taylor the presumption is he would have learned the state of facts disclosed in Michael Taylor's testimony. The insignificant sum paid by Young for the land is a potent circumstance tending to show he had little faith in J. E. Taylor's title. He paid only \$35 for it, and the proof shows it was then worth \$500. Again, the deed J. E. Taylor made to Young contains this very unusual and suspicious clause:

"The party of the first part conveys without general warranty just such title as is in them, to the party of the second part in the certain tract of land hereafter described."

Moreover, in addition to the foregoing matters appearing in Young's contract of purchase and his deed, there is an additional fact which, of itself, is generally sufficient to put a purchaser upon inquiry, which is pos-

session of the land by Michael Taylor at the time of Young's purchase. He and one of his daughters were then living on the land. His possession was notice to a purchaser of his claim; and it was Young's duty to have inquired of him the nature of his possession, before making his purchase; and, not having done so, he is chargeable with all the information such inquiry would have revealed if diligently pursued. *Campbell v. Fetterman's Heirs*, 20 W. Va. 398, and *Western M. & M. Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406, pt. 21, syl. Hence Young was affected with notice of his vendor's trust, and took the land subject thereto. He acquired no better right to the land than his grantor had. The quality of trust being one stamped upon the property, no subsequent dealing with it, by persons having knowledge of the trust, will be allowed to defeat the rights of the cestui que trust. Nothing but the intervention of a bona fide purchaser for value, without notice, can defeat the trust. Equity will follow the trust subject, as long as it can be identified, and will impress it with the original trust, unless a bona fide purchaser without notice has intervened. *Heiskell v. Powell*, 23 W. Va. 717; *Marshall's Ex'rs v. Hall*, 42 W. Va. 641, 26 S. E. 348; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644; and *Hogg v. McGuffin*, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491.

[14] The taxes for all the years, since the year 1897, presumably have been paid by Henry Young; but the final decree does not provide for his reimbursement. True, it recites that plaintiffs offered to pay him any further sums of money that the court might direct they should pay, and shows he declined to receive it. He doubtless did so on the ground that his acceptance might prejudice his right, and hence the decree should have ascertained the amount of taxes paid, and conditioned the making of the deed to plaintiffs on their payment, with interest, to the general receiver. The payment of taxes by Young inured to plaintiffs' benefit, and saved their title from forfeiture; and it is only equitable and right that he should be repaid. Plaintiffs are asking relief in a court of equity, and it is a familiar maxim of the law that he who asks equity should do equity.

The decree of January 30, 1914, should have provided that the rejection of the *Louis F. Payne Oil Company's* petition was without prejudice to any right it may have to defend its lease on the ground of estoppel. The two decrees appealed from will be modified in the respects above indicated, and affirmed as thus modified; and the cause will be remanded for ascertainment of the amount of taxes and interest thereon due Henry Young. Appellees, having substantially prevailed here, are entitled to their costs against appellants.

Modified, affirmed, and remanded.

(76 W. Va. 496)

THOMAS v. ANDERSON et al. (No. 2507.)
(Supreme Court of Appeals of West Virginia.
June 8, 1915.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES — 172—RIGHT TO ENFORCE TRUST.

Where land is conveyed to another without consideration, to hold in trust for the grantors, and with the intention of thereby preventing the same from being subjected to a threatened claim for damages, and it turns out that there was no such claim, and that the grantor had no creditor entitled to subject the land to the payment of a debt, equity will enforce the trust notwithstanding the purpose of the parties in making such deed.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 523-529, 542; Dec. Dig. § 172.]

2. CONTRACTS — 188—EFFECT OF ILLEGALITY — FRAUDULENT CONVEYANCE.

If one of the parties to such fraudulent conveyance by allegation and proof of only a part of the facts constituting the transaction is able to make out a prima facie case for recovery against the other party, the defendant's guilty participation in the fraudulent transaction will not preclude him from proving as matter of defense the illegal part of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 188.]

Appeal from Circuit Court, Jackson County.
Suit by George C. Thomas against Eliza Anderson and others. Decree for plaintiff. Defendants appeal. Reversed, and bill dismissed.

W. F. Boggess, of Ripley, and Ryan & Boggess, of Spencer, for appellants. Elmer L. Stone, of Ripley, and David A. Cronin and John M. Baker, both of Spencer, for appellee.

MILLER, J. The decree appealed from awarding the relief prayed for by the bill, and denying the defenses pleaded in the several answers, adjudged that the deed of June 21, 1899, between plaintiff and defendant Esther Thomas to defendant Eliza Anderson, for eighty-seven acres of land, was duly executed and delivered to and accepted by the grantee on the date thereof, and that the two notes bearing the same date for the sum of two hundred dollars each, signed by the grantee, in the name of Eliza Aplin, payable to the order of said Esther Thomas, with interest from date, and due and payable in thirty and sixty days from date respectively, were, prior to the institution of this suit, for a valuable consideration, assigned and transferred to plaintiff; that a vendor's lien on said land was retained in said deed to secure the payment of said notes, and that plaintiff is entitled to enforce said lien against said tract by reason of being the owner and holder of said notes secured thereby, and that plaintiff was entitled to recover of said Eliza Anderson the principal of said notes and interest, amounting to the sum of \$721.00. And accordingly it was further decreed that plaintiff recover of the said Eliza Anderson the said sum of \$721.00, with in-

terest and costs; and that defendant Nita Evans took and holds said tract subject to said vendor's lien, and to the rights of plaintiff thereunder, and that said lien constituted a valid, binding and subsisting lien against said land; and also that unless said Eliza Anderson, Esther Thomas, or Nita Evans, or some one for them, should pay to plaintiff the sum so decreed, the special commissioner thereby appointed should sell said land upon the terms, and as thereby directed, to pay and satisfy said decree.

The proof in accordance with the allegation of the bill and answers shows that the land decreed to be sold was conveyed to defendant Esther Thomas, then Esther Waybright, by her father W. H. Alpin, by deed of June 19, 1885; that subsequently, on May 6, 1903, her father conveyed to her another tract of three hundred and ninety acres, which included the eighty-seven acre tract, and which land she, subsequently, on October 28, 1908, leased to the Carter Oil Company, for oil and gas; and that on February 9, 1909, she conveyed to her daughter, the defendant Nita Evans, one hundred and eight acres out of said larger tract, and which also included said eighty-seven acre tract.

Plaintiff and defendant Esther Thomas, as the pleadings and proofs show, were married November 10, 1895; they separated about June 17, 1907, and in April, 1909, she obtained against him a decree of absolute divorce; they lived together as husband and wife on said land prior to June 21, 1899, and for many years thereafter, and until their separation, in 1907, except for a very short interval, and after that and until she conveyed the land to her daughter, the said Nita Evans, she continued to occupy the same, paying all the taxes thereon, and at no time did the said Eliza Anderson, the pretended grantee, ever have possession thereof, or claim any right, title or interest therein by reason of said deed, or otherwise.

[1] The several defenses to the bill and the relief prayed for, as presented by the answers and proof thereon, were: First, that the alleged deed of June 21, 1899, to and purporting to secure the alleged notes of Eliza Anderson, was made at the suggestion, if not the procurement, of plaintiff, then the husband of Esther Thomas, and in which he joined, for the purpose of putting the land beyond the reach of Starcher Bros., who, as she may have heard, and as represented to her by plaintiff, were threatening to give her trouble on account of a certain timber contract with her; that both agreed, after consultation with the grantee, Mrs. Anderson, to convey the land to the latter taking her notes, all to be held by the grantors, without any obligation on her part to pay said notes, and the land to be re-conveyed by her to Esther Thomas, as soon as it should be ascertained that Starcher Bros., who in fact had no claim against Mrs. Thomas, was found to have no demand against her, and

that plaintiff having procured and participated in the fraud was precluded from asserting any rights by assignment or otherwise in said notes or in the deed, or in the alleged lien securing the same; second, that both deed and notes were wholly without consideration, and that neither were made, executed or delivered with the intent or purpose of binding the parties thereby, but solely for the purposes stated in the first ground of defense, and that never since the said transaction had possession of said land been changed, or payment of the notes demanded by any one, until the institution of this suit, and laches of plaintiff were pleaded and relied on; third, that said notes were never endorsed or assigned by said Esther Thomas to George C. Thomas, nor was any consideration paid or given by him therefor, but his possession thereof was obtained without authority, at the time the deed and notes were so executed, by his taking them from the table where signed, and that never until after he and his wife had separated and she had obtained her decree of divorce had he made any claim thereto, and that at no time from the date of said notes, June 21, 1899, to the date of the suit, September, 1909, more than ten years, had he ever demanded payment of said notes upon said Eliza Anderson, or any one else connected therewith. And Mrs. Thomas swears positively that some time before she and plaintiff separated, she inquired of plaintiff about said notes and deed and that he assured her they had been long ago destroyed.

Disposing of these defenses in the inverse order stated, the only evidence supporting plaintiff's claim to the notes is the fact of his possession of them, and his uncorroborated testimony that they had been assigned to him by his wife in payment of an alleged claim for money paid for her use, etc. She flatly denies any indebtedness to him, and says that while he may have paid out some money for her, it was either out of her funds or that she had reimbursed him therefor; that at no time did he ever until this suit make any claim of indebtedness against her, that he had taken all her vouchers, checks, etc., and she was unable after so long a time to give full account of the transactions. While Thomas pretends that he had an agreement with his wife before the deed to Mrs. Anderson that the latter's notes were to be transferred to him, this is denied by Mrs. Thomas, and he does not pretend to have ever had a settlement with Mrs. Thomas for money claimed to have been paid on her account; he admits having received some money on her account, but makes claim that he accounted to her for it. As between plaintiff and his wife regarding these notes, according to the former's testimony, the whole transaction, including these notes, took place at one and the same time. And all that any of the witnesses to that transaction say concerning the notes is that after they were

signed by Mrs. Anderson, that Mrs. Thomas endorsed the notes while they still laid on the table, and that plaintiff then picked them up along with the deed and carried them off. Mrs. Thomas swears that she never endorsed the notes, that her name on the back of the notes is a forgery. On this question the evidence is conflicting. But if she did in fact endorse them the other evidence satisfies us beyond doubt that her endorsement was not for the purpose of assigning them to plaintiff on account of or in payment of any claim he had against her. This compelling evidence is that no possession of the land conveyed was ever delivered to Mrs. Anderson, but plaintiff and his wife continued for most of the time to reside on the land and to use the same, paying the taxes, claiming it, dealing with it and treating it as her land; and though plaintiff had the deed recorded, Mrs. Thomas and Mrs. Anderson swear it was without authority. He never had the land transferred to Mrs. Anderson on the land books for taxation, nor did he or his wife ever pay any rent to Mrs. Anderson, make any demand on her for taxes paid, nor until this suit was any demand made upon Mrs. Anderson for payment of the notes. In the mean time the land had been leased for oil, and part of it sold and the rights of other parties become involved therein. Besides all this plaintiff's own confession, given in his evidence in chief, is that he at least consented to, and even participated in the sham to defraud Starcher Bros., out of an alleged claim he reported to his wife they were about to make against her. He knew that he and his wife were not making a bona fide sale of the land to Mrs. Anderson, and he well knew that Mrs. Anderson was not to pay the notes signed by her. If he had had a valid claim against his wife he would not have accepted these notes in payment; if he did why did he wait all the succeeding years, and until after his wife had divorced him before asserting right and title to the notes or attempting to enforce the lien reserved in the deed?

That plaintiff's assertions of right and title to these notes was all an afterthought, conceived after his wife's decree of divorce against him, and for the purpose of obtaining an unjust and unconscionable advantage of her and her sister and daughter, the evidence satisfies us beyond any doubt whatever. The admitted facts, speaking louder than any words of the witnesses, can be reconciled on no other reasonable theory. Not even can the conduct of plaintiff be accounted for on the theory of kindly indulgence to a delinquent relative; indeed he excuses himself for his delay on the ground that he wanted to allow all the interest that was possible to accumulate on the notes.

On the second ground of defense, assuming lawful title and right to the notes in plaintiff, the defense of laches would perhaps not be available under the circumstances of this

case. But the decision of this point is not necessary to the proper disposition of the case. And if the deed was delivered and the notes executed and delivered as the court below, we think, might reasonably have concluded from the evidence, and with the intent to pass title, the deed was good consideration for the notes and the notes for the deed, and there would have been no lack of consideration for either. But as indicated the evidence satisfies us that the whole transaction was a sham resulting and growing out of the fear of the grantors that Starcher Bros. might attempt to assert some claim for damages against Mrs. Thomas, but which they in fact did not do, and the evidence of a member of the firm is that he knew of no such claim, and, so far as he knew, that none had even been made or asserted against Mrs. Thomas.

It is now manifest that the defense must rest mainly on the potency of the first ground alleged. And this defense involves two propositions, the first, that Starcher Bros., who occasioned the fear of plaintiff, communicated to his wife, were not in fact creditors, and never made any claims as such, and never reduced any such claim to judgment against Mrs. Thomas; second, that whatever fraud was committed by the parties to the deed and notes was participated in by plaintiff, and that defendants are not precluded thereby, as against him from pleading the fraud in defense of his suit upon the only part of said transaction remaining executory, namely, the notes and the pretended lien reserved securing the same.

The first of these propositions finds ample support, we think, in the principles enunciated in the recent case of *Criss v. Criss*, 65 W. Va. 683, 64 S. E. 905, opinion by Judge Brannon. In that case the court held that:

"A conveyance of land to be held in trust for a third person, the grantee and beneficiary intending by putting it in the hands of the grantee, to shield it from imaginary liability which the beneficiary feared might be attempted to be asserted, based on forged papers which the parties feared were in existence, when in fact there were no such papers, and no such liability, and the beneficiary owed no debts, will not be held void under the statute avoiding deeds made with intent to defraud creditors, and the trust will be enforced in equity."

So that upon the principles of this case, which we think applicable here, even if this was a suit by Mrs. Thomas against her sister Mrs. Anderson, to enforce the trust attempted to be created in her, the defense of fraud would not avail her.

[2] But assuming fraud, as contended by plaintiff, in the making of said deed and the procuring of said notes, is Mrs. Thomas to be denied the defense that he participated therein and is now claiming to enforce an alleged contract originating in the same transaction, and according to his claim, an integral part thereof? The position of plaintiff's counsel is that because he was not obliged to do so and did not, in order to present

a prima facie case, plead his fraud, or the fraud of either of the other parties to the transaction, the mouths of defendants are hushed while he proceeds in a court of conscience to obtain the benefit of his own fraudulent conduct, and to rob his wife, or the one who was his wife, out of the estate obtained by her from her father. The equitable rules and principles invoked for the proposition lead to no such inequitable and unjust conclusions. In the recent case of *Lanham v. Meadows*, 72 W. Va. 610, 78 S. E. 750, 47 L. R. A. (N. S.) 592, the first point of the syllabus, we held that:

"If a party to an illegal agreement, by proof of part of the facts constituting the transaction out of which it grew, make a prima facie case for recovery against the other party, without disclosing the illegality, the defendant's guilty participation in the transaction does not preclude him from proving as matter of defense the illegal part of the contract."

We think the principles of that case, and the authorities cited in support thereof, ought to control this case and that as plaintiff is seeking relief upon a transaction admitted by him to be fraudulent, and as precluding defendants, they may show the whole transaction and his participation therein, as a complete defense to his suit to enforce payment of the alleged notes and to enforce the alleged lien retained in said deed.

For the foregoing reasons we are of opinion to reverse the decree, and enter such decree here as we think the court below should have entered, dismissing the bill with costs to appellants in this court and in the court below in this behalf expended.

(76 W. Va. 370)

HARMAN et al. v. LAMBERT et al. (No. 2629.)

(Supreme Court of Appeals of West Virginia.
June 1, 1915.)

(Syllabus by the Court.)

1. QUIETING TITLE — 4 — RIGHT TO REMEDY — DOUBTFUL TITLE.

Where plaintiff's legal title is doubtful because of uncertainty in the identity and location of land claimed by him, his remedy is by ejectment, whether in or out of possession, and not by a bill to remove a cloud from title; equity having no jurisdiction in such case.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 5-13; Dec. Dig. — 4.]

2. EQUITY — 17 — RIGHT TO RELIEF — TITLE AND BOUNDARIES — PARTIES IN POSSESSION.

Nor does equity have jurisdiction to settle title and boundaries when plaintiff fails to aver and prove other valid grounds for equitable relief against those in possession of the land.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 38-42, 45; Dec. Dig. — 17.]

3. LANDLORD AND TENANT — 66 — POSSESSION OF TENANT — CHANGE OF NATURE — SECRET LEASE.

If a tenant takes a secret lease from another claiming to be the true owner, without knowledge of his landlord, the character of his possession will not thereby be altered.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 199-209; Dec. Dig. — 66.]

4. QUIETING TITLE — 12 — JURISDICTION — POSSESSION FRAUDULENTLY OBTAINED.

Possession fraudulently obtained will not suffice to give equity jurisdiction to remove cloud from title to real estate.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 44, 45; Dec. Dig. — 12.]

Appeal from Circuit Court, McDowell County.

Suit by W. F. Harman and others against George W. Lambert and others. From decree for defendants, plaintiffs appeal. Affirmed.

Greever & Gillespie, S. M. B. Coulling, and J. W. Chapman, all of Tazewell, Va., for appellants. Strother, Taylor & Taylor and Cook, Litz & Harman, all of Welch, and Sanders & Crockett, of Bluefield, for appellees.

LYNCH, J. Plaintiffs, some of whom are the heirs at law of David G. Sayers, their coplaintiffs joining them because of the existing marital relation, brought this suit, praying cancellation of a deed made to defendants by the heirs of H. C. Auvil as a cloud on plaintiffs' title to a tract of 51 acres of land in McDowell county, and for other relief later referred to and discussed; and from a decree denying such relief and dismissing their bill, plaintiffs have appealed.

Sayers died intestate, seised and possessed of a tract of 3,139 acres, embracing, according to plaintiffs' contention, the 51 acres in controversy. He acquired exclusive title to the tract under a decree of partition entered July 5, 1889, in the chancery cause of William A. Whitley and others against Henry Harrison's heirs and others, pursuant to the report of T. P. Brewster and A. J. Beavers, two of the commissioners appointed for the purpose by a decree entered at the preceding May term of the court having jurisdiction of the cause. On October 25, 1889, Sayers, out of lands other than the tract claimed by plaintiffs, conveyed to H. C. Auvil 100 acres, which defendants claim embraces the lands in controversy, the title to which descended to their grantors as heirs at law of the grantee.

[1, 2] The decree denying relief was predicated exclusively upon plaintiffs' failure to establish by proof the averment that they were in possession of the disputed area. Was the proof introduced for that purpose sufficient to give jurisdiction in equity to dissipate cloud on the legal title? That the 51 acres was embraced in the deed from the Auvil heirs to defendant Lambert, his deed to the defendant Litz and others, and their mining lease to the defendant Dry Fork Colliery Company, clearly appears from the testimony of the surveyors introduced by plaintiffs as witnesses in their behalf. Though the bill charges fraudulent inclusion of the disputed tract in these several grants, they evidently were intended to conform to the Sayers grant to Auvil, and to embrace

only the lands granted by that deed. There is an entire want of proof of anything showing any intention to the contrary. Plaintiffs did not offer any evidence tending to impeach the bona fides of the parties to these conveyances.

Apparently acting upon the theory or belief that their title was free from taint and unassailable on any reasonable ground, defendants early in the year 1909 constructed a building on the 51 acres, and in it as their tenant placed one Joe Crigger to hold for them possession of the lands, then and perhaps still uninclosed. True, the building was hastily constructed and temporary in character, but not in these particulars different from many others in mountainous parts of many counties in this and other states. But, whatever its character and purpose, plaintiffs conceived, and in the nighttime carried into execution, the plan whereby they sought to effect a change in possession, by inducing defendants' tenant to exchange residences with his cousin, Jim Crigger, plaintiffs' tenant on adjoining lands; the purpose being to secure for themselves such possession as would confer jurisdiction to maintain this suit to cancel defendants' deeds as clouds on their title. For, virtually without exception, the rule is that, unless some other special grounds for equitable intervention are averred, a holder of the legal title to real estate must, in order to maintain a bill to quiet title or remove cloud, be in possession of the land when the proceeding is instituted. Clearly, such is the requirement in this jurisdiction. *Poling v. Poling*, 61 W. Va. 78, 55 S. E. 993; *Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49; *Logan v. Ward*, 58 W. Va. 366, 52 S. E. 393, 5 L. R. A. (N. S.) 156; *Mills v. Oil Co.*, 57 W. Va. 235, 50 S. E. 157, 4 Ann. Cas. 427; *Sansom v. Blankenship*, 53 W. Va. 411, 44 S. E. 408; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596. Where the sole purpose sought is the dissipation of such cloud, not only must the bill aver, but, when denied, the proof must show, possession of the lands affected at the date the proceeding is begun.

[3, 4] Such possession plaintiffs did not have when they brought this suit, if they fraudulently obtained that on which they now rely, unless the 51 acres are a part of the 3,139 acres; because possession so procured will not avail as ground for the maintenance of a bill *quia timet*. As an essential jurisdictional fact, the possession necessary for such relief in equity must have been acquired in a legal manner. *Campbell v. Davis*, 85 Ala. 56, 4 South. 140; *Hardin v. Jones*, 86 Ill. 313; *Trotter v. Stayton*, 41 Or. 117, 68 Pac. 3; *Stark v. Starr*, 6 Wall. 402, 18 L. Ed. 925; *Goldsmith v. Gilliland* (C. C.) 22 Fed. 865; *Collier v. Carlisle*, 133 Ala. 478, 31 South. 970. So that plaintiffs' effort to put themselves in a position to say by their bill that they had possession of the lands in dispute cannot secure the indorsement or ap-

proval of a court of equity. Such indorsement would set at naught the provisions of section 4, c. 93, Code, saying:

"The attornment of a tenant to any stranger shall be void, unless it be with the consent of the landlord of such tenant or pursuant to or in consequence of the judgment, order or decree of a court."

Construing this section, we said, in effect, in *Coal & Lumber Co. v. Lumber Co.*, 71 W. Va. 21, 75 S. E. 197, *Voss v. King*, 33 W. Va. 236, 10 S. E. 402, and *Stover v. Davis*, 57 W. Va. 196, 49 S. E. 1023, among other cases, that the recognition of the title of another than the landlord who put him in possession, or attornment to such other, by the tenant of an adversary claimant, will not interrupt the continuity of the landlord's possession, except as provided by that section, unless with knowledge or notice the landlord acquiesces in the disloyal conduct of his tenant; or, as in *Voss v. King*, if a tenant takes a secret lease or conveyance from another claiming to be the true owner, without the knowledge of his landlord, the character of his possession will not be altered. 32 Cyc. 1341.

But plaintiffs argue that, as defendants were trespassers on the 51 acres, their acquisition of the possession was not wrongful, but legitimate and lawful, and therefore not an infringement of the rule invoked by defendants. The inherent vice of this argument is twofold. Plaintiffs' acquisition of the possession was, as we have seen, itself tortious, and violative of the prior possession of the defendants taken under color of title. It cannot, therefore, inure to plaintiffs' benefit. *Kraus v. Congdon*, 161 Fed. 18, 88 C. C. A. 182. Again, the argument assumes as true the very fact in issue in this case, namely, that the 51 acres was part of the 3,139 acres, the title to which vested in them as the heirs of the prior owner.

Of the same character, and subject to the same criticism, is the further argument sought to be impressed upon us that, as plaintiffs were, and continuously since the death of Sayers had been, in possession of the 3,139 acres, they were also in possession of the 51 acres, because the latter was a part of the Sayers tract. As observed, this contention assumes as true the subject-matter of the whole controversy. If the fact be as so assumed, this litigation must terminate favorably to plaintiffs; for they have had possession of, and paid taxes on, the 3,139 acres and every part of it since the death of their ancestor. But, as indicated, there exists a real and substantial disagreement between plaintiffs and defendants as to the exact situs of the 51 acres, and that diversity involves a determination of the question whether the land in dispute falls within the exterior boundaries of 3,139 acres allotted to David G. Sayers in the decree of partition in the Whitley suit, or within the boundaries of the 100 acres conveyed by him to Auvil by the deed of October 25, 1889.

Having reached the conclusion that plaintiffs did not, at the institution of this suit, have the possession deemed requisite solely for cancellation of defendants' deeds as clouds on the title to the 51 acres, was there jurisdiction on other grounds alleged in the original and amended bills to grant such relief? Plaintiffs assign as erroneous the virtual refusal of their claim for recovery of the timber removed from the land in controversy by defendants' vendees. The fact of such sale and removal, while denied in the answers, is substantially proved. But defendants contest the right to such recovery on the ground of ownership under their deeds from the Auvil heirs. Surely, such relief alone, based as it is upon controverted claims of title, does not justify the maintenance of the suit for that purpose. Were plaintiffs' title clear and unimpeachable, or not contested, they might be entitled to the value of the timber, as incidental to other relief upon grounds cognizable in equity. Or, differently stated, such recovery is allowable where equity has jurisdiction to grant other equitable relief. Otherwise the claimants are relegated to the forum wherein there is a complete and adequate legal remedy.

Plaintiffs also seek to support equitable jurisdiction for the award of relief by cancellation upon the averment that defendants fraudulently procured the inclusion of the lands in controversy in the grant to them by the Auvil heirs, with knowledge that the 51 acres were not conveyed by Sayers to their ancestor; wherefore his heirs had no title to pass to defendants. But this charge cannot avail for any purpose without evidence to support it; and we find none in the record.

Did the prayer for an injunction, upon the mere probability or inference that the defendant Dry Fork Colliery Company would proceed to mine coal under the 51 acres, confer jurisdiction in equity to grant the relief prayed by plaintiffs? Although equity has, under certain limitations, jurisdiction to restrain a trespass, the only allegation in the original bill is to the effect that defendants Lambert, Taylor, and Litz have leased the 51 acres, together with other adjoining lands, to the colliery company for the mining of the coal therein, and that it was then engaged in operations on the adjoining lands, "and will mine and remove all the coal from the 51 acres unless restrained from so doing." Nor are the averments of the amended bill definite as to the acts and purposes of the company. The charge therein is that the company "is now mining and removing coal" from a mine situated on such other land; that it "is asserting the right to mine and remove the coal from said 51 acres"; that its operations are so situated that "the coal in said 51 acres can be mined and removed from said mine now open and being operated; that, so far as they know or are informed," the company "may be now actually mining

the coal" under the 51 acres; "and that, if defendants are allowed to mine and remove the same, they will thereby destroy the corpus of the estate and work irreparable injury to plaintiffs." Neither bill distinctly avers that the company is engaged in operations on the disputed tract, or that it has threatened to enter upon it for that purpose. However, admitting as sufficient these averments to show a threatened trespass, on the land claimed by the plaintiffs, they do not say they have instituted or are about to institute an action of ejectment to settle their title to the land agreeably to the rule announced by this court in *Pardee v. Lumber Co.*, 70 W. Va. 68, 73 S. E. 82, 43 L. R. A. (N. S.) 262, and *Waldron v. Ritter*, 70 W. Va. 470, 74 S. E. 687.

But, with more merit, plaintiffs contend that the averments contained in defendants' answers in the nature of cross-bills that they have title and actual possession of the 51 acres, and praying affirmative relief by the cancellation of plaintiffs' title to the tract should the court be of opinion the 51 acres was part of the lands conveyed by the Auvil heirs, gave jurisdiction, agreeably to the doctrine asserted in 32 Cyc. 1338, that a defendant who files a cross-bill to quiet title thereby gives jurisdiction of the whole controversy, although plaintiff asking the same relief as to his title is not in possession of the land incumbered. But, after the court had expressed a purpose to deny plaintiffs any relief upon their bill, and before the entry of the decree now under review, it being entered upon a rehearing awarded on plaintiffs' petition, defendants move to strike from their answers any and all allegations of new matter, if any were averred, as grounds for affirmative relief by way of cancellation of plaintiffs' deeds as clouds on defendants' title, and for specific performance of an alleged contract to convey the lands in dispute, if not already embraced in the 100 acres, which motion was sustained, and such matter stricken from the answers, over plaintiffs' protest and objection. Whether this ruling was erroneous, as plaintiffs contend, it is unnecessary to decide, because they were not prejudiced by it. For, conceding as unwarranted the withdrawal of the new matter in the answers of defendants and their prayer for affirmative relief, it is proper to inquire whether, under the proof, equity has jurisdiction to remove a cloud from or quiet the title of either party to the suit. To confer jurisdiction for such purpose, the title of the claimant must be clear, or reasonably free from complication. *Hitchcox v. Morrison*, 47 W. Va. 208, 34 S. E. 993. "Those only who have a clear, legal, and equitable title to land, connected with possession, have a right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393. "The bill cannot be maintained without clear proof of both pos-

session and legal title. * * * If his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete." *Frost v. Spitley*, 121 U. S. 553, 7 Sup. Ct. 1129, 30 L. Ed. 1010. *Wallace v. Coal Co.*, 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140, says plaintiff must have both good title and actual possession in order to remove cloud from his lands. Equity has no jurisdiction, upon the sole ground of removal of cloud from title, to try conflicting titles to land at the suit of one holding either legal or equitable title; the adverse claimant being in possession. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895. Nor has it jurisdiction to settle title and boundaries when plaintiff does not aver and prove other valid grounds for equitable relief against defendant. *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Kemble v. Cresap*, 28 W. Va. 603; *Hill v. Proctor*, 10 W. Va. 59; *Lange v. Jones*, 5 Leigh (Va.) 192.

Does the case fall within the limitations so prescribed? After stating that the land granted is located "on the south side of Dry fork of Tug river, adjoining lands of Preston Beavers and lands of said Sayers and said Auvil, and being the lower part of the lands sold to J. A. Mulkey by D. G. Sayers and Harrison August 4, 1879, for which they executed their title bond, which has since been assigned to H. C. Auvil," the deed from Sayers to Auvil further bounds and describes the 100 acres as "beginning at a spotted oak, corner to 100 acres known as the Harvey George tract; thence a straight line up the hill to a low gap on top of the ridge that divides Dry fork and the left hand fork of Lick branch; thence running up said ridge with the top thereof to the head of the Lynn hollow; thence down a spur between said hollow and Dry fork to the division line made by and between Daniel Johnson and Albert Sheppard, former owners of said land; thence with said division line to a line of said 100 acres, and with the same down the river to the beginning." The proper location of the 100 acres depends upon the identification of the beginning corner called for in the Sayers deed. While the civil engineers employed by plaintiffs, finding no such monument, began at a red oak pointed out to them by plaintiffs as the true corner of the George tract near what they say was the stump of a spotted oak tree, those employed by defendants, likewise failing, located the corner at a poplar near a small spotted oak tree about 1,900 feet east of the red oak so identified by the former. To some extent, the proof tended to support each selection so made. But, while in part the several surveys coincided, they nevertheless disagreed not only as to the true location of the beginning corner, but necessarily also as to other boundary

lines and monuments delimiting and demarking the Auvil 100 acres and the actual acreage it contained; plaintiffs' surveyors fixing the quantity at about 60 acres; defendants' at 109 acres. However, from the very nature of the controversy, and in view of the great mass of conflicting testimony, raising, as it does, a doubt and uncertainty as to whether the land in controversy is part of the 3,139 acres claimed by plaintiffs or a part of the 100 acres claimed by defendants, and as to whether plaintiffs or defendants are the true owners of the legal title, we deem this case one peculiarly appropriate for jury determination in an action of ejectment, and not for a court of equity upon a bill to dispel cloud from the legal title, if any, of either party. In this view of the case, the ruling upon the motion to dismiss parts of defendants' answers did not operate to plaintiffs' prejudice; equity being without jurisdiction in any aspect of the case.

We are therefore of opinion to affirm the decree.

(76 W. Va. 379)

REMAGE v. MARPLE et al. (No. 2406.)
(Supreme Court of Appeals of West Virginia.
June 1, 1915.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY §194—LIABILITY OF SURETIES—CONTRIBUTION.

To become liable as sureties for the same debt or for the performance of the same duties, it is not essential that the obligors be bound by the same instrument. If sureties, each of them will be liable for the undertaking, or required to contribute thereto proportionately, though bound by different instruments. And this relation and liability may arise by implication from circumstances, as well as by express agreement.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 727-731; Dec. Dig. § 194.]

Error to Circuit Court, Braxton County.

Action by J. C. Remage against J. A. Martin and others. Judgment for plaintiff, and defendant C. W. Marple brings error. Affirmed.

Corley & Green and John B. Morrison, of Sutton, for plaintiff in error. Hines & Kelly, of Sutton, for defendant in error.

LYNCH, J. In September, 1907, J. A. Martin as principal, and C. W. Marple as surety, executed to S. E. Perkins their note for \$575, payable in one year. After its maturity, Marple gave notice under the statute to Perkins to sue on the note, and the payee demanded additional security. Martin then procured from J. C. Remage as maker, and transferred to Perkins, a negotiable note of December 12, 1908, for \$500, payable to himself in 60 days. The first note remaining unpaid, Perkins, without instituting any action thereon, promptly sued on the second note and obtained a judgment thereon against Martin and Remage, which was

satisfied out of the proceeds of a sale of Ramage's real estate. Thereafter Ramage brought assumpsit for reimbursement, and obtained a judgment against Marple alone for \$322. Martin, though named as defendant, was not served with process, and did not appear in the action. As plaintiff in error, Marple denies any liability to Ramage, and assigns as erroneous certain rulings on instructions.

The testimony may reasonably be deemed sufficient to prove that, when the second note was executed, Martin promised but failed to secure it by deed of trust to be delivered simultaneously therewith, but took and retained the note over the objection of Ramage, and about three weeks before its maturity transferred it to Perkins in order to avoid suit against him on the first note; and that this second note was accepted by Perkins, without knowledge of the circumstances attending its execution, not in payment but as additional security for the first note without any express agreement as to suspension of his right of action thereon. Plaintiff testified that when he learned of the transfer he protested to Martin and demanded return of the note, and also explained fully to Marple all the circumstances attending its execution and transfer; that Marple requested him to leave the note with Perkins as security, and assured him the first note would be paid by Martin, telling him "just to leave it there and Martin would come out and pay" the original debt, "and not to raise any disturbance about my note, it was to keep Perkins off of him and Martin at that time"; that, because of such request and assurance by Marple, he did leave the note with Perkins as such security. The procurement and transfer by Martin of the Ramage note is admitted by Marple, though there is no proof that he knew anything about either transaction at the time it took place. But he denies he ever had any understanding with plaintiff that the note was to be left with Perkins for any purpose.

Were Ramage and Marple cosureties for Martin's liability to Perkins? Apparently, the jury, in fixing the amount of plaintiff's recovery, followed the rule of contribution, on the theory that, under the facts, such relation existed. Upon the trial, plaintiff, in one aspect of the case, contended he was merely surety for Marple, by virtue of his alleged understanding with the latter. He requested and the court gave an instruction embodying this theory of liability; which, if correct and sustained by proof, would have entitled him, not to contribution merely, but to recovery of the entire sum paid Perkins, leaving Marple, who would thus occupy toward him the position of principal, without right of contribution in case he had himself discharged the Martin debt. But, in argument here, plaintiff seems to have abandoned this position, and now makes no complaint as to the amount of his recovery. That the-

ory is, in fact, untenable under the proof. For, from his own testimony, it is clearly apparent Ramage, at the time of the execution of the note by him and of his alleged understanding with Marple, relied on Martin to pay the original obligation due to Perkins, with whom he left the second note, as he claims, on the assurance by Marple that Martin would pay the first note. Hence the instruction mentioned, while not specifically objected to, was improper. However, as the jury clearly were not misled by it, but were guided by instructions fully and correctly presenting the theory of cosuretyship, the error is now a harmless one.

Under the facts detailed and not controverted, the jury reached a proper conclusion. Judged by such facts, Ramage and Marple were cosureties. Though by different instruments, they had become bound for payment of the same debt. Marple's knowledge of the execution of the note by Ramage as collateral security was immaterial. 2 Daniel, Neg. Inst. § 1340; *Rosenbaum v. Goodman*, 78 Va. 121. Hence Ramage was entitled, not to subrogation, but to contribution.

"It is well settled that, if different persons are sureties for the same debt, or for the performance of the same duties, each will be made * * * to contribute, though they be bound by different bonds, and though they knew nothing at the time of the obligations of each other. * * * What difference does it make if they are severally bound and by different instruments, but for the same principal, and the same engagement? In all these cases the sureties have a common interest and a common burden; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one and the same instrument." *Corprew v. Boyle*, 24 Grat. (Va.) 290.

"If there are two parties bound as principal and surety for a debt, and a third party afterwards, at the request of the principal, bind himself as surety for the debt, the two sureties, in the absence of any agreement to the contrary, become cosureties of the same principal, and this relation may be established by implication from circumstances, as well as by express agreement." *Harnsberger v. Yancey*, 33 Grat. 527.

See, also, *Stovall v. Bank*, 78 Va. 188.

It is contended by defendant that, by giving the notice provided for by sections 1 and 2, c. 101, Code, he was released from all liability as surety. Written notice was given to Perkins, as therein provided, about 10 days before the transfer of the Ramage note, to proceed to enforce the principal debt against Martin. But no action was taken by the creditor upon that obligation. Instead, Perkins chose to enforce the note given as collateral security. But the defense so interposed fails for want of proof. The statute does not require the creditor to proceed against an insolvent debtor. The provision is that he shall forfeit his right against the surety if he shall not within a reasonable time after notice "institute suit against every party to such contract who is a resident in this state and not insolvent." Solvency of the principal obligor is essential to such release. *Barnes v. Boyers*, 34 W. Va. 303, 12

S. E. 708. Here there is no proof whatever of the solvency of Martin. Indeed, circumstances appearing in the record strongly indicate his insolvency.

Again, as to the further claim that the taking of the Remage note by Perkins was a release of Marple, even conceding that the giving of that note had the effect of extending time by the creditor on the principal debt by suspending right of action thereon until maturity of the security, yet Marple's request and inducement to Remage to leave the note with Perkins, if true, as the jury apparently found, was a waiver of his right to a discharge. "The right of the surety to be discharged by reason of * * * extension of" time for "payment is a personal privilege and one which he may waive by a verbal ratification or assent made after the agreement for such extension has been entered into." *Glenn v. Morgan*, 23 W. Va. 467. And, by some authorities, the taking of a new note merely as collateral security does not release the surety on the first note. 1 *Brandt on Suretyship*, §§ 403, 404; 32 *Cyc.* 211. Whether, as Perkins testifies, the new note was taken by him as such collateral security merely, is a question of intention of the parties. *Stuart v. Lancaster*, 84 Va. 772, 6 S. E. 139; *Davis v. Davis*, 104 Va. 65, 51 S. E. 216.

What has been said practically disposes of the rulings on instructions. No. 3, given for plaintiff, does not, as defendant contends, assume the fact of cosuretyship. On the contrary, it simply requires a finding for plaintiff if the jury shall find from the evidence this relation existed between him and Marple. No. 2 for defendant, refused, in so far as it propounded correct legal principles, was sufficiently covered by other instructions given for him. No. 5 was properly refused. It wholly ignores the theory and evidence of cosuretyship, and, before plaintiff could recover any sum in this action, it would require a showing of a written contract by Marple to pay him the entire amount of the Martin note. This was clearly erroneous.

Finding no error, we affirm the judgment.

(76 W. Va. 508)

STATE v. HICKS et al.

(Supreme Court of Appeals of West Virginia.
June 8, 1915.)

(Syllabus by the Court.)

1. BOUNDARIES ¶6—INDEFINITE DESCRIPTION—MISTAKE IN CALL.

In construing a general and indefinite description of land contained in a deed, a call therein plainly appearing to be a mistaken one, from its irreconcilability with another call, with the intention of the parties as viewed from the situation and circumstances surrounding them when the deed was made, and with the acts of the parties under the deed, may be wholly rejected.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 47-57; Dec. Dig. ¶6.]

2. BOUNDARIES ¶9—INDEFINITE DESCRIPTION—STATEMENT OF ACREAGE.

Where a description in a deed is indefinite and uncertain as applied to the ground, by reason of conflicting calls or otherwise, the statement of the acreage called for may become an essential part of the description.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 77-89; Dec. Dig. ¶9.]

Appeal from Circuit Court, McDowell County.

Suit by the State against J. W. Hicks and others. From decree for the State, defendant W. F. Harman appeals. Reversed, decree entered, and remanded, with directions. See, also, 84 S. E. 928.

Chapman & Gillespie, of Tazewell, Va., Sanders & Crockett, of Bluefield, and S. M. B. Coulling, of Tazewell, Va., for appellant. W. B. Kegley, of Wytheville, and Anderson, Strother & Hughes, of Welch, for appellees.

ROBINSON, P. This suit by the State to sell lands as forfeited, involved, among several tracts, two tracts of land which are the subject of the decree appealed from. One of the tracts was reputed to contain one hundred acres, the other forty acres. The Virginia-Pocahontas Coal Company claimed title to the first and denied that it was forfeited and liable to be sold for the benefit of the school fund. Harman, however, asserted that he was owner of a one-half interest in the first and of the whole interest in the other, and prayed that he be permitted to redeem both of the tracts. He claimed that the two tracts adjoined each other and were distinct from each other. The coal company not only denied his title to any interest in the one hundred acre tract, but claimed that nearly all of the forty acre tract was overlapped by and included in the bounds of the other. If there was such overlap, and title to the one hundred acre tract was not forfeited, the forfeited title to the forty acre tract so far as it was overlapped of course gave way to the former.

On the hearing of the cause upon the report of a commissioner, together with the testimony taken and the documents filed before him, the court decreed that the one hundred acre tract was not forfeited, and dismissed the same from the suit. It further decreed that the greater part of the forty acre tract was included within the boundaries of the other tract, and therefore denied to Harman the right to redeem any of the forty acre tract except a small portion ascertained to be outside of the boundaries of the other tract. Having found the one hundred acre tract not forfeited, the court found it unnecessary to say who owned the tract with right to redeem. It was necessary, however, to determine the boundaries of the same, so as to find what part of the forfeited forty acre tract Harman was entitled to redeem.

Harman cannot complain of the decree wherein it dismisses the one hundred

acre tract in which he claimed to own a one-half interest, and the State does not complain. But wherein the decree extends the boundary of that tract so as to include the greater part of the forty acre tract, he is affected and has appealed. For, out of the issue of forfeiture or no forfeiture, his claim of sole ownership in the larger part of the forty acre tract has been adjudged against him. So the case presents a question of location of boundaries. Incidental to Harman's prayer to redeem the forty acre tract which is admittedly forfeited, the question whether the boundary is overlapped by the other one must be decided.

Before proceeding further, it is well to state that the one hundred acre tract is the same that was involved in *Carretta Railway Co. v. Fisher et al.*, 74 W. Va. 115, 81 S. E. 710. In that case it was adjudged that the one hundred acre tract was forfeited, but that Harman owned a one-half interest therein, subject to the forfeiture. Now, if his cotenant, the Virginia-Pocahontas Coal Company, may prevail in spreading the one hundred acre tract largely over the forty acre tract, his claim of sole ownership of the latter is virtually reduced to a one-half interest in that tract also.

[1] We are of opinion that the court erred in determining that the boundaries of the one hundred acre tract extended to any part of the forty acre tract. Only by giving force to that which is evidently a mistaken call in the deed could such extension be made. But the acceptance of that call is certainly at variance with the intention of the parties to the conveyance, not only as that intention may reasonably be inferred from the description of the deed when applied to an actual survey of the ground, but from the situation and circumstances surrounding the parties when the deed was made and their practical exposition of the meaning of the deed by acts under it. The call is so irreconcilable and incongruous with the very next call in the deed, with the intention of the parties as viewed from their general situation and the circumstances surrounding them when the conveyance was made, and with the acts of the parties under the deed after it was made, that it must be wholly rejected. *Matheny v. Allen*, 63 W. Va. 443, 60 S. E. 407, 129 Am. St. Rep. 984; 5 Cyc. 916; 2 Devlin on Deeds (3d Ed.) § 1013d; *Tyler on Boundaries*, 124.

The one hundred acre tract was conveyed by Preston Beavers to Mary and Sarah Jane Farley, on February 4, 1880. The land lay in a remote and mountainous section, at that time undeveloped and without accurate methods of land transfers. The description given is most general. Yet it is only similar to those then generally employed in an undeveloped section of the country. It is by no means unusual for such a description to be incomplete or mistaken. Not being taken from actual survey, but only from the general knowledge of the parties as to the situa-

tion of the land, such description can not be expected always to afford accurate or even consistent boundaries. In the crude way of transferring land by calls for hollows, spurs, branches, lines of old surveys, and the like, there was probability of some one being mistaken in his recollection of just how things actually lay on the ground. Errors and inconsistencies could readily creep in. Remoteness, land values, habits and education of the people, and other things, did not tend to promote accuracy.

The description in the deed referred to is as follows:

"All that certain tract or parcel of land situated lying and being in said County and on the waters of Barrenshe Creek, bounded and described as follows, viz.: Beginning at the school house running down the Creek to the Mouth of the mill hollow running up the mill hollow to the original line of a survey said Beavers purchased of Peery et al. and with said line crossing the lick branch to the top of the fork spur and down said spur to the creek about 250 yds. below the mouth of Laurel Creek crossing ~~crossing~~ same and ~~strait~~ up the hill to the original line of said survey and with same to above the school house and down the hill to the beginning containing 100 acres be the same more or less."

We recognize that it will be impossible so to delineate the lay of the land as to make what we may say in construing the description wholly intelligible to readers other than counsel in this case. That could only be done by an exposition of the map from which we write. Between the lines of this opinion, as it were, is that map. Yet its exposition in the reports is impracticable.

The call, "running up the mill hollow to the original line of a survey said Beavers purchased of Peery et al.," is totally inconsistent and incongruous. No line of the survey which Beavers purchased from Peery and others can be reached by running up the Mill Hollow. To run up that hollow no line of the survey will ever be reached, or even approached. Yet there is no controversy as to the lines of the survey purchased by Beavers from Peery and others. A line thereof is not far from the mouth of Mill Hollow, but by actual survey crosses Barrenshe creek before it reaches the mouth of the hollow. No other lines of the survey referred to have any relation to Mill Hollow. It is this line which does have relation to the hollow that was evidently meant in the description. Doubtless it was supposed that this line crossed the hollow and then crossed Barrenshe Creek below the mouth of the hollow, instead of above the same as now shown by recent survey. If this line of the survey so crossed the hollow, the call for running up the hollow to it would be the place. It is plain that the party giving the description must have believed that a line of the survey crossed the hollow or came to it; for the description purports that a line of the survey can be reached by running up the hollow. It appears now that none can be so reached, but that to go up the hollow is to go farther and

farther from any line of the survey, leaving a body of land that the grantor concededly did not own between lines of the survey called for and the hollow. It is this method of inclusion that has been appealed to for the taking in of the forty acre tract. The commissioner and the court have said that the hollow must be adhered to to its very head, and then a straight line for a long distance to the north supplied to reach a line of the survey that could never in reason have been deemed to have had relation to Mill Hollow. This method itself recognizes a mistake in the description—the leaving out of a call or line. Is it not more reasonable to assume that the call for running up Mill Hollow to a line of the survey is the mistaken one, since no line of the survey can be found in Mill Hollow, than to adhere to the call and never reach the place called for by it? The description tells us to go from the mouth of Mill Hollow to a line of the survey; it does not tell us to go to the head of the hollow and supply a long line to the north to reach a line of the survey. To reach any line of the survey by a line from the mouth of Mill Hollow, we are compelled to disregard the call for running up the hollow. But the description says we shall go from the mouth to a line of the survey. What line? Plainly one that had relation to the hollow, one that was thought of because of its relation to the same. That line of the survey can in reason be none other than the one which by the recent survey crosses Barrenshe Creek above the mouth of the hollow. True to reach it we must disregard the call for running up the hollow, but even by doing this we more reasonably conform to the general intention of the parties expressed in the deed than to go wandering far from any line of the survey. The certainty of that call loses its weight when it is found to be false by not leading to what it purports to lead to. It is at most a general and indefinite call indicating direction or course to the well established line of the survey intended to be reached directly by a line from the mouth of the hollow. The call for the line of the survey is locative and paramount to any direction given for reaching it.

The line of the survey, called for as being reachable from the mouth of Mill Hollow, we are told by the description is one that will cross Lick Branch. Disregarding the mistaken call for running up the hollow, and starting for the only line of the survey that has any relation to Mill Hollow, we shortly reach that line. This line continued with other lines of the survey crosses Lick Branch. It is said, however, that the description says "line" and not "lines." But this seems a small inconsistency in comparison to what those who call our attention to it would have us do; that is, to go up the hollow and never reach any line of the survey that even connects with one approaching or crossing Lick Branch. It seems more con-

sistent with the general intention of the parties, apparent from the survey map of the territory, to go from the mouth of the hollow to the only line of the survey having relation to the hollow and then to follow established lines of the survey to a crossing of Lick Branch, than to go up the hollow farther and farther from any line of the survey and then supply one long line so as to reach a line of the survey at a point most remote from the hollow but just in place to cross Lick Branch. It is clearly apparent that the parties meant to reach the survey directly from the mouth of the hollow and to be guided by that survey to a point beyond Lick Branch. We can not believe that they meant to go wandering in the mountains, far from the survey which they plainly indicated must be reached from the mouth of Mill Hollow.

The situation and circumstances surrounding the grantor at the time of the conveyance negative any intention to convey any such boundary as would be included by running up the hollow to its head and supplying the long line to the north. It must be conceded that he did not own that which is thus taken in from outside the Peery survey. It is to be assumed that he meant to act fairly with the grantees and to convey only land which belonged to him. In the absence of plain intent to do otherwise, we can not impute dishonesty to him in the conveyance of land beyond his actual bounds. That he was only endeavoring to convey from what had been conveyed to him by Peery and others is clear, from his situation as a land owner at the time. Indeed the description in his deed, mistaken though it is, indicates the same thing, when compared with the survey map before us.

Further, there were subsequent acts of the parties in living under the deed, which put a practical construction on its meaning as to the boundary conveyed. From acts of both the grantor and the grantees under it, we must know that they never understood it as conveying a boundary that included land south of the Peery survey mentioned in it. The grantor, soon after making the conveyance, bought from Sayers land extending over Mill Hollow. Would he have dealt with an adverse claimant if he had theretofore claimed to own land on all one side of the hollow to its head, and had conveyed the same to others with warranty of title? Moreover, it appears that Madison Farley, the husband and father of the grantees in the deed from Beavers, in two years after the conveyance purchased the forty acres from Sayers and took title thereto in the name of another infant daughter, Matilda. The deed from Sayers describes the forty acre tract as adjoining the lands which Mary and Sarah Jane Farley had bought from Beavers. The Farleys were all living together as a family on the Beavers tract. The forty acre tract lay opposite their front door. Would Madison, the husband and father, acting for the

family, have bought for one infant daughter land understood to be in the bounds of that already owned by his wife and another infant daughter? For Mary and Sarah Jane Farley, the grantees of Beavers, he understood and accepted the lines of the Beavers deed as we have construed the description therein. And conveyances afterwards made by Mary and Sarah Jane Farley show that they understood the description not to include the forty acre tract.

[2] Indicative also that Beavers, the grantor, did not mean to include land between the hollow and the Peery survey, is the matter of acreage. His deed calls for reasonable approximation to one hundred acres: That amount is found within the survey from which we perceive he only meant to convey. To include the outside boundary is to increase the acreage called for in the deed more than fifty per cent. "Where the description of land by monuments, distances or otherwise is vague and indefinite, by reason of conflicting lines or omission of a line, or from any other cause, the statement of the acreage is an essential part of the description." *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762.

The forty acre tract is distinct and separate from the land which Beavers conveyed to Mary and Sarah Jane Farley. This smaller tract, now owned by Harman through conveyances from Matilda Farley, is not within the bounds of the one hundred acre tract, and Harman is entitled to redeem it.

It is submitted that the forty acre tract, even if not included within the bounds of the other tract, is now owned by the Virginia-Pocahontas Coal Company through a tax deed based on a delinquent sale in the name of Elizabeth Farley. That tax deed purports not to convey the forty acre tract, but an undivided third interest in the one hundred acre tract. Besides, it is totally void. We so held in *Caretta Railway Co. v. Fisher et al.*, *supra*.

Wherein the decree adjudges the boundaries of the one hundred acre tract to be indicated on the Rawle map by the letters K I M I X R W N O F K and denies to Harman redemption of the forty acre tract as indicated on the map by the letters J G O D T S Q J, it will be reversed, and such decree as the circuit court should have entered in the premises will now here be made. That decree will be that the one hundred acre tract conveyed by Preston Beavers to Mary and Sarah Jane Farley, on February 4, 1880, includes none of the land indicated on the map by the letters J G C D T S Q J, and that Harman may redeem the latter upon the payment of the taxes and dues properly chargeable against the same. And the cause will be remanded with direction to ascertain the amount he should pay and to decree a redemption of the land in his favor when he shall have paid the amount necessary thereto.

(76 W. Va. 492)

WEST VIRGINIA DEVELOPMENT CO. v. PRESTON COUNTY DEVELOPMENT CO. et al. (No. 2431.)

(Supreme Court of Appeals of West Virginia. June 3, 1915.)

(Syllabus by the Court.)

1. INJUNCTION — RIGHT TO REMEDY — EJECTMENT TO TRY TITLE.

Pending a suit brought or about to be brought to try title to land, plaintiff may by injunction protect and maintain the status quo, and prevent waste or irreparable injury, until the title can be finally adjudicated.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 86-90; Dec. Dig. —38.]

2. INJUNCTION — RIGHT TO REMEDY — ERECTION OF DAM—EJECTMENT TO TRY TITLE.

And within this rule equity may enjoin the erection of a permanent dam on and across a water course on the disputed land pending a suit in ejectment to try the title to the land.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 86-90; Dec. Dig. —38.]

Appeal from Circuit Court, Preston County.

Suit by the West Virginia Development Company against the Preston County Development Company and another. From decree for defendants, plaintiff appeals. Reversed and remanded.

Cox & Baker, of Morgantown, for appellant. Smith & Jackson, of Clarksburg, and Moreland & Guy, of Morgantown, for appellees.

MILLER, J. The decree or order appealed from, pronounced by the judge of the circuit court in vacation, on May 8, 1913, on motion of defendants, dissolved the injunction theretofore awarded by two members of this court, on May 1, 1913, enjoining and restraining the Preston County Development Company and Herbert C. Greer, and each of them,

"from the further building, constructing or putting in operation a dam, conduit line or power plant upon Bull Run in Preston County, West Virginia, within or any part of which is within the contour lines of the water to be impounded by the dam of the plaintiff mentioned in said bill, at or near Beaver Hole, near the line between Preston and Monongalia Counties, West Virginia; and from placing, transporting or operating any machinery or appliances for the purpose of such power plant, dam or conduit line, located or to be located within the said contour lines of the water to be impounded by the said dam of the plaintiff; and from the further constructing or operating of a power plant, dam or conduit line, or any part thereof, below the elevation 970 feet above mean sea level (U. S. G. S. Datum), in or near or upon said Bull Run in said Preston County, West Virginia, or elsewhere within said contour lines, and from operating a power plant below said elevation 970 feet above mean sea level in, near, along or upon said Bull Run; and from building upon or improving or from placing materials upon the land to the center of Bull Run on the side on which is located the Pickenpaugh heirs tract mentioned in said bill, and from taking the water from Bull Run to the center

thereof on the side on which the said Picken-paugh heirs tract is located."

The case was heard on said motion before the judge in vacation on bill, answer of defendant company, and ex parte affidavits filed by the parties, and by the terms of the order of dissolution it was to be without prejudice to plaintiff to institute any other suit or proceedings that it might be advised it was proper to institute touching the matters involved, and without prejudice to the institution of condemnation proceedings by plaintiff against defendants or either of them at any future time, for their lands or the lands of either of them, or any part thereof mentioned and referred to in the bill.

Plaintiff based its right to relief by injunction on the grounds, first, that it was prior in time, and therefore in right, in the location of its Beaver Hole dam, a right which it conceived was preserved to it by section 16, chapter 11, Acts 1913 (Code 1913, c. 54B, § 16 [sec. 3164]), and that in attempting to bring themselves within the exception of section 3 (sec. 3151) of said chapter, defendants were not acting in good faith, but for the purpose of fraudulently increasing their damages against plaintiff in condemnation, and of imposing upon it burdensome terms and conditions, which it would be unable to bear, and thereby defeat its work of internal improvement provided for in the statute. Second, that defendants, in attempting to locate their said dam and works on Bull Run, had entered upon, and were committing waste upon lands along said run owned by plaintiff, acquired by deed in fee absolute for the very purpose of its public works, and for which, as alleged in the bill and not denied, and fully proven, it was about to bring ejectment against defendants, and that it had the right by injunctive process to preserve the status quo until its rights to said land could be finally adjudicated in such suit.

The facts on which plaintiff predicates its first ground for relief, are controverted, and as the record was presented, on pleadings, exhibits and ex parte affidavits, are not very well developed. Moreover, all the facts pertaining thereto will necessarily be involved in the proceedings in condemnation yet to be brought by plaintiff to take the lands of defendants, and as we see it we ought not as the case is now presented, on this appealable but interlocutory order, prejudice or foreclose the rights of the parties by any adjudication thereon. We must not be understood as deciding, however, that when such proceedings in condemnation have been maturely brought a case may not then be presented for a continuance of the injunction. That question is not presented and not decided.

[1, 2] But on the second ground for relief we are clearly of opinion that the bill is well founded and that plaintiff was and is entitled to maintain the status quo by the injunction

awarded, until its title to the land claimed by it along Bull Run, and sued for in ejectment, can be finally adjudicated. This proposition is fully supported by our cases of *Freer v. Davis*, 52 W. Va. 1, syl. 2, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; *Pardee v. Camden Lumber Co.*, 70 W. Va. 68, 73 S. E. 82, 43 L. R. A. (N. S.) 262; *Waldron v. W. M. Ritter Lumber Co.*, 70 W. Va. 470, 74 S. E. 687; *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532.

On rehearing, it is insisted that these cases involving waste or irreparable injury, and destruction of the substance of the inheritance, can have no application to the case at bar. Many decisions are found justifying injunctive process to stay or prevent the erection of permanent structures like the defendants' proposed dam on the land of another the title to which is not in dispute, or as to which the title is beyond legal controversy, such as an inferior store building, which would require removal, or might prove a serious obstruction to the free use by the owner of his land and be the beginning of an adverse title, *Ephraim Creek Coal & Coke Co. v. Bragg*, 83 S. E. 190; 22 Cyc. 834; the erection of a wall on another's land which would render it unfit for building without removal by him, *Herr v. Bierbower*, 3 Md. Ch. 456; a structure which will change the current of a river and cause it to overflow on another's land, *Cobb v. Illinois, etc., Co.*, 68 Ill. 233; the building of a brick wall projecting over an adjoining lot, although safe and secure, *Meyer v. Metzler*, 51 Cal. 142; the building and maintenance of a dam causing an overflow on another's land, *Troe v. Larson*, 84 Iowa, 649, 51 N. W. 179, 35 Am. St. Rep. 336; *A. P. Cook & Co. v. Beard*, 108 Mich. 17, 65 N. W. 518; 40 Cyc. 591. In all such cases these authorities hold the jurisdiction of a court of equity by injunction cannot be resisted upon the ground that the injury may be compensated in money damages, or that the structures may be removed at the end of a lawsuit.

If such be the rule where the title is not in real controversy, we think it follows that where the title is in dispute and it is alleged, and if denied, proven, that plaintiff has or is about to bring a suit in ejectment to try the title, that injunction should be available to stay or prevent like injuries pending a suit to try title. The cases cited in so far as the question of the permanency or irreparable character of the injuries or the destruction of the substance of the inheritance, waste, and want of adequate remedy at law, are concerned, are of the class to which the case at bar properly belongs. And if equity will enjoin trespasses where the title is not in actual controversy, there is no reason based on principle why like relief should not be granted, pending a suit to try the title, when such a suit has been or is about to be brought. The injury to the true owner is as great and

the reason for staying waste and irreparable injury as potent in the one class of cases as in the other.

For these reasons we are of opinion to adhere to our former opinion, to reverse the decree or order below, and to remand the cause for further proceedings to be had herein in accordance with the principles enunciated and further according to rules and principles governing courts of equity.

(76 W. Va. 467)

STATE v. SEAMAN. (No. 2477.)

(Supreme Court of Appeals of West Virginia.
June 8, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §700 — SIDEWALKS—DESTRUCTION AND FAILURE TO REPAIR—ELEMENTS OF OFFENSE.

The offense created by section 56a. xlii, c. 43, Code 1913 (sec. 1808), consists of two elements: Destruction of or injury to the sidewalk, and failure to repair it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1495, 1508; Dec. Dig. §700.]

2. MUNICIPAL CORPORATIONS §700—INJURY TO SIDEWALK — FAILURE TO REPAIR—INDICTMENT—SUFFICIENCY.

An indictment under the statute, which omits to allege failure to repair, is fatally defective on demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1495, 1508; Dec. Dig. §700.]

Error from Circuit Court, Roane County.

J. D. Seaman, Jr., was convicted of injuring a sidewalk and failing to repair it, and brings error. Reversed, verdict set aside, indictment quashed, and accused discharged.

Geo. F. Cunningham, of Spencer, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morris and J. E. Brown, Asst. Attys. Gen., for the State.

LYNCH, J. On an indictment charging violation of section 56a. xlii, ch. 43, Code (sec. 1808), defendant was found guilty and adjudged to pay a fine and the costs of the prosecution. The statute creating the offense sought to be charged provides that:

"Any person or persons who shall in any manner destroy, take up, or in any way injure any sidewalk already constructed, or that may hereafter be constructed according to the provisions of the foregoing section, and shall fail to repair the same, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than five nor more than fifty dollars."

The sidewalks contemplated by these sections are those constructed by plank, gravel, concrete, or other suitable material, alongside public highways in rural or suburban communities.

[1, 2] Though not specifically assigned as ground for the demurrer or motion to quash overruled, in the petition for writ of error or in argument, the material defect in the indictment is the failure to aver all the facts

and circumstances essential to show the offense prescribed by the statute and defendant's violation of its provisions. The language descriptive of the offense comprehends more than destruction of the sidewalk or injury to it. Circumstances and conditions may readily be perceived justifying temporary injuries to such structures, as where they tend to impede or obstruct travel, or access to the highway from different portions of adjacent farm lands used for agricultural or other purposes, readily conceivable as necessary and unavoidable. Evidently the statute was not intended to subject to punishment those who, to subserve their immediate convenience, may cause a mere temporary injury to a sidewalk constructed under its authority. That such purpose was not within its purview becomes apparent, in view of the clear and explicit terms used to describe the offense it creates. That offense is composed of two elements: Injury done, and failure to repair. Both must concur. An injury repaired is not, but an injury not repaired within a reasonable time is, punishable under the statute. Such is its plain intentment, as manifestly appears from its express terms when properly understood and construed. So interpreted, it subjects to punishment any person who destroys or injures the sidewalk and fails to repair it. Destruction or injury, and failure to repair, constitute the essential elements of the prescribed offense.

Well established is the rule requiring an indictment to allege all the facts and circumstances descriptive of the offense sought to be charged and necessary to advise the accused of the nature and character of the accusation preferred against him. The indictment must aver every fact entering into a legal definition of the crime he is required to answer. The charge that his conduct is "unlawful" or "contrary to law" does not avail to supply the omission of a material element, nor to cure an imperfect description, of the offense. *State v. Riffe*, 10 W. Va. 794; *State v. Brewing Co.*, 53 W. Va. 593, 45 S. E. 924; *State v. Welch*, 69 W. Va. 547, 72 S. E. 649; *State v. Weir*, 71 W. Va. 93, 76 S. E. 135. These requirements are applicable to statutory offenses. The indictment must aver a complete description. It must state all the circumstances constituting a definition of the offense, so as to bring defendant clearly within the statutory terms, and on its face show guilt, conceding the averments made to be true. *State v. Dolan*, 58 W. Va. 263, 52 S. E. 181, 6 Ann. Cas. 450; *Huff v. Com.*, 14 Grat. (Va.) 648. General words must be enlarged, if necessary to show a particular wrongful act. *State v. Mitchell*, 47 W. Va. 789, 35 S. E. 845.

Because the indictment failed to comply with these requirements, and to allege any offense demanding punishment, the trial court erred in overruling the demurrer and denying the motion to quash. We therefore

reverse the judgment, quash the indictment, and discharge defendant from further prosecution under it.

(76 W. Va. 503)

OHIO RIVER CONTRACT CO. v. SMITH.
(No. 2708.)

(Supreme Court of Appeals of West Virginia.
June 8, 1915.)

(Syllabus by the Court.)

1. SALES — RESCISSION OF CONTRACT—CONDITIONS—RETURN OF PROPERTY.

A purchaser of personal property, to avail himself of his right to be relieved from his obligation to pay the purchase money, by rejection of the subject of the sale for noncompliance with a condition thereof or by rescission of the contract for fraud or other sufficient cause, must reject or return the property in toto, and thus place the vendor in statu quo as nearly as may be.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303-312; Dec. Dig. § 124.]

2. SALES — ACCEPTANCE AND RETENTION OF PROPERTY—WAIVER OF CONDITIONS—LIABILITY FOR PRICE.

Acceptance and retention of part of the property by the purchaser is a waiver of conditions, misrepresentations, and fraud, and binds him to payment of the whole of the purchase price, subject to his right of recoupment to the extent of the damages resulting from breach of warranties, if any.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 456-468; Dec. Dig. § 179.]

3. SALES — ACTION FOR PRICE—BREACH OF WARRANTY—PLEADING AND PROOF.

In an action for purchase money, damages for breach of warranty may be proved under the general issue in assumpsit or debt, provided notice of the claim is filed as a basis therefor, but not otherwise.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1248-1257; Dec. Dig. § 437.]

Error to Circuit Court, Wood County.

Action by the Ohio River Contract Company against Lloyd E. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

George W. Johnson, Moss, Marshall & Forrer, and H. P. Camden, all of Parkersburg, for plaintiff in error. Ireland & Perkins, of Parkersburg, for defendant in error.

POFFENBARGER, J. Rulings upon instructions and evidence, the correctness of which depends largely upon principles of the law of sales, are the major subjects of complaint on this writ of error to a judgment for \$669.38, in an action of debt for the alleged contract price of certain steel sheet piling, defense to which was made under the general issue and a special plea of set-off for freight on the piling, paid by the defendant.

The contract out of which the controversy arose was a verbal one and is to be deduced from the highly conflicting testimony of three witnesses for the plaintiff, Eichel, Wright, and Dotson, all of whom say there was an absolute sale of the piling at the price of \$25 per ton, and two witnesses for the de-

fendant, himself and his consulting engineer, Burgess, both of whom say it was to be shipped for trial and subsequent purchase or rental, only in the event it should be found fit for the purpose for which the defendant desired to use it. Some time after it was shipped, the plaintiff rendered a bill for the purchase money, framed in accordance with its claim as to the terms of the agreement. The defendant says he returned it, with written notice of his election not to purchase or accept the piling because it had been found unfit for use in his work.

The material consisted of 85 pieces of piling weighing nearly 30 tons, and was intended for use in the construction of a cofferdam, incident to the laying of filter beds in the Ohio river, at the city of Parkersburg, under a contract the defendant had with the city for the installment of a filtration plant, as a part of its waterworks. Eichel, the president of the Ohio River Contract Company, Wright, and Dotson were interested in the Parkersburg & Marietta Sand Company, a corporation, which had the contract with the defendant, for certain work to be done in the construction of the filter beds. They were equal owners of its stock, and Wright had formerly been in the employ of another corporation managed by Eichel. These circumstances are relied upon by the defendant, in connection with other evidence adduced by him, as showing knowledge on the part of the plaintiff, through Eichel, its president, of the nature of the work to be done and the unfitness of the piling in question for use in the prosecution thereof. In fact, the Parkersburg & Marietta Sand Company had purchased the greater part, if not all, of its machinery from the Evansville Contract Company of which Eichel had been manager and for which Wright had worked. Eichel says the piling was suitable, but could be successfully employed only by the use of proper machinery and appliances in the hands of experienced and competent operators or workmen.

When the piling arrived, the Parkersburg & Marietta Sand Company, to whom the contract for driving it had been let, at once received and conveyed it to the place at which it was to be used. Twenty-three pieces of it, a little more than one-fourth of the entire lot, were driven imperfectly and with difficulty on account of alleged defects in them, and then the effort to use them was abandoned and the remaining pieces conveyed to premises of the Parkersburg & Marietta Sand Company and there deposited. Subsequently, at a date not fixed by the evidence, but seemingly after the work had been completed, the 23 pieces that had been driven were bent over on the bed of the river and left there. As to this, the defendant says:

"I was on the work when they tried to pull it, and they couldn't. Then they dug down on the outside, and it was the intention to bring

a float over and fasten them to the float and take a boat and tow them over and pitch them on the bank; but in the meantime Mr. Ruth came up and ordered the pile-driver men to knock them over in the river, which he did. And these 23 pieces of piling are now lying in the river with the ends lying over in the bottom."

Though it does not appear from the testimony, Mr. Ruth was probably a representative of the government and had no purpose other than abatement of the piling as an obstruction to navigation. As to whether the defendant took any beneficial use of the 23 pieces, the evidence is indefinite. Morgan, an employé of the Parkersburg & Marietta Sand Company, who drove them, says he quit driving them by order of Wright to do so and to use, in lieu thereof, wooden piling. Of these driven, he says they made the coffer incomplete, but not that, as driven, they were unfit for use or were unused.

[1-3] Lack of any plea of warranty and breach thereof, or notice of recoupment, limited the defenses to insufficiency of the evidence to establish a contract of sale, or to proof of a conditional sale and rejection of the articles for noncompliance with the condition or rescission of the contract. Without a notice thereof, the purpose of which is to prevent surprise, a right of recoupment cannot be relied upon as matter of defense. *Sterling Organ Co. v. House*, 25 W. Va. 64, 87. Such a claim involves admission of the contract of purchase and acceptance of the thing bought, and asserts a right to abatement of the price to the extent of the damages flowing from the breach of the warranty. Neither in his own testimony nor that of any other witness did the defendant assume such an attitude. His sole contention was entire nonliability, and he asked no instruction authorizing the jury to reduce the plaintiff's demand by an allowance for damages.

Whether there was a contract of purchase before the piling was shipped, as claimed by Elchel, Wright, and Dotson, or whether it was shipped for mere experiment or trial, with a view to a subsequent purchase or rental, was submitted to the jury by the instruction given at the instance of the plaintiff, but the correctness of that instruction is challenged because it is binding in form and takes no notice of the theories of a conditional sale and rejection for noncompliance and rescission. This omission, as well as the refusal of three instructions asked for by the defendant, embodying these theories, was justified by the acceptance and use of the 23 pieces of piling left in the river and failure to deposit them in a place of safety.

The legal consequence of this fact may not have been apprehended or appreciated at the time, but that can make no difference. Ignorantia legis neminem excusat. The law recognizes no partial rejection of the subject

of a sale, for noncompliance with a condition and rescission, to be effective, must go to the entire subject-matter of the contract. In this respect, the rules governing rescission and rejection for noncompliance with conditions are identical. In the one case, the annulment of the contract must be total and complete; in the other, the purchaser must reject in toto. In each, the opposite party must be put in statu quo. *Eagle Glass & Mfg. Co. v. Supply Co.*, 81 S. E. 976; *Mechan on Sales*, § 1398; *Maness-Bruning Shoe Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907. Of course, there are exceptions to all rules. If goods are sold with the privilege of a test and return in case they are found to be unsuitable or unsatisfactory, such as are consumed by the test do not have to be returned. But, in the case of an implement or machine, the use of which does not destroy it, a different rule necessarily applies; there being no physical impediment to its return, nor any reason for not returning it. Even though they may have been injured by the test made, these great sheets of steel had value. If insusceptible of repair, their aggregate weight was six or seven tons and they had a scrap-iron or junk value. Besides, a fair test could have been made without the use of one-fourth of the entire quantity.

Under this hard and fast rule of the law of sales, relaxation of which public policy forbids in the interest of certainty and stability of commercial transactions, the evidence of conditions, misrepresentation, and defects and unfitness which might have afforded ground for rejection or rescission goes for naught. All these rights are deemed by the law to have been waived or abandoned by partial acceptance of the piling, whether the defendant actually intended to give them up or not.

Assuming the limitations of the cross-examination of Elchel, Wright, and Omelaer would have been erroneous, if the defendant had preserved his right of rejection for noncompliance with conditions, the conclusion just announced renders the subject-matter of the questions immaterial. In view of the fact on which it is based, the court could have eliminated all of the evidence of conditions, warranties, and misrepresentations. For the same reason, the subject-matter of some of the offers of evidence by the defendant, which the court rejected, was immaterial. In some instances, objections were sustained to repetitions of testimony, and, in others, the witnesses subsequently testified to matters as to which their evidence had been excluded. All of these rulings have been carefully examined, and nothing prejudicial in them has been discovered. To set them all out here and analyze them would be a useless consumption of time and space.

The judgment will be affirmed.

(16 Ga. App. 522)

OCILLA SOUTHERN RY. CO. v. FLETCHER. (No. 6003.)

(Court of Appeals of Georgia. June 28, 1915.)

*(Syllabus by the Court.)***1. PLEADING** \Leftrightarrow 104—**VENUE—PRESENTATION OF ISSUE.**

While the venue of the injury was not directly shown by the evidence, the record in the case does not show that any demurrer or plea to the jurisdiction of the court was filed by the defendant, and without such a plea there was no issue as to the venue made in the court below. *Central of Georgia Ry. Co. v. Dowe*, 6 Ga. App. 858, 65 S. E. 1091; *Central Railroad v. DeBray*, 71 Ga. 406 (2). There is no contention that the injury did not occur in the county where the suit was filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 213-217; Dec. Dig. \Leftrightarrow 104.]

2. APPEAL AND ERROR \Leftrightarrow 1005—**DISCRETIONARY RULING—DENIAL OF NEW TRIAL.**

There was some evidence to support the finding of the jury, and, the trial judge having approved it, his discretion in overruling the motion for a new trial will not be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. \Leftrightarrow 1005.]

Error from City Court of Fitzgerald; D. E. Griffin, Judge.

Action by R. B. Fletcher against the Ocilla Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. J. Quincey, of Ocilla, and Elkins & Koplin and J. B. Wall, all of Fitzgerald, for plaintiff in error. McDonald & Grantham, of Fitzgerald, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 536)

CHAMPION MFG. CO. et al. v. W. W. CRANDALL & CO. (No. 6018.)

(Court of Appeals of Georgia. June 28, 1915.)

*(Syllabus by the Court.)***1. CONTRACTS** \Leftrightarrow 245—**EVIDENCE** \Leftrightarrow 397—**PAROL.**

Previous negotiations are merged in a subsequent written contract, and additional obligations cannot be grafted thereon by parol testimony, unless made subsequently to the contract and upon a valuable consideration. *Smith v. Newton*, 59 Ga. 113. The trial judge did not err in his ruling upon the admissibility of evidence, nor in his remark complained of in the fourth ground of the amendment to the motion for a new trial, nor in his charge in reference to the clearly opinionative statements, alleged to have been made by the plaintiff, as to the probable volume of sales of the defendant's patented device. *Terhune v. Coker*, 107 Ga. 352, 33 S. E. 394; *Dortic v. Dugas*, 55 Ga. 484, 495; *Angler v. Equitable Association*, 109 Ga. 625 (3), 35 S. E. 64; *Baldwin v. Daniel*, 69 Ga. 782.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. \Leftrightarrow 245; Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. \Leftrightarrow 397.]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence fully authorized the verdict, no error of law appears, and the court did not err in overruling the motion for a new trial.

Error from City Court of Macon; Robert Hodges, Judge.

Action between the Champion Manufacturing Company and others and W. W. Crandall & Co. From the judgment, the parties first mentioned bring error. Affirmed.

J. E. Hall and John R. L. Smith, both of Macon, for plaintiffs in error. Hardeman, Jones, Park & Johnston, of Macon, for defendants in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 534)

MACON GEORGIA STATE FAIR ASS'N v. GORDON et al. (No. 6012.)

(Court of Appeals of Georgia. June 28, 1915.)

*(Syllabus by the Court.)***1. GENERAL DEMURRER.**

The court did not err in overruling the general demurrer.

2. PLEADING \Leftrightarrow 245 — **SPECIAL DEMURRER — AMENDMENT.**

The special grounds of demurrer, having been met by proper amendment, were also properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 635, 653-675; Dec. Dig. \Leftrightarrow 245.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence abundantly authorized the verdict, and the court committed no errors in his charge, or in his refusal to charge, which require the grant of a new trial.

Error from City Court of Macon; Robert Hodges, Judge.

Action between the Macon Georgia State Fair Association and E. Gordon and others. From the judgment, the Fair Association brings error. Affirmed.

Miller & Jones, of Macon, for plaintiff in error. Nottingham & Nottingham, of Macon, for defendants in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 484)

MCCOLLOUGH et al. v. HAND. (No. 6208.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***1. SHERIFFS AND CONSTABLES** \Leftrightarrow 161 — **ACTION ON CONSTABLE'S BOND—RIGHT OF ACTION—PRIOR ADJUDICATION.**

Pol. Code 1910, § 12, provides that suit on the bond of a public officer may be brought by any person aggrieved by the official misconduct of the officer. A constable is required to give a bond conditioned on the faithful performance of his duties (Civ. Code 1910, § 4691); and for any breach thereof the constable and the sureties on his bond may be sued. No prior adjudication upon a rule is requisite to entitle the aggrieved party to bring action on the bond. *McCain v. Bonner*, 122 Ga. 842 (3), 51 S. E.

36: *Jefferson v. Hartley*, 81 Ga. 716, 9 S. E. 174.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 383-387; Dec. Dig. ¶¶ 161.]

2. ACTION ON CONSTABLE'S BOND.

The allegations of the plaintiff's petition set forth a cause of action, and the form of the present action does not preclude the defendant from setting up any defense of which he may have availed himself, had the plaintiff elected to proceed by a rule.

Error from City Court of Newman; W. A. Post, Judge.

Action between Lewis McCollough and others and Lee Hand. From the judgment, the parties first mentioned bring error. Affirmed.

W. C. Wright, of Newman, for plaintiffs in error. H. A. Allen, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 537)

THOMASVILLE IRON WORKS v. CLARK. (No. 6045.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶78—DECISIONS APPEALABLE—WRIT OF ERROR—PREMATURITY—DISMISSAL.

The suit was for the contract price of 12 pumps made to order for the defendants, aggregating \$270, and also to recover a further sum for swinging a certain door for them, and for one automobile axle sold to them, amounting to \$18.46 additional. Those paragraphs of the petition which alleged indebtedness for the pumps were stricken on demurrer, and the remainder of the petition was allowed to stand. The plaintiff excepted to the order sustaining the demurrer. *Held*, there was no final judgment in the case, and the bill of exceptions embraces a matter which is only of an interlocutory character, and which therefore is not properly the subject-matter of a final bill of exceptions. The writ of error to this court is therefore premature. *Case Threshing Machine Co. v. Hodges*, 9 Ga. App. 722, 72 S. E. 189; *Hurrell v. Southern Railway Co.*, 13 Ga. App. 409, 79 S. E. 240, and cases there cited.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. ¶¶ 78.]

2. APPEAL AND ERROR ¶776 — PREMATURE BILL OF EXCEPTIONS — EXCEPTIONS PENDENTE LITE.

This court declines to allow the plaintiff in error the privilege of filing its bill of exceptions as exceptions pendente lite.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3115-3119; Dec. Dig. ¶¶ 776.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by the Thomasville Iron Works against J. T. Clark. A demurrer to a portion of the petition was sustained, and plaintiff brings error. Writ of error dismissed.

Roscoe Luke, C. E. Hay, and Louis S. Moore, all of Thomasville, for plaintiff in error. J. H. Merrill, of Thomasville, for defendant in error.

WADE, J. [1, 2] It is unnecessary to comment on the ruling stated in the first head-note. While this court, as well as the Supreme Court, has frequently permitted plaintiffs in error to file, as exceptions pendente lite in the court below, bills of exceptions which were prematurely brought, the practice is not one that should be encouraged, and the privilege should be accorded only where it appears (in the absence of any distinct and clear ruling on the question thereby presented) that the premature bill of exceptions was sued out for the evident purpose of reviewing a judgment which might, under some view or interpretation thereof, be reasonably considered a final judgment in the case. To invariably permit a party, where no special reason is disclosed by the record for a departure in his favor from the usual rule, to file as exceptions pendente lite a bill of exceptions prematurely brought to this court, would be to allow in every instance an opportunity to institute an experiment, at the cost of time and expense to the opposite party, as well as to impose upon this court the wholly unnecessary burden of passing on the same case twice at least, if not more often. There have been variations from the ruling here announced, which appear to have been prompted by charity towards plaintiffs in error, and by unselfish disregard of the useless labor thus imposed upon this court; but, in view of the increasing volume of business coming before us for attention, we must hereafter endeavor to curtail by every proper method the unnecessary bringing of questions to this court for solution, and to sanction generally the practice of allowing bills of exceptions prematurely brought here to be filed as exceptions pendente lite in the court below would naturally tend to increase, rather than to restrict, the bringing of cases to this court. When the rights of all parties can be preserved by the filing of exceptions pendente lite, and the entire case, after it has been finally disposed of, can be considered and reviewed, it is not only contrary to law (Civil Code, § 613), but entirely unreasonable, to expect this court to expend the time and energy necessary to take several bites from one cherry, rather than to masticate and digest the whole (including the stone) at one time.

Writ of error dismissed.

(16 Ga. App. 477)

WIGGINS v. STATE. (No. 6054.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW ¶668 — STATEMENT OF ACCUSED—CHARACTER OF DECEASED.

The majority of the court are of the opinion that this case is controlled by the ruling in *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64.

See, also, *Daniel v. State*, 103 Ga. 202, 29 S. E. 767; *Baker v. State*, 142 Ga. 619, 83 S. E. 531, in which it was held, that—"in making his

statement to the jury as provided for by statute, the prisoner not being sworn as a witness, nor subject to cross-examination, nor restricted by rules of evidence, he cannot lay the foundation for introducing in his favor evidence that would otherwise be inadmissible," and consequently that the trial judge did not err in excluding testimony as to the violent and turbulent character of the deceased, offered in behalf of the prisoner; it not appearing by the evidence that the character of the deceased in that respect was known to the accused. For my part, I think that, under the rule that "a defendant charged with murder can introduce proof that the deceased was a person of violent and turbulent character, where it was shown prima facie that the defendant had been assailed and is honestly seeking to defend himself (Doyal v. State, 70 Ga. 134), the statement of the accused alone may present such a prima facie case as to authorize the introduction of proof aliunde that the deceased was a man of violent and turbulent character. If, in according to the statement of a defendant preference over the sworn testimony, the jury may acquit the defendant, certainly in a doubtful case the statement may provide such a prima facie case that the prisoner was assailed, and that it was necessary to defend himself, as to allow him corroboration and require the admission of any testimony tending to illustrate to the jury the motive by which he was actuated. Keener v. State, 18 Ga. 223, 63 Am. Dec. 269.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1584-1590; Dec. Dig. § 668.]

Russell, C. J., dissenting.

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Mody Wiggins was convicted of a crime, and he brings error. Affirmed.

Evans & Evans, of Sandersville, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, for the State.

PER CURIAM. Judgment affirmed.

RUSSELL, C. J., dissents.

(16 Ga. App. 537)

SAVAGE v. ATLANTIC COAST LINE R. CO. (No. 6019.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR § 979—DISCRETIONARY RULING—GRANTING NEW TRIAL.

This being the first grant of a new trial, and it not being made to appear that the judge abused his discretion, or that the law and facts required the verdict rendered therein, the judgment will not be disturbed by the Court of Appeals. Civil Code 1910, § 6204. Even if the evidence required a verdict for the plaintiff, it cannot be said that the finding for the exact amount of the verdict rendered was demanded in such a sense that the exercise of the discre-

tion of the trial judge upon that point was precluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.]

Error from City Court of Macon; Robert Hodges, Judge.

Action by John Savage against the Atlantic Coast Line Railroad Company. Verdict for plaintiff, new trial granted, and plaintiff brings error. Affirmed.

Robert L. Berner, of Macon, for plaintiff in error. Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 539)

ROSENBUSCH v. LESTER BOOK & STATIONERY CO. (No. 6148.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR § 1001—CERTIORARI § 44—VERDICT—EVIDENCE.

Though the testimony was somewhat uncertain and unsatisfactory, there was some evidence to support the finding in favor of the plaintiff, and therefore the judge of the superior court did not err in declining to sanction the petition for certiorari, which set forth no reversible error. If there was even slight evidence to support the verdict or judgment of which complaint was made, he was under no obligation to sanction the petition, unless some sufficient legal error appeared therein. We repeat what was said by this court in Meeks v. Carter, 5 Ga. App. 421-423, 63 S. E. 517, that, in cases brought up by exceptions to a refusal to sanction or to a judgment overruling a certiorari "we do not propose to reverse the judgment for minor and trivial errors, when it is plain that substantial justice, or a close approximation thereto, has been done," and where there is any evidence to support the verdict or judgment objected to as being without evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001; Certiorari, Cent. Dig. §§ 98-107; Dec. Dig. § 44.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Lester Book & Stationery Company against G. H. Rosenbusch. Judgment for plaintiff, sanction of petition for certiorari refused, and defendant brings error. Affirmed.

Gober & Jackson, of Atlanta, for plaintiff in error. C. V. Hohenstein and Felder & Coburn, all of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 479)

BLEDSON v. CITY OF JACKSON.
(No. 6076.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***1. CRIMINAL LAW §304 — INTOXICATING LIQUORS §236—INTOXICATING NATURE OF BEER—EVIDENCE—JUDICIAL NOTICE.**

While the courts do not take judicial cognizance of the fact that liquor not otherwise denominated than as "beer" is intoxicating (*Lumpkin v. Atlanta*, 9 Ga. App. 470, 472, 71 S. E. 755), still, in a prosecution under a municipal ordinance forbidding the keeping of intoxicants for the purpose of illegal sale, evidence to the effect that the beer alleged to have been purchased by a witness was the kind that he bought in barrooms, and that six or seven bottles of such beer would make him drunk, may be sufficient to support the inference that the liquid in question was intoxicating.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. §304; Intoxicating Liquors, Cent. Dig. §§ 480-491; Dec. Dig. §236.]

2. MUNICIPAL CORPORATIONS §642—VIOLATION OF ORDINANCE—CREDIBILITY OF WITNESSES.

Though the evidence in this case is weak, and comes entirely from two witnesses who testified that they were paid \$10 in each case of this kind in which a conviction was secured, the judge of the superior court did not err in overruling the certiorari, since the credibility of witnesses is a matter addressed solely to the discretion of the trial court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. §642.]

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Emma Bledson was convicted of violating an ordinance of the city of Jackson, certio-

rari was overruled, and she brings error. Affirmed.

C. L. Redman, of Jackson, for plaintiff in error. J. T. Moore, of Jackson, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 483)

CARSWELL v. MAYOR AND COUNCIL OF CITY OF WAYNEBORO. (No. 6127.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***MUNICIPAL CORPORATIONS §642 — VIOLATION OF ORDINANCE—ASSIGNMENT OF ERROR—PETITION FOR CERTIORARI.**

A general assignment of error in a petition for certiorari that the municipal court erred in entering up the judgment of which complaint is made, without more, is insufficient to present the point that the municipal ordinance, under which the petitioner was convicted, was void because the municipality, without express legislative authority, had assumed to penalize an act already made an offense by the laws of the state. There being no other or further assignment of error, the judge of the superior court did not err in overruling the certiorari.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. §642.]

Error from Superior Court, Burke County; W. W. Sheppard, Judge.

P. H. Carswell was convicted of violating an ordinance of Waynesboro, certiorari was overruled, and he brings error. Affirmed.

C. B. Garlick, of Waynesboro, for plaintiff in error. H. J. Fullbright, of Waynesboro, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(16 Ga. App. 470)

STEINHAEUER & WIGHT, Inc., v. THOMPSON. (No. 5872.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***1. EVIDENCE — 455—PAROL—CONTRACT OF SALE.**

Where, in a contract for the sale of an automobile the time of delivery is not fixed otherwise than by a stipulation that the automobile will be delivered "as early as possible," parol evidence is admissible to explain the meaning of the term "as early as possible," as it was understood by the contracting parties at the time of making the contract, and testimony on this point is not subject to the objection that it tends to vary the terms of the written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104; Dec. Dig. —455.]

2. SALES — 382, 384—BREACH OF CONTRACT—REMEDY OF SELLER—MEASURE OF DAMAGES—EVIDENCE.

Upon the breach of a contract of sale, the vendor may recover such damages as naturally arise according to the usual course of things, and such damages as were contemplated by the parties, at the time the contract was made, as the probable result of a breach; and necessary expenses incurred by either party in complying with the contract may be recovered; but the provisions of sections 4305 and 4402 of the Civil Code of 1910 have no application when the property which has been rejected by the buyer is resold by the vendor. In such a case the measure of the vendor's damages is the difference between the contract price and the price on resale. Civil Code 1910, § 4131. The defendant by its plea of set-off was confined to the measure of damages specified in the particular remedy provided by section 4131, which the defendant selected. Accordingly the trial judge did not err in repelling testimony to the effect that the failure of the purchaser to take an automobile placed upon the vendor the necessity of selling the car again at an expense consisting of show room, shop, and selling force, amounting to 10 per cent. of the list price of the car. Especially was the exclusion of this testimony harmless in view of the fact that there was no evidence as to the price at which the car was resold by the vendor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1096, 1098-1107; Dec. Dig. —382, 384.]

3. SALES — 398—BREACH OF CONTRACT—ACTION FOR DEPOSIT—INSTRUCTIONS—EVIDENCE.

This suit was an action to recover a deposit with the vendor, to be applied in partial payment for an automobile which was to be delivered by the vendor to the purchaser making the deposit, at a time in the future, "as early as possible," and was based upon an alleged failure of the vendor to deliver the machine as soon as it might have been delivered, or within a reasonable time; and in the state of the record the court did not err, in the absence of testimony showing that the defendant's delay was immaterial, or that the plaintiff by his conduct had waived compliance with this term of the contract, in instructing the jury

as to the duty of the defendant to comply with each and every term of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1137-1139; Dec. Dig. —398.]

4. SALES — 398—TRIAL — 256—BREACH OF CONTRACT—ACTION FOR DEPOSIT—INSTRUCTIONS.

The instruction to the effect that if the jury believed from the evidence that the defendant failed to comply with the terms of the contract, and failed to tender delivery of the car within the life of the contract, it would be their duty to find for the plaintiff the amount sued for is not subject to the exception that it is ambiguous as to the life of the contract, in that it fails to set forth what was the life of the contract under the evidence in the case. As stated in the first headnote, the life of the contract was a matter for the determination of the jury; and if fuller and more specific instructions were desired, they should have been appropriately requested.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1137-1139; Dec. Dig. —398; Trial, Cent. Dig. §§ 628-641; Dec. Dig. —256.]

5. ASSIGNMENTS OF ERROR—VALIDITY.

The remaining grounds of the motion for new trial do not specify wherein consists the error complained of, and therefore fail to constitute valid assignments of error.

Error from Municipal Court of Atlanta.

Action between Steinhauer & Wight, Incorporated, and C. S. Thompson. From the judgment Steinhauer & Wight, Incorporated, bring error. Affirmed.

E. A. Neely, of Atlanta, for plaintiff in error. R. W. Milner, of Covington, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 588)

SEABOARD AIR LINE RY. v. BRAILEY. (No. 6070.)

(Court of Appeals of Georgia. July 3, 1915.)

*(Syllabus by the Court.)***REFUSAL OF NEW TRIAL.**

The judgment of the court, to whom all the issues of fact were submitted, no jury trial having been demanded by either party, was authorized by the evidence. There was no error of law, and the trial judge did not err in refusing a new trial.

Error from City Court of St. Marys; Emmett McElreath, Judge.

Action by J. S. Brailey, Jr., against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Bolling Whitfield, of Brunswick, for plaintiff in error. R. D. Meader, of Brunswick, and H. R. Lang, of Waverly, for defendant in error.

BROYLES, J. Judgment affirmed.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(16 Ga. App. 544)

MILLS v. CITY OF ATLANTA. (No. 6561.)
(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS \S 236 — ILLEGAL SALE—VIOLATION OF ORDINANCE—PROOF.

Under a municipal ordinance prohibiting the keeping by any person, firm, or corporation, for unlawful sale, of any spirituous, fermented, or malt liquors within the limits of the municipality, proof that the accused made one illegal sale of liquor is sufficient to show that the liquor sold was kept on the particular occasion for the purpose of illegal sale. *Reese v. Newnan*, 120 Ga. 198, 47 S. E. 560; *Thomas v. Atlanta*, 16 Ga. App. —, 84 S. E. 964; *Barnes v. Atlanta*, 16 Ga. App. —, 84 S. E. 964, and cases there cited.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. \S 236.]

2. INTOXICATING LIQUORS \S 236—KEEPING FOR SALE — VIOLATION OF ORDINANCE — PROOF.

There was direct evidence that the accused was in possession and control, within the limits of the City of Atlanta, of liquor there purchased from her by the witness; and therefore the recorder was warranted in drawing the inference that she was keeping the liquor for sale in violation of the municipal ordinance. The case of *Lumpkin v. Atlanta*, 12 Ga. App. 111, 76 S. E. 1059, is not in point. The evidence authorized the judgment rendered by the recorder, and that judgment has been approved by the judge of the superior court.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. \S 236.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Floried Mills was convicted of violating an ordinance of the City of Atlanta, the judgment was approved by the judge of the superior court, and defendant brings error. Affirmed.

C. G. Battle, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 573)

MOSLEY v. STATE. (No. 5905.)
(Court of Appeals of Georgia. May 17, 1915.
Rehearing Denied July 3, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 825 — INSTRUCTIONS — REQUESTS—STATUTORY DEFINITIONS OF OFFENSE.

While it is essential to a conviction for the offense of seduction that the jury be satisfied beyond a reasonable doubt that the female alleged to have been seduced was, at the time of the alleged seduction, a virtuous unmarried female, and they should be so instructed by the court, still, in the absence of an appropriate and timely request for fuller instructions upon the point, the reading of the Code section (Pen.

Code 1910, § 378) defining the offense of seduction is sufficient to inform them of the necessity for proof of the fact that the person alleged to have been seduced was "a virtuous unmarried female."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2005; Dec. Dig. \S 825.]

2. CRIMINAL LAW \S 1159 — NEW TRIAL — GROUNDS—CONFLICTING EVIDENCE.

There was conflict in the evidence, but, since it is not made to appear that the finding reached by the jury was the result of aught else than the exercise of their exclusive prerogative of determining the credibility of witnesses, the trial judge did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. \S 1159.]

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

S. C. Mosley was convicted of seduction, and brings error. Affirmed.

Hines & Jordan, of Atlanta, and E. J. Giles and Cowart & Brown, all of Lyons, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 506)

GRUBBS v. CITY OF QUITMAN.
(No. 6531.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 642—VIOLATION OF ORDINANCE—PETITION FOR CERTIORARI—DESCRIPTION OF OFFENSE.

While it is essential that the provisions and terms of a municipal ordinance be stated in a petition for certiorari, when the existence of the ordinance is admitted (*Hill v. Atlanta*, 125 Ga. 697 [2], 698, 54 S. E. 354, 5 Ann. Cas. 614), still it is not necessary that the ordinance itself be literally copied in the petition. A statement that the ordinance under which the accused was tried was one "making it a penal offense to keep, for the purpose of illegal sale within the limits of said city, any intoxicating liquors," is sufficiently definite to enable the court to determine the offense with which the accused is charged.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1412-1415; Dec. Dig. \S 642.]

2. CRIMINAL LAW \S 419, 420 — MUNICIPAL CORPORATIONS \S 642—EVIDENCE—APPEAL —CERTIORARI—VERIFIED PETITION.

According to the allegations of the petition for certiorari, the sole issue in the case before the municipal court was whether the accused sold a bottle of whisky, or whether he gave it to a named person; and it was therefore error, prejudicial to the accused, to have admitted, over his timely objection, the testimony of a third witness, who detailed an alleged conversation, not shown to have been uttered in the presence or hearing of the accused, which cor-

robored the testimony of the witness for the prosecution that the liquor was delivered in pursuance of a sale, and contradicted the testimony of the witness for the defendant, which, if credited, showed plainly that the defendant's delivery of the intoxicant was in pursuance of a gift. The answer of the municipal court to the certiorari might have placed a different aspect upon the case, by contradicting the allegations of the petition for certiorari; but, until the coming in of the answer, the allegations of the petition for certiorari, which has been verified by law, must be assumed to be true. *Linder v. Renfroe*, 1 Ga. App. 58, 57 S. E. 975. For this reason the court erred in refusing to sanction the petition for certiorari.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 973-983; Dec. Dig. § 419, 420; *Municipal Corporations*, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.]

Broyles, J., dissenting.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Lamar Grubbs was convicted of violating an ordinance of the City of Quitman. Sanction of petition for certiorari refused, and defendant brings error. Reversed.

J. D. Wade and W. A. Hassell, both of Quitman, for plaintiff in error. M. Baum, of Quitman, for defendant in error.

RUSSELL, C. J. Judgment reversed.

BROYLES, J. (dissenting). While I agree with the majority of the court that the evidence of the witness Ratcliff was inadmissible, because it introduced a conversation not in the presence of the defendant, and not in any way connecting him with the crime, I do not think it was prejudicial to the defendant's cause. The legal evidence in the case clearly authorized the finding that the defendant was guilty as charged. See, in this connection, the opinion of the majority of this court in *Venable v. Atlanta*, 7 Ga. App. 190 (4), 66 S. E. 489:

"Where the legal and competent evidence against an offender in a municipal court fully supports the finding of the recorder, the admission by him of some testimony which may have been irrelevant and inadmissible, because hearsay, will not demand a reversal of his judgment by a reviewing court."

(16 Ga. App. 466).

ELLIOTT v. WILKS. (No. 5827.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. JUDGMENT §321—RIGHT TO AMEND—TIME—NOTICE.

By proper order, a judgment may be amended so as to conform to the pleadings, and this may be done even after the issuance of an execution and without notice to the defendant. Where a court has jurisdiction of the person and the subject-matter, it is to be presumed that it had before it evidence sufficient to authorize the judgment which was rendered; and the period of time which may have elapsed between the original rendition of the judgment and the amendment thereof is immaterial, provided the

judgment as amended conforms to the pleadings of record.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 619, 620; Dec. Dig. § 321.]

2. JUDGMENT §119—TRIAL §10—TRIAL BY COURT—ACTION IN CITY COURT—TIME FOR TRIAL.

Under the provisions of the act of 1909 amendatory to the act creating the city court of Nashville (Acts 1909, p. 283, § 3), a judgment may be rendered by the court or a verdict be taken, as the case may require, at the appearance term, in all civil cases in which there is no plea or defense filed, on the call of the appearance docket; and by the terms of the act of 1911 (Acts 1911, p. 311, § 3), the judge of the city court of Nashville may try and dispose of all cases ripe for trial where a jury has not been demanded. Consequently the judge in the present case was sitting both as court and jury.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 208, 209, 211-220; Dec. Dig. § 119; *Trial*, Cent. Dig. § 27; Dec. Dig. § 10.]

3. JURY §16—JURY TRIAL—ACTION ON NOTE—ATTORNEY'S FEES.

While a judgment for the attorney's fees stipulated in a promissory note cannot be rendered by the court without a jury, as upon an unconditional contract in writing, even when no jury has been demanded, still when the petition in a suit on such a note alleges that written notice has been given to the defendant as required by law, and no defense has been filed in the suit, the failure to deny the averment that due and timely notice was given must be construed as such an implied admission as dispenses with the necessity for further proof and as authorizes a recovery of the fees, and as will authorize the judge to direct a verdict when he is not empowered to sit as a jury; and consequently he may render an appropriate judgment upon the proof supplied by the implied admission, when he is legally empowered to try the case without a jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 84-94; Dec. Dig. § 16.]

4. JUDGMENT §301—AMENDMENT—RIGHT.

Since in the present case no jury was demanded, the judge was expressly authorized to try the case and to render the judgment for attorney's fees, an amendment conforming the judgment to the record was properly allowed; and it was not error thereafter to sustain a demurrer to the affidavit of illegality.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 587-593; Dec. Dig. § 301.]

Error from City Court of Nashville; C. A. Christian, Judge.

Action by J. T. Wilks against Bob Elliott. Judgment for plaintiff, affidavit of illegality interposed by defendant to the levy, judgment amended, demurrer to affidavit of illegality sustained, and defendant brings error. Affirmed.

Jos. A. Alexander and W. G. Harrison, both of Nashville, for plaintiff in error. J. Z. Jackson, of Adel, for defendant in error.

RUSSELL, C. J. A fl. fa. in favor of J. T. Wilks against Bob Elliott, based upon a judgment rendered March 12, 1914, for \$1,663.12 principal, \$257.70 interest, and \$191.98 attorney's fees, was levied upon cer-

tain real estate as the property of the defendant. To this levy Elliott interposed an affidavit of illegality. The illegality was based upon an alleged want of jurisdiction on the part of the court to render the particular judgment; it being insisted that the court could not render a judgment at the appearance term, and that, even if the court could render the judgment for principal and interest, the judgment as to attorney's fees was void. The original judgment was as follows (after stating the case):

"The above-stated case coming on in its regular order to be heard, and no defense being filed as required by law, and personal service appearing, it is therefore ordered, considered, and adjudged by the court that the plaintiff do have and recover of and from the defendant the sum of \$1,868.12 as principal, and the sum of \$251.70 as interest, and the sum of \$191.98 as attorney's fees, and the further sum of \$10.30 as cost of suit, and the further interest on said sum at the rate of 8 per cent. per annum until paid. Judgment signed this the 12th day of March, 1914. C. A. Christian, Judge City Court of Nashville."

The plaintiff in *fi. fa.* offered an amendment, which was allowed by the court, and which changed the judgment so that it read as follows:

"The above-stated case coming on regularly to be heard at this the March term, 1914, of said court, before the judge thereof, without the intervention of a jury, no demand having been filed for a trial by jury, and no defense having been interposed, and it appearing to the court that the plaintiff is entitled to recover of and from the defendant the principal sum of \$1,868.12, together with \$251.70 interest and \$191.98 attorney's fees, judgment is hereby rendered in favor of the plaintiff and against the defendant for the said several sums and \$—, costs of court, together with future interest on the said principal sum at the rate of 8 per cent. per annum. Judgment signed in open court this the 12th day of March, 1914. C. A. Christian, Judge City Court of Nashville."

Thereafter a demurrer to the affidavit of illegality which had been filed by the plaintiff in *fi. fa.* was sustained and the illegality was stricken. It is insisted that the court erred in permitting the judgment to be amended and in sustaining the demurrer to the affidavit of illegality.

[1] 1. Whether the court erred in allowing the judgment to be amended depends entirely upon whether the amendment was more extensive in its scope than the pleadings would authorize. It is not a question whether the amendment was offered at the same term and while the judgment was still in the breast of the court, but whether the amendment was required in order to make the record of the finding speak the truth as to what transpired on the trial. In the original petition in the case, as it appears in the record, the plaintiff alleged the service of a notice, given in accordance with law, to bind the defendant for attorney's fees; and there was no denial of this averment. The judgment, as originally entered by the court, is subject to the construction that it was entered without proof, but an inspection of the record shows that in accord with the ruling in *V.*

M. & W. Ry. Co. v. Citizens' Bank, 14 Ga. App. 329, 80 S. E. 913, the lower court had before it a sufficient implied admission of liability for attorney's fees on the part of the defendant to have authorized a jury, or the judge sitting as a jury, to find in favor of the plaintiff as to the attorney's fees. For this reason there was no error in allowing the judgment to be so amended as to conform to the pleadings. A judgment may be amended by order of the court in conformity to the verdict upon which it is predicated, even after execution issues (Civil Code, § 5697); and it was held in *Irby v. Brown*, 59 Ga. 596, that it was not error to allow a judgment to be so amended as to conform to the pleadings even after the lapse of 10 years. A judgment by default may be amended so as to conform to the pleadings even after execution has been issued and property has been sold thereunder. *Dennis v. Colley*, 112 Ga. 114, 37 S. E. 119. In the more recent case of *Scarborough v. Merchants' & Farmers' Bank*, 131 Ga. 590, 62 S. E. 1040, it was held that a judgment could be amended at a subsequent term of the court in order to conform to the pleadings on *ex parte* application of the plaintiff. That notice to the defendant is not essential was held in *Saffold v. Wade*, 56 Ga. 174, and in *Bell v. Bowdoin*, 109 Ga. 200, 34 S. E. 339, as well as in the *Scarborough Case*, *supra*. Under the provisions of section 5311 of the Civil Code, it is extremely doubtful whether the defendant's affidavit of illegality could have been considered in any event, because it appears from the record that he was served and had had his day in court. A defendant who has been served and who has had his day in court cannot go behind the judgment by affidavit of illegality for the purpose of making the question that the verdict was not authorized by the pleadings or that the judgment did not follow the verdict. *Bird v. Burgsteiner*, 108 Ga. 654, 34 S. E. 153. Where a court has jurisdiction, it is to be presumed that it had before it pleadings and evidence authorizing the judgment rendered. *Bedingfield v. First National Bank*, 4 Ga. App. 197 (3), 61 S. E. 30. In this view of the case, the correctness of the court's ruling upon the amendment really did not concern the plaintiff in error, unless it appeared from the record itself that the judgment was void.

[2] 2. The original judgment rendered for attorney's fees, under the ruling in *Turner v. Bank of Maysville*, 13 Ga. App. 547, 79 S. E. 180, would appear to be unauthorized, were it not for the provisions of the act amendatory to the act creating the city court of Nashville. See Acts 1909, p. 283 (3), and Acts 1911, p. 311 (3). If the case were not submitted to a jury, ordinarily the judge would have no right to enter a judgment for attorney's fees, because liability for the attorney's fees is not unconditional, but a conditional part of the contract. It appears

however, that under the provisions regulating the city court of Nashville, any case in which there is no demand for a jury is triable by the judge sitting as a jury. This being true, a finding by the judge in the present case was at once a verdict and a judgment, and upon sufficient proof the judge was as fully authorized to find the attorney's fees in favor of the plaintiff as to award judgment for the principal and interest in the case.

[3] 3. In *Valdosta, Moultrie & Western R. Co. v. Citizens' Bank*, supra, this court held that while a judge sitting also as a jury, where no jury was demanded, may, upon proper proof, award a judgment for attorney's fees, the form of the judgment should properly authenticate the fact that sufficient evidence had been offered to support a recovery upon this conditional term in the contract; and it was for this purpose that the amendment in the present case was allowed. In the instant case the record discloses that the judge was authorized to award a judgment for attorney's fees; and the purpose of the amendment, no doubt, was to comply with the ruling in *Valdosta, Moultrie & Western R. Co. v. Citizens' Bank*, supra; and, as already pointed out in the first division of this opinion, the amendment was not only allowable, but proper, and affords the plaintiff in error no ground for complaint.

[4] 4. Since in the present case no jury was demanded, the judge was expressly authorized to try the case and to render judgment for attorney's fees, an amendment conforming the judgment to the record was properly allowed, and it was not error thereafter to sustain a demurrer to the affidavit of illegality.

Judgment affirmed.

(16 Ga. App. 476)

LENOX DRUG CO. v. NEW ENGLAND JEWELRY CO. (No. 6053.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1062 — HARMLESS ERROR — CONSTRUCTION OF CONTRACT BY JURY.

While the construction of a written contract is a duty for the court to perform, a new trial will not be granted where the court submits the contract to the jury, and it is properly construed by them. *Main v. Simmons*, 2 Ga. App. 821, 59 S. E. 85. In this case we think the jury properly construed the contract.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212-4218; Dec. Dig. ⇐1062.]

2. APPEAL AND ERROR ⇐882—INVITED ERROR—INSTRUCTIONS—DEFENSE PLEADED.

The defendant, having pleaded an express warranty, will not be heard to complain that the court charged upon this subject.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. ⇐882.]

3. INSTRUCTIONS—ACTION ON CONTRACT.

The other excerpt from the charge complained of, when considered in connection with the entire charge and the evidence in the case, contains no error.

4. TRIAL ⇐259—PRESENTING QUESTIONS IN LOWER COURT—REQUESTS FOR INSTRUCTION.

The fourth ground of the amendment to the motion for a new trial, complaining that the court failed to give certain instructions, is without merit, as the trial judge certifies that no written request therefor was submitted to him. [Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 648-650; Dec. Dig. ⇐259.]

5. APPEAL AND ERROR ⇐237—PRESENTING QUESTIONS IN LOWER COURT—ARGUMENT OF COUNSEL.

The remarks of counsel for the plaintiff, in arguing the case before the jury, complained of by plaintiff in error, were improper, not warranted by the evidence, and perhaps prejudicial to the defendant, but counsel for the defendant did not then and there invoke a ruling thereon. He should either have made a motion for a mistrial or have requested the court to charge the jury that they should disregard the argument. He did neither the one nor the other, and by failing to do so has waived his right, and cannot now make the use of such improper argument a ground of his motion for a new trial. *Satterfield v. Ayers*, 10 Ga. App. 742, 73 S. E. 1091; *Georgia Railroad v. Dougherty*, 4 Ga. App. 614, 62 S. E. 158.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1302½; Dec. Dig. ⇐237.]

6. VERDICT—SUFFICIENCY OF EVIDENCE—ACTION ON CONTRACT.

The evidence authorized the verdict, and there was no error in overruling the motion for a new trial.

Error from City Court of Nashville; C. A. Christian, Judge.

Action by the New England Jewelry Company against the Lenox Drug Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

Wm. Story, of Nashville, for plaintiff in error. Hendricks & Hendricks, of Nashville, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 471)

HARVEL v. ATLANTIC COAST LINE R. CO. (No. 5894.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1002 — VERDICT — CONFLICTING EVIDENCE.

The plaintiff alleged in her petition that she applied to the agent of the defendant railroad company at Bainbridge, Ga., for a ticket to Lela, Ga., a point on the same road, and "the agent handed her a ticket for which she paid the amount charged by him, to wit, 55 cents [the price of a ticket to Donalsonville, as disclosed by the evidence], which she did not examine, but thought it was a ticket to Lela, for which she had applied," and that the defendant's agent, when requested to sell her a ticket to Lela, "did not do so, but handed her a ticket to Donalsonville, and she did not know, until the train stopped at Donalsonville, that the train did not stop at Lela, and that the ticket was not sold to her to that point." The plaintiff alleged further that the train on which she took passage

failed to stop at Lela, and she was carried beyond that point to Donalsonville, two or three miles further. No definite and specific damages were shown by the testimony to have resulted to the plaintiff, but it is contended that she was at least entitled to nominal damages. The evidence was in conflict, and the jury settled the conflict in favor of the defendant; and since there was testimony from which the jury was authorized to infer that a ticket to Donalsonville was sold to the plaintiff with full knowledge on her part that the train would not stop at Lela, and testimony that no ticket to Lela was sold at Bainbridge to any person on that day, which contradicted her evidence that the ticket sold to her was a ticket to Lela, the verdict was sufficiently supported.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ☞ 1002.]

2. DENIAL OF NEW TRIAL.

In the state of the record there is no error requiring the grant of a new trial.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by Kate Harvel against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. E. O'Neal, of Bainbridge, and E. M. Donalson, of Macon, for plaintiff in error. Pope & Bennet, of Albany, and R. G. Hartsfield, of Bainbridge, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 473)

KEATON v. SHERROD. (No. 5977.)
(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

EVIDENCE ☞ 157 — BEST AND SECONDARY — BOOKS OF PARTNERSHIP.

The court erred in ruling out the defendant's testimony, and in thereafter directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. ☞ 157.]

Broyles, J., dissenting.

Error from City Court of Cairo; J. R. Singletary, Judge.

Action by S. A. Sherrod against B. C. Keaton. Judgment for plaintiff on directed verdict, and defendant brings error. Reversed.

J. Q. Smith, of Cairo, for plaintiff in error. Lebbeus Dekle, of Thomasville, for defendant in error.

RUSSELL, O. J. The majority of the court is of the opinion that, while the books of the partnership would be primary proof of the state of the mutual accounts between the partners, the mere fact that this is true would not require the exclusion of testimony of an independent fact, to wit, that there was an agreement between the parties that the aggregate amount of certain items, perhaps appearing upon the books, was to be entered

as a credit upon the note given by the defendant to the plaintiff, which formed the basis of the suit. There would not necessarily be any conflict between this evidence of an agreement that a credit should be entered and any entry which might appear upon the books, and, in fact, the independent fact to which the defendant offered to testify might of necessity rest in parol. For this reason we think the court erred in excluding the testimony offered to show that the plaintiff agreed to enter upon the note the credit which he thereafter failed to enter.

Judgment reversed.

BROYLES, J. (dissenting). In a suit upon a promissory note, the defendant acknowledged its execution and that the plaintiff was the owner and holder of the note, assumed the burden of proof, and testified as follows:

"That when this note was executed he and the plaintiff were copartners in the sawmill business; that soon after that time they dissolved, and the plaintiff owed him 'the sum of \$115, partly, to wit, about \$35, in accounts on the books,' and that 'the plaintiff was to have given his note credit for the sum of \$115 that he admitted owing him independent of the books,' and he thought that this had been done until the suit was filed; that he did not remember what all the \$115 indebtedness consisted of; that 'the entire indebtedness and transaction were shown by the books of the partnership, but it was understood between them at the time of the dissolution that he owed defendant the amount as aforesaid and was to credit his note with the same.'"

The court ruled out all of this evidence, upon the ground that the partnership books were the best evidence of the indebtedness, and directed a verdict for the plaintiff for the full amount sued for.

My Colleagues are of the opinion that the testimony of the defendant that "the plaintiff was to have given his note credit for the sum of \$115 that he admitted owing him independent of the books" should have been admitted, and that the court erred in directing a verdict for the plaintiff. The opinion of the writer is that this evidence was properly excluded, as the defendant, notwithstanding the above statement that it was "independent of the books," afterwards in his testimony admitted that "the entire indebtedness and transaction were shown by the books of the partnership." According to my view, those books were the best evidence, and, it not having been shown that they were inaccessible, the secondary evidence was properly ruled out by the court. See Civil Code, §§ 5748, 5752; Compton v. Fender, 132 Ga. 483 (2), 64 S. E. 475. In my opinion, the testimony of the defendant having been properly excluded, and there being no other evidence submitted for the defense, and the answer having admitted a prima facie case in the plaintiff, the court did not err in directing a verdict for the plaintiff.

(16 Ga. App. 465)

MULLIN v. CITY OF ST. MARYS.
(No. 5825.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***1. POWER OF CITY—CONTRACTS.**

The charter of the city of St. Mary's (Acts 1910, p. 1086) expressly authorizes the city to sell or lease "any estate or estates, real or personal, lands, tenements and hereditaments of all kinds whatsoever, within or without the limits of said city, for corporate purposes," and provides that the city council "shall have special powers in such capacity to make all contracts which said council may deem necessary for the welfare of said city or its citizens," etc. The petition does not disclose that the contract alleged as the basis of the present action by the city was unauthorized.

2. PLEADING —193—DEMURRER TO PETITION.

The petition alleges that the defendant is indebted to the city in a stated sum, besides interest, "since the 11th day of January, 1912," and that "said indebtedness accrues to said city by reason of the purchase by the said defendant of the city's turpentine privilege, for the year 1912, in the timber of said city on what is known as the city common; said defendant contracting and agreeing to pay said sum at said time, and causing said transaction to be entered of record in the minutes of the board of aldermen of said city." *Held*, that the court erred in not sustaining the special ground of the demurrer that the petition does not set out the terms of the contract, so as to put the defendant upon notice of what he is called upon to defend. Civ. Code 1910, § 5541; Southern Express Co. v. Cowan, 12 Ga. App. 318, 77 S. E. 208.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. —193.]

3. GROUNDS OF DEMURRER.

There was no error in overruling the other grounds of the demurrer.

Error from City Court of St. Marys; Emmet McElreath, Judge.

Action by the City of St. Marys against W. H. Mullin. Judgment for plaintiff, and defendant brings error. Reversed.

A. D. Gale, of Brunswick, for plaintiff in error. S. C. Townsend, of St. Marys, for defendant in error.

WADE, J. Judgment reversed.

(16 Ga. App. 479)

BERRY v. CITY OF JACKSON. (No. 6075.)
(Court of Appeals of Georgia. June 25, 1915.)*(Syllabus by the Court.)***MUNICIPAL CORPORATIONS —640, 641—VIOLATION OF ORDINANCES — CREDIBILITY OF WITNESSES—DOUBT OF JUDGE.**

There was no error in overruling the certiorari.

(a) The extent to which the credibility of witnesses, who admit that their obtaining a stipulated reward, is dependent upon conviction of one accused of the violation of a municipal ordinance, may be affected, is a matter left to the trial court. The municipal court may altogether disregard the witness thus interested, or may believe him. Ford v. State, 13 Ga. App. 68 (4), 78 S. E. 782.

(b) An oral expression, upon the part of the trial judge, of doubt as to the sufficiency of the

proof of the defendant's guilt, whether made prior to the signing of the judgment of guilty or thereafter, cannot be used to impeach that judgment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1410, 1411; Dec. Dig. —640, 641.]

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Mattie Berry was convicted of violating a city ordinance, and her petition for certiorari was overruled by the superior court. She brings error. Affirmed.

C. L. Redman, of Jackson, for plaintiff in error. J. T. Moore, of Jackson, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 479)

COCHRAN v. CITY OF JACKSON.
(Nos. 6077-6087.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***ORDINANCES—VIOLATION—CONVICTION.**

The decision in these cases is controlled by the ruling in Berry v. City of Jackson, supra, this day decided.

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Lizzie Cochran, G. A. Cook, Robert Fish, Ida Foster, Scott Goodman, Abbie Johnson, Carrie Lewis, Vinie Myrick, Vinie Slaughter, Charley Stafford, and Ned Taylor were convicted in separate actions for the violation of a municipal ordinance. Their petitions for certiorari were overruled by the superior court, and they bring error. Affirmed.

C. L. Redman, of Jackson, for plaintiffs in error. J. T. Moore, of Jackson, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 502)

STEPHENS v. STATE. (No. 6367.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***DENIAL OF NEW TRIAL.**

The evidence, though weak, authorized the verdict; no error of law is complained of; and the discretion of the trial judge in refusing the grant of a new trial will not be controlled.

Russell, C. J., dissenting.

Error from City Court of Dublin; J. B. Hicks, Judge.

Proceedings between Lewis Stephens and the State. From the judgment, Stephens brings error. Affirmed.

R. Earl Camp, of Dublin, for plaintiff in error. S. P. New, Sol., of Dublin, for the State.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J., dissents.

(16 Ga. App. 470)

BUSSELL v. WHIDDON. (No. 5845.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***ASSIGNMENTS OF ERROR—CERTIORARI.**

The assignments of error directed to the insufficiency of the possessory warrant and the antecedent affidavit are not sufficiently specific to present any point for decision. Upon the merits, the finding in favor of the plaintiff in the inferior judiciary seems to have been fully authorized, and the judge of the superior court did not err in refusing to sanction the petition for certiorari.

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by J. E. Whiddon against Oscar Bussell. Judgment for plaintiff, sanction of petition for certiorari refused, and defendant brings error. Affirmed.

C. O. Hall, of Tifton, for plaintiff in error. Ridgill & Mitchell, of Tifton, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 480)

MAYOR AND COUNCIL OF MACON v. STRINGFIELD. (No. 6099.)

(Court of Appeals of Georgia. June 25, 1915.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS—§741—CLAIMS—NOTICE—EXTENT OF CLAIM.**

As a prerequisite to bringing a suit against a municipal corporation in this state for injury to person or property, a demand in writing must be presented to the governing authority of the municipality for adjustment, stating the time, place, and extent of the injury, as near as practicable, and the negligence which caused the same. Pol. Code 1910, § 910. A notice which fails to specify any amount of money as damages is not a compliance with this requirement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.]

*(Additional Syllabus by Editorial Staff.)***2. WORDS AND PHRASES—"EXTENT."**

In Pol. Code 1910, § 910, requiring the notice of injury which must be served on a municipality to state the extent of the injury, the word "extent" includes not only the nature and character of the injury, but the amount of damages measured in money.

[For other definitions, see Words and Phrases, First and Second Series, Extent.]

Error from City Court of Macon; Robert Hodges, Judge.

Action by Mrs. A. J. Stringfield against the Mayor and Council of Macon. Judgment for the plaintiff, and defendant brings error. Reversed.

Walter De Fore and Chas. H. Garrett, both of Macon, for plaintiff in error. Robt. W. Barnes, of Macon, for defendant in error.

WADE, J. [1] Political Code, § 910, provides that:

"No person, firm or corporation, having a claim for money damages against any municipal

corporation of this State on account of injuries to person or property, shall bring any suit at law or equity against said municipal corporation for the same, without first presenting in writing such claim to the governing authority of said municipality for adjustment, stating the time, place, and extent of such injury, as near as practicable, and the negligence which caused the same, and no such suit shall be entertained by the courts against such municipality until the cause of action therein has been first presented to said governing authority for adjustment."

It has been many times decided by the Supreme Court and this court that a substantial compliance with the requirements of the above section is all that is necessary, since the object of the notice therein provided for is to put the municipal corporation in possession of such facts as will enable it to investigate the actual merits of the claim urged against it, and to determine whether to pay the same. It was said in Langley v. Augusta, 118 Ga. 590, 600, 45 S. E. 486, 490 (98 Am. St. Rep. 133):

That the purpose of the act of 1899 (Political Code, § 910) was simply to give to a municipality notice that the citizen or property owner had a grievance against it, and that the act "does not contemplate that the notice shall be drawn with all of the technical niceties necessary in framing a declaration"; that "it is necessary only that the city shall be put on notice of the general character of the complaint, and, in a general way, of the time, place, and extent of the injury. The act recognizes, by the use of the words 'as near as practicable,' that absolute exactness need not be had. A substantial compliance with the act is all that is required; and, when the notice describes the time, place, and extent of the injury with reasonable certainty, it will be sufficient."

It is said in the same case that:

"The petition need not actually follow the notice, and an immaterial variance between the two as to time, place, or extent of injury will not amount to a fatal variance."

In Tallapoosa v. Brock, 138 Ga. 622, 75 S. E. 644, the Supreme Court said that:

The act of 1899 (Political Code, § 910) requires "a presentation in writing of such claim to the governing authority of the municipality for adjustment, stating the time, place, etc., before bringing suit, and allows the municipal authorities 30 days in which to act on the claim. A petition which fails to do this is demurrable."

In Bostwick v. Griffin, 141 Ga. 120, 80 S. E. 657, that court again said that:

"No such suit [for injuries to person or property] shall be entertained by the courts against such municipality until the cause of action therein has been presented for adjustment."

One of the things necessary in a notice of this character is a statement as to the "extent of such injury." The reason for this requirement is obvious. The object and purpose of the statute embodied in this section was to give such information as would apprise the governing authority of the municipality of the amount of the claim and to enable the proper officials to investigate the injury complained of and determine whether or not to adjust the demand without suit. It can readily be seen that, if no specific amount of damages is claimed in the notice or de-

mand, it would be impossible for the city, acting through the proper officials, to determine whether or not the demand is reasonable or excessive, and whether or not it should be adjusted without suit or resisted in the courts, even where the facts alleged in the notice as to the time, the place, and the character of the injury are fully set forth. For instance, suppose one having a demand against a municipality on account of a broken limb, caused by a fall into an open and unprotected ditch across or in a city street, gave written notice to the proper officials of the city, setting forth with sufficient fullness the time, the place and the nature of the injury, describing with minuteness what particular bone was broken and the exact injury suffered, how could the city authorities determine (even where their investigation verified all that was alleged in the written notice, and clearly demonstrated the liability of the city for the injury) whether or not they would adjust the claim without suit, unless the notice apprised them as to "the extent of such injury," peculiarly as well as otherwise. If the injured person claimed an exorbitant amount for a simple fracture from which no permanent injury resulted, the city officials would not be willing to effect a settlement on the terms named by him; whereas, if he named a reasonable and moderate amount, an immediate settlement might be accomplished or negotiations begun which would result in a settlement. If no notice is given the city as to how much the injured person claims as "the extent of such injury" peculiarly, the written notice would not enable the city officials to determine whether they should meet the demand made, and thereby prevent a suit against the city.

[2] The word "extent," as used in this section of the Code, bearing in mind the object to be accomplished by the notice, must include not only the nature and character of the injury for which payment is demanded, but also the amount of the damages, measured in the only terms by which the city could adjust the same, to wit, in dollars and cents.

In conformity with the view expressed above, this court, in *Smith v. Elberton*, 5 Ga. App. 286, 63 S. E. 48, said that:

"Notice of the time, place, and extent of the injuries to person or property claimed to have been inflicted by the corporation, and the amount of the damages claimed, shall be given to its officers."

In *Kennedy v. Savannah*, 8 Ga. App. 98, 68 S. E. 652, this court held that a notice which described certain personal injuries suffered by the plaintiff by a fall, whereby he incurred a doctor's bill of \$150, hospital fees of \$30, and was permanently injured as therein described, and concluded by laying his damages at \$5,000, was sufficient. In that case the present Chief Judge of this court said, speaking for the full court, that:

"Only such substantial compliance with the provisions of the act of 1899 (Acts 1899, p. 74) requiring notice to be given to municipal corporations of claims for damages against them is necessary as will enable the municipality to fully investigate the claim and to determine whether it prefers to adjust the claim without suit or to contest its validity in the courts."

In *Sandersville v. Stanley*, 10 Ga. App. 360, 73 S. E. 535, it was held that:

The requirements of section 910 are "sufficiently complied with where the notice gives information sufficiently definite to locate the property alleged to have been injured, the amount of damages claimed, and sufficient data to enable the city authorities to examine into the alleged injuries and determine whether the claim should be adjusted without suit."

The notice in that case specifically set out the extent of the injury claimed, as it alleged that the various matters complained of had all resulted in injury and damage to the plaintiff "in the sum of \$1,500 or other large sum."

The notice given to the governing authority of the city of Macon in this case sets out the time, the place, and the nature of the alleged injury, but fails to set out the "extent" of the injury, or claim any specified amount as damages, or indicate for what maximum amount the injury could be compensated. The court therefore erred in overruling the demurrer.

Since our holding will necessarily result in dismissal of the suit, the remaining questions raised by the demurrer need not be now considered.

Judgment reversed.

(16 Ga. App. 521)

THURMAN v. WALRAVEN. (No. 5980.)
(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨732—ASSIGNMENT OF ERROR—DENIAL OF NEW TRIAL.

The motion to dismiss the writ of error is denied. Where a bill of exceptions assigns error upon a judgment overruling a motion for a new trial, the assignment of error is sufficiently specific.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3022-3024; Dec. Dig. ⇨732.]

2. ABATEMENT AND REVIVAL ⇨39—PLEA IN ABATEMENT—ACTION BY CORPORATION—SURRENDER OF CHARTER.

Where a corporation surrenders its charter, a pending suit in which it is plaintiff dies with the charter. Consequently, such a suit cannot be pleaded in abatement (although it may still remain on the docket of the court) to another suit subsequently brought by an individual to whom the corporation, before the surrender of its charter, had transferred its claim against the defendant. Accordingly, the court did not err in overruling the plea in abatement. *Merritt v. Gate City Bank*, 100 Ga. 147, 27 S. E. 979, 33 L. R. A. 749, and cases therein cited.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 194-204; Dec. Dig. ⇨39.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence sustained the verdict, and the court did not err in overruling the motion for a new trial.

4. ASSIGNMENTS OF ERROR.

The other assignments of error are without merit.

Error from Municipal Court of Atlanta.

Action between Arthur Thurman and D. S. Walraven. From the judgment, Thurman brings error. Affirmed.

Watkins & Lewis, of Atlanta, for plaintiff in error. Hill & Wright, of Atlanta, for defendant in error.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J., concurs dubitante.

(16 Ga. App. 504)

SEABOARD AIR LINE RY. v. BLACKWELL. (No. 5631.)†

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. RAILROADS Ⓒ344—NEGLIGENCE—PLEADING—BLOW POST LAW.

The trial judge did not err in sustaining the demurrer to the twenty-third paragraph of the answer, wherein the defendant pleaded that the failure to comply with the "blow post law," as embodied in sections 2675-2677, Civ. Code 1910, was not, as a matter of law, negligence on the part of the defendant relatively to the transaction in question, and in thereafter striking that paragraph of the answer. *Seaboard Air Line Ry. v. Blackwell*, 143 Ga. —, 84 S. E. 472.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. Ⓒ344.]

2. RAILROADS Ⓒ350—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether the plaintiff's son by exercising ordinary care for his own safety, could have avoided the injury which resulted in his death, was a jury question; and, in view of the evidence as to the defendant's failure to comply with the provisions of the "blow post law," there is sufficient testimony as a whole to support the jury's finding in favor of the plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. Ⓒ350.]

3. APPEAL AND ERROR Ⓒ977—REVIEW—DENIAL OF NEW TRIAL—VERDICT.

The verdict having been approved by the trial judge, and there being no complaint that any error was committed in the trial, other than the alleged error in striking the portion of the defendant's answer referred to above, the judgment overruling the motion for a new trial, based only on the general grounds will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. Ⓒ977.]

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Action by Elizabeth Blackwell against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Z. B. Rogers and H. J. Brewer, both of Elberton, and F. C. Shackelford and Cobb & Erwin, all of Athens, for plaintiff in error. Pulliam Proffitt, of Elberton, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 502)

BUFORD v. STATE. (No. 6342.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

VOLUNTARY MANSLAUGHTER—DENIAL OF NEW TRIAL.

The assignment of error that the verdict of voluntary manslaughter was not authorized by the evidence, and therefore was contrary to law, is not supported; and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Alonzo Buford was convicted of voluntary manslaughter, and brings error. Affirmed.

Chas. W. Worrill, R. Terry, and J. E. McDonald, all of Cuthbert, for plaintiff in error. B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 472)

GEORGE v. SHIELDS. (No. 5900.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. VERDICT SUSTAINED.

The evidence authorized the verdict.

2. EVIDENCE Ⓒ370—DOCUMENTARY EVIDENCE—ADMISSIBILITY—PROOF OF SIGNATURE—PLEADING.

The execution of the instrument sued upon was not brought into question by a plea of non est factum, and there was no error in permitting the payee therein named to make proof of the signature thereto attached and thereafter allowing the same to be introduced in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1533, 1559, 1560, 1562-1578, 1592; Dec. Dig. Ⓒ370.]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action between Calhoun George and J. C. Shields. From the judgment, George brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error. P. Cooley, of Jefferson, for defendant in error.

WADE, J. Judgment affirmed.

Ⓒ—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
† Writ of error to United States Supreme Court allowed July 6, 1915.

(16 Ga. App. 513)

BIRDFORD SUPPLY CO. et al. v. EDWARDS. (No. 5963.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE \S 206—CIVIL ACTIONS—CERTIORARI—SUFFICIENCY OF ASSIGNMENT.

Where a petition for certiorari assigned error on several special grounds, and also because "the verdict rendered by the jury in said case is contrary to law and to the evidence, and decidedly and strongly against the weight of the evidence," and the petition itself set forth all the evidence adduced at the trial, together with copies of all the pleadings in the case, the judge of the superior court did not err in overruling a motion to dismiss the certiorari upon the ground that there was no assignment of error upon the final judgment in the case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 800-806; Dec. Dig. \S 206.]

2. APPEAL AND ERROR \S 1078—WAIVER OF ERRORS—FAILURE TO ARGUE.

Assignments of error abandoned in the brief of counsel for the plaintiff in error will not be considered in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4256-4261; Dec. Dig. \S 1078.]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by W. J. Edwards against the Birdford Supply Company and others. Judgment for the plaintiff in the superior court on certiorari to a justice of the peace, and defendants bring error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error.

WADE, J. [1] The bill of exceptions complains that the judge of the superior court erred in overruling a motion to dismiss a certiorari because there was no assignment of error on the final judgment in the case, and also assigns error generally because he rendered final judgment in favor of the plaintiff in certiorari. The brief for the plaintiff in error insists only on the assignment of error based on the refusal of the judge of the superior court to dismiss the certiorari because there was no assignment of error therein on the final judgment in the justice's court; and therefore we need not consider whether the court correctly rendered a final judgment in the superior court. Various alleged errors are set forth explicitly in the petition for certiorari, and exception is expressly taken to rulings on different motions made and also on the admission of testimony. The petition avers that the court erred in overruling certain motions and allowing a certain amendment, and in admitting certain specific evidence therein referred to, and assigns error upon various grounds specified, and generally as follows:

"All of which rulings of the court petitioner assigns as error. Your petitioner avers that the court erred in all the foregoing rulings, and that the verdict entered by the jury in said case

is contrary to law and to the evidence, and decidedly and strongly against the weight of the evidence."

The petition sets out in detail all of the evidence adduced at the trial, and also sets out the verdict returned by the jury, as follows:

"We, the jury, find in favor of the traverse. This November 20, 1913.

"B. B. Tatum, Foreman."

A copy of all the pleadings is attached to the petition, including the original traverse referred to in the verdict, together with an amendment thereto; and all of the allegations to the petition are adopted as true by the magistrate in his answer.

In Fleming v. State, 67 Ga. 767, it is held that:

"Where a certiorari is sought in a criminal case tried before a county court, the petition should set out the errors complained of. Where a petition for certiorari set out the facts of a trial, a brief of the evidence, the judgment of guilty and closed by stating 'to which proceedings your petitioner alleges error,' the assignment of error was too general, and *nothing could be considered under it, except whether the finding was supported by the evidence.* [Italics ours.]. An assignment of error that the verdict and judgment 'is contrary to law' is not a specific assignment of error, and cannot be considered by the court. Newberry v. Tenant, 121 Ga. 561, 49 S. E. 621; Rodgers v. Black, 99 Ga. 142, 25 S. E. 20." Callaway v. Atlanta, 6 Ga. App. 354, 355, 64 S. E. 1105, 1106.

In that case the point which it was sought to review by this general assignment that the verdict and judgment "is contrary to law," etc., was not merely whether or not the verdict and judgment were supported by the evidence, but whether the fine imposed by the recorder was in accordance with the provisions of a certain ordinance; and under repeated rulings both of the Supreme Court and of this court, as well as under the ruling in the Fleming Case, supra, it is clear that the assignment was insufficient for that purpose. Nevertheless, under such an assignment, it is equally clear that the insufficiency of the evidence to support the verdict, or the question whether the verdict was contrary to law because unsupported by the evidence, could have been considered and passed upon.

In Hunter v. Garrett, 104 Ga. 647, 30 S. E. 869, the Supreme Court held that a petition for certiorari presents no question for determination by the Supreme Court, when the only language in the petition attempting to assign error on the verdict complained of was as follows:

"This is the second verdict of about this kind rendered in said court. The jurors in this district do not consider the rights of parties, and know nothing of their duties under the law. Wherefore, in order that said errors may be reviewed and corrected, petitioner prays that the state's writ of certiorari may issue, directed to said magistrate, in terms of the law."

In Papworth v. Fitzgerald, 111 Ga. 54, 36 S. E. 311, it was held that a petition for certiorari, in which no effort was made to

assign error upon the judgment which it was sought to review, except in the allegation that "petitioners objected to the judgment of said court, still object, and say the same was error, and as such assign it," did not comply with the statute (Civil Code of 1910, § 5183) requiring that a plaintiff in certiorari shall, in his petition for the writ, "plainly and distinctly set forth the errors complained of." In that case the plaintiff in certiorari simply set forth that he "objected" to the judgment, and alleged that the same was erroneous, and did not set out in what particular it was erroneous; or, as stated in the body of the opinion:

"The petition for certiorari makes no attempt whatever to assign error upon the judgment sought to be reviewed. It does not even charge that it was contrary to law, or evidence or in what particular it is defective, or for what reason it should be set aside."

If the petition had alleged that the judgment complained of was contrary to law or contrary to the evidence, and if a brief of the evidence had been included in the petition, the assignment of error would have been sufficient to authorize the court to pass at least upon the sufficiency of the evidence set forth to sustain the judgment returned.

"A petition for certiorari must allege error so specifically and distinctly that a reviewing court may understand the ground of error relied on. *Clements v. McCormick Machine Co.*, 115 Ga. 851 [42 S. E. 222]. Such a petition, which sets forth all the evidence submitted on the trial before a jury in a justice's court, and alleges that the verdict complained of is against the weight of the evidence and without evidence to support it, sufficiently complies with this rule." *Mathews v. Parker*, 124 Ga. 144 (1), 52 S. E. 322.

It was held by this court in *Fish v. State*, 8 Ga. App. 398, 69 S. E. 37, that:

"An assignment of error, in a petition for certiorari, that 'the verdict was without any evidence to support it, and was contrary to law,' is sufficiently specific to bring under review all the evidence set out in the petition, when the writ is not sanctioned, or, when sanctioned, as verified by the answer of the magistrate to the writ."

See, also, *Langley Mfg. Co. v. Frey*, 10 Ga. App. 753 (1), 73 S. E. 1074.

So it is evident that the general assignment of error contained in the petition for certiorari in the case under review, "that the verdict entered by the jury in said case is contrary to law and to the evidence, and decidedly and strongly against the weight of the evidence," was such a clear and distinct assignment of error as authorized the court to review all the evidence set forth in the petition (which was adopted by the answer of the magistrate), and to determine therefrom if the evidence as a whole did not in fact support the verdict returned by the jury, and therefore was contrary to law, or if the verdict was decidedly and strongly against the weight of evidence. Of course, under this general assignment of error, no errors committed by the court, and no question other

than as to the sufficiency of the evidence to support the verdict, could be considered, and the only other errors that might be considered were such as were specifically assigned.

[2] Since the sole question to be determined by us (according to the express contention of plaintiff in error) is whether the court erred in refusing to dismiss the certiorari, for the lack of sufficient assignments of error therein, we neither consider nor determine the sufficiency of the evidence to support the final judgment rendered by the judge of the superior court, or the propriety of the rendition of that judgment by him, and must assume that the record as a whole warranted the final disposition made of the case.

Judgment affirmed.

(16 Ga. App. 539)

COONER v. STATE. (No. 6424.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 1064 — APPEAL — PRESENTATION BELOW — GROUNDS OF MOTION FOR NEW TRIAL — ADMISSION OF EVIDENCE.

The first, second, third, and fourth grounds of the amendment to the motion for a new trial, complaining that the court erred in admitting certain evidence over the objections of the defendant's counsel, but failing to state what objections were made to any of this evidence at the time it was offered, cannot be considered by this court. *Clarke v. State*, 90 Ga. 448 (1), 16 S. E. 96; *Dutton v. State*, 92 Ga. 14 (2), 18 S. E. 545; *Stevens v. State*, 93 Ga. 307 (4), 20 S. E. 331; *Huff v. State*, 85 Ga. 336 (2), 11 S. E. 619; *Griffin v. State*, 86 Ga. 257 (1), 12 S. E. 409; *Roberson v. State*, 87 Ga. 209 (2), 13 S. E. 696.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. — 1064.]

2. HOMICIDE — 309 — INSTRUCTIONS — EVIDENCE — VOLUNTARY MANSLAUGHTER.

It is complained that the court erred in charging the law of voluntary manslaughter, because the evidence adduced at the trial, if sufficient for a conviction, warranted only a verdict finding the defendant guilty of murder or of involuntary manslaughter. Not only did the evidence introduced in behalf of the state authorize the charge of voluntary manslaughter, but the statement of the defendant himself plainly showed an assault upon his person by the deceased at the time of the killing, amounting to less than a felonious assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. — 309.]

3. CRIMINAL LAW — 762, 1172 — HARMLESS ERROR — INSTRUCTION ON VOLUNTARY MANSLAUGHTER — INTIMATION OF OPINION.

The charge of the court is not subject to the exception that the court expressed and intimated an opinion in charging the jury as follows: "If you find that the defendant, without malice, and not under such circumstances as would justify or excuse the killing, voluntarily killed the deceased, and that he was impelled to do so by a sudden, violent impulse of passion, supposed to be irresistible, produced by some actual assault upon the defendant or an attempt by the deceased to commit a serious personal injury upon the defendant, or by other equivalent circumstances sufficient to justify the

excitement of passion, then the homicide would in law be voluntary manslaughter."

(a) Under the evidence, this charge was favorable to the defendant, rather than against him, and therefore he cannot be heard to complain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769, 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 762, 1172.]

4. CRIMINAL LAW § 516, 814—CONFESSIONS—CIRCUMSTANTIAL EVIDENCE—FAILURE TO INSTRUCT.

The defendant made several statements that he killed the deceased, and the reasons given by him for the killing furnished no legal and adequate excuse or justification therefor. The brief of his counsel treats these declarations as confessions, and in the opinion of this court, they amounted to confessions of guilt (sufficiently corroborated), and were not simply incriminatory statements. See *Jones v. State*, 130 Ga. 274 (4), 60 S. E. 840; *Pritchett v. State*, 92 Ga. 65 (5), 18 S. E. 536. The court did not err in not giving in charge to the jury the law applicable to cases founded solely on circumstantial evidence since the confessions made by the defendant constituted direct and positive evidence of his guilt, and there was no request so to charge. *Barrow v. State*, 80 Ga. 191 (3), 5 S. E. 64; *Moore v. State*, 97 Ga. 759 (1), 25 S. E. 362; *Toler v. State*, 107 Ga. 682, 33 S. E. 629.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1139-1145, 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 516, 814.]

5. CRIMINAL LAW § 1038—CAUTIONARY INSTRUCTIONS—REQUEST—CONFESSIONS.

Though the evidence authorized a charge to the jury that all admissions should be scanned with care, and confessions of guilt should be received with great caution (Penal Code, 1910, § 1031), failure to give such an instruction, in the absence of a timely written request, is not reversible error. *Walker v. State*, 118 Ga. 34, 44 S. E. 850; *Patterson v. State*, 124 Ga. 408, 52 S. E. 534; *Tolbirt v. State*, 124 Ga. 767, 53 S. E. 327; *Nail v. State*, 125 Ga. 234, 54 S. E. 145; *Pierce v. State*, 132 Ga. 27, 63 S. E. 792; *Lindsay v. State*, 133 Ga. 818 (6), 76 S. E. 369; *Cook v. State*, 9 Ga. App. 208, 70 S. E. 1019; *Baker v. State*, 14 Ga. App. 578, 81 S. E. 805; and numerous other authorities.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.]

Error from Superior Court, Charlton County; J. W. Quincey, Judge.

P. A. Cooner was convicted of involuntary manslaughter, and brings error. Affirmed.

W. M. Oliff, of Folkston, and W. B. Gibbs and Jas. R. Thomas, both of Jesup, for plaintiff in error. M. D. Dickerson, Sol. Gen., of Douglas, and Wilson, Bennett & Lambdin, of Waycross, for the State.

WADE, J. It is unnecessary to discuss all the exceptions covered by the foregoing headnotes. We deem it proper, however, to enlarge slightly on two of the headnotes.

[1] 1. The first four grounds of the amendment to the motion for a new trial complain that the court erred in admitting certain testimony over the objections of counsel for the defendant, and, as stated in the headnote, the objections actually made at the time

when the evidence was offered do not appear in these grounds of the motion for a new trial. The first ground recites that:

"The court erred by permitting and allowing the witness T. W. Vickery to testify, over the objections of the defendant's counsel, as to the statement by P. A. Cooner at and before the coroner's inquest that was held over the dead body of the said B. F. Richardson."

Following this in subdivisions, the movant insisted that the court erred for several reasons therein set forth, but nowhere in that ground or in the subdivisions thereof is it stated or suggested that the objections as to the admissibility of the evidence urged in these subdivisions were urged at the time when the evidence was offered and admitted; but, so far as disclosed by the record, the various objections may have been discovered after the trial of the case. The second ground sets forth that:

"The movant says that the court erred by permitting F. E. Brock, a witness for the state, to testify, over the objection of defendant's counsel, to the statement made by the defendant at the hearing of the inquest over the dead body of B. F. Richardson, for the following reasons"

—which are set forth in subdivisions of this ground, but it does not appear that the reasons suggested therein why the evidence complained of should have been excluded were suggested or urged when the evidence was offered at the trial.

The third and fourth grounds allege that the court erred in admitting certain testimony, and set out why, in the opinion of movant, the admission of the testimony was erroneous, but, as said in reference to the first and second grounds, it is not stated that these objections were urged at the time when the evidence was offered. The various authorities cited in the first headnote cover the point here discussed.

[2] 2. To what is said in the second headnote as to the propriety of the charge of the court on the subject of manslaughter it is not necessary to add anything further than a part of the statement made by the accused at his trial, which was as follows:

"He [the deceased] had started to his room, and he said, 'I am going to my room.' At that time there was an ordinance here in town against cursing here in town or in any public place, and I demanded that he go with me before the town council, and he refused to go anywhere, and he continued to curse and raise a disturbance. He appeared to be drunk or drinking and boisterous, and he started towards me. I told him to stop, and demanded two or three times for him to stop, and he continued to come on towards me, and I stepped back out in the hall. I kept backing and backing, and all at once he made a sudden spring at me, and I struck at him with my club in my left hand, and when I struck at him I did not hit him, but the lick knocked his hat off. He caught my arm in some way, and grabbed the club I had in my left hand and turned it around. The club had a leather string on one end of it which I had around my wrist here, and when he twisted the club down, it twisted the string on my arm. I grabbed for my pistol,

one I had, a 35 special Smith & Wesson, double action, and when I grabbed the pistol with my right hand he continued to twist the club, and made a grab at the pistol, and in the scuffle over the pistol it went off. I didn't know Mr. Richardson was shot. I knew the pistol fired, but I did not know he was hit. He came back on me again, and hit at me with his other hand. I did not know that he was shot at all until he said he was shot, and I sent after Dr. Williams, and Dr. Williams came; I didn't know he was shot. I didn't intend to shoot him, and didn't know he was shot until he said he was."

Several different witnesses who heard the statement freely and voluntarily made by the accused at the inquest testified that the defendant did not then claim that the pistol went off accidentally, but all of them said, in substance, and one of them literally:

That the deceased "grabbed at the club he had in his hand, and that as he attempted to get hold of the club he pushed him [the deceased] back again and tried to hit him with the club at the same time. He said he did not hit him, and that he [the deceased] came back again the third time, * * * and when he [the deceased] made the third attempt Mr. Cooner pushed him back and shot him at the same time."

Another witness testified:

The accused "told him he went up there and found this fellow [the deceased] up there, and he said that just as he was trying to arrest him this fellow grabbed hold of his billy, and he said, 'I told him if he came on me I would shoot him,' and says he told him three times, and says he shot him. He says, 'I thought he was trying to get into the room in there,' and says he was trying to get in there to get a gun."

The evidence discloses that no weapon of any kind, not even a pocketknife, was found on the person of the deceased, or in the other room supposed to be his room; in this latter room nothing was found but a shirt. Several witnesses testified that the defendant never stated at the inquest that the deceased "jumped on him," but said merely that the deceased "grabbed his [the defendant's] club."

The statement of the defendant, when taken in connection with the evidence of several witnesses to the effect that the defendant confessed to them after the killing that he had intentionally shot the deceased, while attempting to arrest him as town marshal for some minor municipal offense, certainly authorized the submission to the jury of the law of manslaughter, since the evidence further showed that there was no marked disparity in size, if any disparity, between the deceased and his slayer, and it is nowhere suggested, in any of the proved confessions made by the accused or in his statement, that the killing was necessary in order to save his life, or even that he was acting

under the fears of a reasonable man that his life was in danger, but from his own statement and from his confessions it appears that the deceased made or attempted to make an assault upon him immediately before the fatal shot was fired, amounting to less than a felony, which, while not justifying the homicide, may yet have been sufficient to arouse in the mind of the accused an irresistible passion of anger which brought about the fatal shot without any admixture of deliberation whatsoever. It appears to us that the jury took the most lenient view possible under the evidence submitted to them, and gave to the defendant the benefit of every legal defense which might be extracted from the record as a whole; for, regardless of what may have been the imagined rights and powers which the defendant supposed he was clothed with by reason of the fact that he was marshal of the little town of Folkston, it seems to us that the homicide was wanton and unjustifiable. It has been said that "a little learning is a dangerous thing"; and it may be said with equal, if not greater, truth that a little "authority" is often a far more dangerous thing than a little learning. It would be well if town marshals, constables, policemen, and other petty officers could learn otherwise than by sad experience that even those who wear a badge of authority upon their breasts or carry a club in hand are not above the law, and may not with entire immunity trample under foot the laws and customs established for the benefit and protection of all the people of a democracy, where the will of the majority finds expression in the statutes passed by their representatives and construed by their courts. It would be perhaps hard to convince many petty officers that they are not entitled to carry concealed pistols, for instance, or are not justified in shooting down a petty offender who breaks loose from the strong arm of the law as represented by the officer, and attempts to flee; but with increasing intelligence and knowledge of the law, and the fearless infliction of punishment upon the officer as well as the private citizen who may offend, a proper respect for the law of the land, which is above and over us all, to protect our lives, liberties, and property, and also to prevent wrongdoing by punishment, may finally obtain. Unfortunately such an officer, too often,

"Dress'd in a little brief authority,
Most ignorant of what he's most assur'd,

* * * * *
Plays such fantastic tricks before high heaven
As make the angels weep."

Judgment affirmed.

(143 Ga. 526)

MARSHALL v. CARTER. (No. 373.)

(Supreme Court of Georgia. June 18, 1915.)

*(Syllabus by the Court.)***1. EVIDENCE — §353, 460 — DESCRIPTION OF PREMISES—SUFFICIENCY — EXTRINSIC EVIDENCE.**

A grantor in his deed described the land thereby conveyed as follows: "All that certain tract, part, or portion of land, situate, lying, and being in the 456th G. M. district of Appling county, containing two hundred and forty-five (245) acres, more or less, and bounded as follows: on the north by lands of W. L. Stone, on the east by lands of H. A. Walker, on the south by lands of H. G. Hall, and on the west by lands of M. B. Johnson. Said tract of land being land I purchased from Mrs. Odum about five (5) years ago." One of the abutters in the calls was the grantor. *Held*, that the description is not so indefinite as to exclude the deed from evidence, and aliunde evidence is receivable to identify the land as that purchased by the maker from Mrs. Odum.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1404-1423, 1430, 1431, 2115-2128; Dec. Dig. §§ 353, 460.]

2. EXECUTION — §312 — SALE—DEED—DESCRIPTION—SUFFICIENCY.

A deed by a sheriff purporting to convey a portion of a larger tract of land owned by the defendant in *fi. fa.*, wherein the description is of calls for the abutters, one of whom is the defendant in *fi. fa.*, and wherein the land is estimated as containing a given number of acres "more or less" is lacking in definiteness, because of the failure to locate, or furnish the data to locate, the dividing line between the land which is sold and the rest of the land of the defendant in *fi. fa.*

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 921-924; Dec. Dig. § 312.]

3. EJECTMENT — §9 — RIGHT OF ACTION — SECURITY DEED.

A deed to secure a debt passes the legal title, and will authorize a recovery in ejectment.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 16-29; Dec. Dig. § 9.]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Ejectment by A. M. Marshall against Nep Carter. Judgment for defendant, and plaintiff brings error. Reversed.

F. P. McIntire, of Savannah, and Parker & Highsmith, of Baxley, for plaintiff in error. Alvin V. Sellers, of Baxley, for defendant in error.

EVANS, P. J. A. M. Marshall brought his suit in ejectment against Nep Carter, tenant in possession. W. L. Stone was served with a notice of the pendency of the suit, and cited to appear and assert any claim which he might have to the land; and in response to the notice he appeared and defended the action. On the trial of the case it was admitted that Stone was the real claimant of the land, and that Carter was in possession as his tenant. The plaintiff was nonsuited, and sued out a bill of exceptions, complaining of the nonsuit and of the exclusion of certain muniments of his title, on the ground

of the insufficiency of the description of the property.

[1] 1. The locus is a part of land lot 519. It appeared from the evidence that land lot 538 adjoined lot 519. On January 13, 1903, G. W. Stone conveyed to W. L. Stone the east half of lot 538, and to Martin Stone the west half of the same lot. On January 25, 1906, Elizabeth Odum conveyed to W. L. Stone:

"All that tract or parcel of land lying and being in the second district of Appling county and known and distinguished by No. 519, and being all of said lot except one hundred (100) acres in the southwest corner, which has been conveyed to H. A. Walker and H. A. Odum. The said tract of land containing 390 acres, more or less, agreeable to the original survey. Said land bounded on the north by lands of W. L. Stone and M. V. Stone, on the east by lands of H. A. Walker and H. A. Odum, and on the south by lands of Henry Hall, and on the west by lands of M. B. Johnson."

On September 4, 1908, W. L. Stone executed to Marshall & Co., a firm composed of A. M. Marshall and J. F. Hennemier, a deed to secure a debt to—

"all that certain tract, part, or portion of land, situate, lying, and being in the 456th G. M. district of Appling county, containing two hundred and forty-five (245) acres, more or less, and bounded as follows: on the north by lands of W. L. Stone, on the east by lands of H. A. Walker, on the south by lands of H. G. Hall, and on the west by lands of M. B. Johnson. Said tract of land being land I purchased from Mrs. Odum about five (5) years ago."

Hennemier, on September 4, 1908, transferred to A. M. Marshall his interest in the land therein described. This deed and transfer were rejected on the ground that the deed was invalid, because the property was insufficiently described. The plaintiff then tendered in evidence a sheriff's deed, dated May 7, 1913, together with the execution and entry of levy thereon, conveying to the plaintiff, in pursuance of a sale made under a *fi. fa.* in favor of Marshall & Co. against W. L. Stone, issued from the superior court of Chatham county, a tract of land described as follows:

"All that certain lot, tract, or parcel of land, situate, lying and being in the 456th G. M. district of Appling county, Georgia, containing two hundred forty-five (245) acres, more or less, and being bounded on the north by lands of W. L. Stone, on the east by lands of H. A. Walker, on the south by H. G. Hall, and on the west by lands of M. B. Johnson, and being part of lot No. 519 in the second land district of said county."

This deed was rejected for insufficiency of description. The plaintiff then introduced testimony to the effect that the locus in quo is the land purchased by W. L. Stone from Mrs. Elizabeth Odum about 1906; that lot 538 adjoins 519 on the north; and that in 1908 H. A. Walker owned the adjoining lands on the east, H. G. Hall the adjoining lands on the south, and M. B. Johnson, the adjoining lands on the west.

The real defendant, W. L. Stone, was vouched in by notice, and appeared and de-

fended the action. The plaintiff claims a right of recovery against him and his tenant, both under the deed to secure debt and under the sheriff's deed. The court rejected both deeds, as containing insufficient descriptions of the land purported to be conveyed. With respect to the deed to secure debt we think the description is ample. It appears that W. L. Stone purchased two adjoining tracts of land. In conveying the land described in the security deed to Marshall & Co. he gave himself as an abutting owner, and the conveyance is to be treated as that of a part of a greater tract. If nothing more appeared in the description of the land than that he was conveying a portion of a larger tract, naming himself as one of the abutters, without locating the dividing line and estimating the area as containing a given number of acres, more or less, the case would fall under the ruling made in *Huntress v. Portwood*, 116 Ga. 351, 42 S. E. 513. But the description by calls is aided by the further statement that "said tract of land being land I purchased from Mrs. Odum about five (5) years ago." This additional description defines the land conveyed as that having been previously purchased, about five years ago, from Mrs. Odum. It is well settled that the description of land in a deed is sufficient if it affords means, by the application of allunde proof, of identifying the land. *Luttrell v. Whitehead*, 121 Ga. 690, 49 S. E. 691. It has been held that a description of land in a deed as "ten acres of land, situated in [a certain district], where I now reside," is not too indefinite to be made certain by parol evidence. *Brice v. Sheffield*, 118 Ga. 128, 44 S. E. 843. In *Derrick v. Sams*, 98 Ga. 397, 25 S. E. 509, 58 Am. St. Rep. 309, the description of land in a mortgage was, "parts of lots of land Nos. 22 and 38 in the 5th land district of Rabun county, Ga., it being the land purchased by J. L. Hensen of J. E. Derrick"; and it was held that it was not so defective and uncertain as to render the mortgage inadmissible in evidence, and that it was competent to identify by parol evidence the land covered by the mortgage as the same as that purchased by Hensen from Derrick. It would seem that the principle of that case is conclusive on the ruling in the present case as to the admissibility of the security deed from Stone to Marshall & Co. The deed from Mrs. Odum was put in evidence. That deed contained a definite description of the land, and the deed from Stone to Marshall is to be construed as incorporating that description, which may be shown by extrinsic evidence. The court erred in repelling the security deed.

[2] 2. But the deed from the sheriff makes no reference to any allunde fact for better description, and must stand or fall upon the sufficiency of its own language as a description of a specific tract of land. The calls give the abutters on the east, south, and west. The abutter called for on the north

is W. L. Stone. The sheriff in selling land acts as the agent, appointed by law for the defendant, to make an involuntary conveyance of the defendant's property. To all intents and purposes the deed, so far as the description is concerned, is to be treated as having been made by the defendant in *fi. fa.* Where land is levied upon as being a part of a larger tract owned by the defendant in *fi. fa.*, and the calls of the levy are the abutters, one of whom is the defendant in *fi. fa.*, and the area of the land is given as containing a specified number of acres, more or less, and the description furnishes no data to locate the dividing line between the tract to be sold off and that which remains, the description is insufficient. The insufficiency of the description by calls is not aided by the assertion that it is a part of lot 519 in the second land district, for the reason that the deed does not purport to convey all of the land of the defendant in *fi. fa.* lying in that particular land lot. No escrow deed for the purpose of levy was introduced in evidence. Nor does the record contain a description of the land as contained in the levy. We cannot assume that the description in the levy was different from that in the sheriff's deed, nor can we assume that an escrow deed was filed. Accordingly, the sheriff's deed under the circumstances cannot be treated as valid, or as preventing a recovery on the security deed.

[3] 3. A plaintiff may recover in ejectment on a security deed made to him by the defendant. *Dykes v. McVay*, 87 Ga. 502 (2). If the court had not erroneously rejected the security deed, the plaintiff would have made a *prima facie* case. Accordingly, the judgment is reversed.

Judgment reversed. All the Justices concur.

(143 Ga. 549)

HOUSTON v. GARRETT. (No. 376.)

(Supreme Court of Georgia. June 19, 1915.)

(Syllabus by the Court.)

1. ACTION ON PURCHASE-MONEY NOTE.

This case is controlled by the ruling in the cases of *Mallard v. Allred*, 106 Ga. 503, 32 S. E. 588, and *Henderson v. Fields*, 85 S. E. 741, this day decided.

(Additional Syllabus by Editorial Staff.)

2. PLEADING — 17 — ALLEGATION OF INSOLVENCY — SUFFICIENCY.

The allegation in a pleading that a man is worth but little, and not as much as a \$1,600 homestead, and is the head of a family, is not equivalent to an allegation that he is insolvent.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 38, 41, 195, 350; Dec. Dig. § 17.]

Error from Superior Court, Worth County; E. E. Cox, Judge.

Action by J. A. Garrett against C. R. Houston. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Williamson and Tison & Bell, all of Sylvester, for plaintiff in error.

BECK, J. To a suit upon a promissory note brought by the defendant in error against the plaintiff in error the latter pleaded that the note was given for the purchase price of certain real estate, the vendor executing to the maker of the note a bond for title, conditioned to make good and sufficient title to the property upon payment of the note sued on; that at the time of the making of the note there was an outstanding paramount title, and it is still outstanding, and the plaintiff cannot make a good title as contemplated by the bond for title; and should the defendant be required to pay the amount sought to be recovered, he would have no way to require the plaintiff to execute to him a deed; and the plaintiff could not be made to answer in damages, as the plaintiff is "worth very little, and is not worth as much as a \$1,600 homestead allowed by law," and is the head of a family. Upon the trial of the case the court struck the plea.

[1, 2] The court did not err in striking this plea. There is no allegation that the defendant has been or is threatened with eviction. He does not offer to rescind the trade. He does not show that he has made any payment of the purchase money. He does not offer to restore possession of the land. Even if to show insolvency of the plaintiff under these circumstances would be a sufficient plea and answer to the suit, this plea cannot be construed as alleging insolvency. To say that a man is worth but little, and is not worth \$1,600, and is the head of a family, is not the equivalent of alleging in direct terms that he is insolvent. Under the rulings in the cases of Mallard v. Allred, 106 Ga. 503, 32 S. E. 588, and Henderson v. Fields, 85 S. E. 741, this day decided, an elaboration of the ruling here made is entirely unnecessary. Those cases ruled the one at bar.

Judgment affirmed. All the Justices concur.

(143 Ga. 539)

COFFEY v. COBB. (No. 375.)

(Supreme Court of Georgia. June 19, 1915.)

(Syllabus by the Court.)

SPECIFIC PERFORMANCE — § 85 — PETITION — SUFFICIENCY — PAROL GIFT OF LAND.

The court erred in not sustaining the demurrer to the petition as amended.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 219-222; Dec. Dig. § 85.]

Error from Superior Court, Murray County; A. W. Flite, Judge.

Action by Mrs. R. N. Cobb against Webster R. Coffey. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 140 Ga. 661, 79 S. E. 568.

This suit was originally brought to compel specific performance of an alleged parol

gift of land from the father to the daughter (the plaintiff in this case), the daughter having made valuable improvements thereon. When the case was tried in the superior court the second time, the plaintiff amended her petition by alleging:

"Before petitioner went into possession of the land, to wit, in the year 1907, her said father, Webster R. Coffey, contracted with your petitioner that she should have 5 acres of land near the public road, being 5 acres of lot 181 in Ninth district and third section of said county, bounded on the north by the original land line, on the west by the land of John Franklin, and south and east by Harris Coffey; also 38 acres in the southeast corner of 182 and southeast corner of lot 181, bounded on the south by the original land line, on the west by the Franklin lands, and on the north by the lands claimed by J. A. Coffey, and on the east by the lands of Webbie Coffey, both of said tracts being in the Ninth district and third section of said county, Ga., and containing 43 acres, more or less. Petitioner further shows that the said contract made with the defendant was that she was to have the crops on said property, but was to pay the usual rents during the life of said defendant, if he required it, and the lines of said land were pointed out and designated at said time mentioned above. Petitioner further shows that in the fall of the said year 1907 she, with her family, took possession of said land in accordance with said contract with said defendant, and with reference to and in accordance with said contract built a dwelling house thereon worth about \$400, barn worth \$50, dug a well, built a smokehouse, fence, etc., cleared land, and placed other valuable improvements on said 5 acres of land, and cultivated said 38 acres of land, cleared up portions of the same, fenced it up, and otherwise improved said lands, all of which were done in pursuance to and in reference to said contract with said defendant, and that petitioner paid to said defendant, in accordance with said contract and with reference thereto, one-third of the corn and one-fourth of the cotton, and that she continued to do so in accordance with said contract until the fall of 1910, when the said Webster R. Coffey concluded to move away from the house to the home place on said other parts or tracts of land to Eton, Ga., when the rent in kind was changed to \$50, which was 8 per cent. on the value of petitioner's said land; but the said contract with your petitioner was not changed in any respect, except as to the manner of payments, and said lines heretofore mentioned were marked by stakes as set out in the petition."

To this amendment the defendant demurred on the following grounds:

"First. Because the amendment does not change in any particular the allegations of fact as set forth in the original petition filed by plaintiff. Second. The allegations in paragraph 3, that she, the plaintiff, was to pay the usual rent if — required it, is conclusive of the relation of landlord and tenant, and the fact is alleged that the usual customary rent of the third of the corn and a fourth of the cotton was paid by the plaintiff to and accepted by the defendant as rental for said land is no part payment of the purchase price of said land, because it is not alleged that any purchase price was fixed at the time alleged that defendant was to take for said land. Third. Because the improvements alleged to have been made were made, as alleged, in the year 1907, while the relation of landlord and tenant existed between plaintiff and defendant, and cannot be construed to be part performance of any contract, in the absence of a price at which said land was to be

purchased in the year 1907. Fourth. Because it is not alleged that any part of the purchase money was ever paid or any valuable improvements were made upon said lands after the agreement was made to pay the \$50 which was alleged was 8 per cent. of the value of said land, which fixed the contract price of said land if such a contract was made."

The court overruled the demurrer, and the defendant excepted *pendente lite*. The case proceeded to trial, and a verdict and judgment were rendered for the plaintiff. To a judgment overruling his motion for a new trial, the defendant excepted.

R. Noel Steed, of Chatsworth, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. W. E. Mann and W. C. Martin, both of Dalton, and C. N. King, of Spring Place, for defendant in error.

HILL, J. (after stating the facts as above). This is the second appearance of this case in this court. *Coffey v. Cobb*, 140 Ga. 661, 79 S. E. 568. When the case was here before, in delivering the opinion of the court reversing the judgment of the court below, Mr. Justice Beck said:

"As we have held above, the theory of the plaintiff, that at the time of her going into possession of certain land pointed out to her by her father in 1907 this possession was taken under such an agreement as would make a parol gift of the land, is untenable in view of the evidence, no certain boundaries or any particular lot of land having been fixed; and, moreover, the plaintiff shows by her own evidence that up to the year 1910 she was a mere tenant, paying rent. And we now consider whether or not in the year 1910 such an agreement with reference to the sale and purchase of the land was made by the plaintiff and her father as would give her a right to a decree of specific performance on the ground that an enforceable parol contract for the sale of the land was made and entered into. Section 4634 of the Civil Code provides: 'The specific performance of a parol contract as to land will be decreed, if the defendant admits the contract, or if it be so far executed by the party seeking relief, and at the instance or by the inducements of the other party, that if the contract be abandoned he cannot be restored to his former position. Full payment alone, accepted by the vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to the parol contract, will be sufficient part performance to justify a decree.' Under the terms of the contract made in 1910, according to the evidence of the plaintiff, she was to have the land upon the payment of \$50 a year during the lifetime of her father and the payment of the sum of \$125 in case he demanded payment of the same. Viewing the evidence in the light of the last sentence of the Code section we have quoted, while the plaintiff submitted testimony to show that she was in possession of land which had belonged to her father and which she claimed he had agreed to let her have on the terms last stated, there is no such clear and satisfactory evidence of anything done with reference to the parol contract as to show sufficient part performance to justify the decree sought."

And see 140 Ga. at bottom of page 668, 79 S. E. 568.

The amendment to the petition does not

allege a parol gift of land with valuable improvements thereon, such as equity will decree the specific performance of, or a contract of sale of the land; but it sets out a rent contract between the plaintiff and the defendant. From the amendment it clearly appears that the plaintiff went into possession of the land and so remained until 1910 as the tenant of the defendant. It does not appear that any purchase price had been agreed upon for the land; but, on the contrary, it appears that the plaintiff was to pay rent in kind until the defendant moved to a nearby town, when the rent was changed to \$50, which the plaintiff alleged was 8 per cent. on the value of the land. We fail to see that the amendment changes the case as made in the original petition, so as to authorize a specific performance of the contract on the basis of a sale of the land by the defendant to the plaintiff. The amendment alleges, among other things, that the plaintiff was to have the crops grown on the land in controversy, "but was to pay the usual rents during the life of said defendant if he required it," etc. It does not appear from the amendment what was to become of the land after the death of the defendant, whether it should become the property of the plaintiff, or belong to the estate of the defendant. In the absence of any allegation on the subject, and in view of the other allegations of the amendment, we must assume that it remained the property of the defendant's estate. If, therefore, the facts alleged in the original petition and the evidence supporting the same did not create a parol gift of land such as would authorize the plaintiff to have specific performance, neither does the amendment to the petition; and, this being so, we think the court erred in not sustaining the demurrer to the petition as amended. This ruling being controlling of the case, the errors alleged to have been subsequently committed on the trial need not be considered.

Judgment reversed. All the Justices concur.

(143 Ga. 495)

WOOD v. CLARY. (No. 361.)

(Supreme Court of Georgia. June 15, 1915.)

(Syllabus by the Court.)

LIVERY STABLE KEEPERS—DUTIES AND LIABILITIES—DISEASED ANIMAL.

It is the duty of a livery stable keeper to exercise extraordinary diligence for the protection and safe-keeping of a mule intrusted to him. He is not liable for loss resulting solely from a disease with which the mule was afflicted at the time it was delivered into his keeping, where he was not negligent in respect thereto. The facts examined, and held to be insufficient to authorize a recovery.

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Cent. Dig. § 6; Dec. Dig. ¶7.]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by H. A. Clary against J. M. Wood.

Judgment for plaintiff, and defendant brings error. Reversed.

Wm. Wynne and J. M. Pitner, both of Washington, for plaintiff in error. Colley & Colley, of Washington, for defendant in error.

EVANS, P. J. This is a suit for damages. The plaintiff was the owner of a mule which he left with the defendant, a livery stable man, for the purpose of sale. The plaintiff contends that the mule died of an injury sustained in consequence of the defendant's negligence. On the trial he recovered a verdict, which the court refused, on motion for new trial, to set aside.

The case depends upon the sufficiency of the evidence to support the verdict. The plaintiff testified that he purchased the mule from the defendant, who was the keeper of a public livery stable, in November, and in the following February he carried the mule to the defendant's place of business and turned it over to the defendant, to be put where it could be sold. Some time in March the plaintiff was shown a knot on the shoulder of the mule. Later, in about 2½ months after placing the mule with the defendant, the plaintiff took the mule to his home, and paid the liveryman his bill, amounting to \$37.50. The knot on the mule's shoulder continued to enlarge, and was lanced by a horse doctor, on the defendant's suggestion. No benefit came from the operation, and the plaintiff notified the defendant that the operation was without benefit to the mule, and the defendant said he would get a veterinary from Augusta, which he did. The veterinary operated on the mule, and in a few hours it died. The plaintiff's total loss, including the items specified, amounted to a sum in excess of the recovery. A witness for the plaintiff testified that mules, when put in the livery stable for sale, are put in the mule pen. The defendant testified that he sold the mule to the plaintiff in November, and that in the following February the plaintiff brought the mule to him to sell for him. The next morning after the mule was put in his possession for sale he exhibited it to Mr. Barksdale, who had spoken about buying the mule. Mr. Barksdale rubbed his hand over the mule's shoulders and said that he did not care to buy the mule, as there was a little knot on its shoulder that could be felt, but could not be seen. The shoulders were clean, and the hair and skin not broken. The knot could be felt, but could not be seen. When the plaintiff brought the mule to him for sale he had it put in the pen with five or six fine mules, none of which were vicious. It is customary and usual to keep all mules intended for sale in a pen. No mule is placed in a pen with shoes on its hind feet. The plaintiff's mule had this growth on it before it was brought to him. It could not have developed in one night. The knot was discovered the next day after the plaintiff

brought it to him. He took an interest in the mule, as the plaintiff had bought it from him, and had left it with him to sell; so, when the plaintiff told him that the mule was getting worse, he suggested that a veterinary from Augusta be sent for. The veterinary came, and the defendant sent a note to the plaintiff to pay the bill. He allowed the veterinary to operate on the mule, but did not pay him, and, as the defendant had sent for the doctor, he had to pay his charge. The mule was placed in his care as agent to sell, and was not brought to him as a livery stable man. He was to receive no compensation for the sale of the mule, but was to sell it as an accommodation for the plaintiff, who was to pay only the actual board bill incurred before the sale was made. Barksdale, a witness for the defendant, testified that on the morning after the mule was put in the defendant's stable by the plaintiff he examined it with a view of purchasing it. Underneath the skin on one of the mule's shoulders he felt a lump. This lump could not be seen, nor was the hair or skin on the mule's shoulder broken or ruffled. Witness told the defendant that he did not care to buy the mule at all with a lump on its shoulder. He wished to purchase the mule before the plaintiff bought it, and several times examined it. Newsome testified that he went out to the plaintiff's place with the defendant, and they together examined the mule, and found it in bad condition, and the defendant said he would write for the veterinary. The plaintiff did not tell defendant that he would pay the veterinary's bill.

Notwithstanding the keeper of the livery stable was to receive no compensation for effecting a sale of the mule, yet he was to be paid for its keep pending the consummation of a sale. His possession of the mule was that of a keeper of a livery stable. The keeper of a livery stable is a depositary for hire, and is bound to the same diligence and entitled to the same lien as an innkeeper. Civil Code 1910, § 3515. An innkeeper is bound to extraordinary diligence in preserving the property of his guest intrusted to his care. Civil Code 1910, § 3508. The keeper of the livery stable, therefore, is bound to extraordinary diligence in protecting the property which is committed to his care. The evidence in the present case is without conflict. The plaintiff seeks to draw the inference that the defendant was negligent in placing his mule in a pen with other mules, and that the knot was the result of a kick. There is nothing in the evidence on which to base this contention. It is undisputed that it was customary and usual to place mules for sale in pens with other mules, and that the mules in the pen where the plaintiff's mule was put were not vicious, and were unshod on their hind feet. The mule was examined on the next day. There was nothing on the shoulder of the mule to indicate that it had been kicked. The skin was not bro-

ken; the hair was not ruffled. The knot seemed to have been observable only by touch. In all probability it was an incipient tumor with which the mule was affected at the time it was turned over to the livery stable man; and, under the facts developed at the trial, the death of the mule was not attributable to the defendant's negligence.

Judgment reversed. All the Justices concur.

(148 Ga. 525)

BELCHER v. KELLY et al. (No. 371.)

(Supreme Court of Georgia. June 18, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 1078—**ASSIGNMENTS OF ERROR—ABANDONMENT—BRIEF.**

Assignments of error not referred to in the brief of counsel for the plaintiff in error will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. \Leftrightarrow 1078.]

2. PRIVATE WAY BY PRESCRIPTION.

The evidence was sufficient to authorize a finding that the applicants were entitled to a private way by prescription over the land of the defendant.

3. EASEMENTS \Leftrightarrow 61—**PARTIES** \Leftrightarrow 69—**PRIVATE WAYS—OBSTRUCTIONS—ACTIONS—PARTIES.**

Several persons, as individuals, instituted a summary proceeding under Civil Code 1910, § 825, for the removal of obstructions from an alleged private way through the land of the defendant to a designated Masonic hall. The fact that they described themselves as members of the Masonic lodge would not make the lodge a party plaintiff to the proceeding; and the further fact that the petitioners did not constitute a majority of the members, and that other members did not desire such obstructions removed, was not cause for reversal of the judgment of the ordinary directing them to be removed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. \Leftrightarrow 61; Parties, Cent. Dig. § 112; Dec. Dig. \Leftrightarrow 69.]

4. EASEMENTS \Leftrightarrow 61—**PRIVATE WAYS—OBSTRUCTIONS—ACTIONS—JURISDICTION.**

The fact that the deed under which the defendant held from a third person recited that a private way through the land was reserved would not show that the ordinary was without jurisdiction to preside in the summary proceeding for the removal of obstructions from the alleged prescriptive private way claimed by the plaintiffs under Civil Code 1910, § 825, which was construed, in *Holloway v. Birdsong*, 139 Ga. 316, 77 S. E. 146, to be applicable only in cases of private ways by prescription.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. \Leftrightarrow 61.]

5. REFUSAL OF CERTIORARI.

There was no error in refusing to grant the writ of certiorari.

Error from Superior Court, Fayette County; Robt. T. Daniel, Judge.

Action by G. C. Kelly and others against S. I. Belcher. Judgment for plaintiffs, certiorari refused, and defendant brings error. Affirmed.

Lester Dickson, of Fayetteville, and J. F. Gollightly, of Atlanta, for plaintiff in error. J. W. Culpepper, of Fayetteville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(143 Ga. 549)

SMITH v. FIRST NAT. BANK OF WAYCROSS. (No. 378.)

(Supreme Court of Georgia. June 19, 1915.)

(Syllabus by the Court.)

MORTGAGES \Leftrightarrow 380—**TRIAL** \Leftrightarrow 5—**FORECLOSURE—RENDITION OF FINAL JUDGMENT—TIME.**

The statute for the foreclosure of mortgages on real estate (Civ. Code 1910, §§ 3276, 3283) prescribes that the rule absolute shall be granted at the next term immediately succeeding the one from which the rule to show cause issues. Waivers by the defendant of statutory requirements, and consent that the rules nisi and absolute may be issued and the mortgage finally foreclosed at the first term, do not bind third persons, nor confer such jurisdiction on the court as will authorize it to render a final judgment of foreclosure at the first term. As to third persons, such a judgment is void.

(a) The proceeding to foreclose was statutory, and not an equitable action.

(b) Civ. Code 1910, §§ 5602, 5659, refer to the trial of cases where new parties are made.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1144, 1145, 1154; Dec. Dig. \Leftrightarrow 380; Trial, Cent. Dig. §§ 11, 12; Dec. Dig. \Leftrightarrow 5.]

Error from Superior Court, Ware County; J. W. Quincey, Judge.

Action by the First National Bank of Waycross against W. J. Smith, executor. Judgment for plaintiff, and defendant brings error. Reversed.

Wilson, Bennett & Lambdin, of Waycross, for plaintiff in error. J. L. Sweat, of Waycross, for defendant in error.

EVANS, P. J. The First National Bank of Waycross levied an execution issuing upon a judgment of foreclosure of a mortgage on land, and a claim was interposed by the wife of the defendant in *fi. fa.* Upon her death her executor was made a party in her stead. The court directed a verdict for the plaintiff. The claimant made a motion for new trial, which was overruled.

The claimant insists that the judgment of foreclosure is void. The record of that proceeding shows that, on the first day of the May, 1911, term of the superior court of Ware county, the bank filed a petition alleging that W. J. Smith executed a mortgage to A. M. Knight upon certain described land, to secure the latter's indorsement of a certain note due by the mortgagor to the First National Bank of Waycross in the sum of \$2,500; that Knight had duly transferred the mortgage to it; that subsequently Smith conveyed the mortgaged property to his wife

in settlement of an alleged indebtedness to her, and she went into possession of the property; that the property was liable to deteriorate in value from use and decay, and the plaintiff invoked the equity power of the court, not only to aid in the foreclosure of the mortgage, but to protect its rights in the premises, and to aid in the foreclosure of the mortgage in the meantime; that due notice had been given by the plaintiff to the defendant of its intention to proceed at the present term of the court to collect the note by foreclosure of the mortgage; and that, in addition to the principal and interest due thereon, the plaintiff would claim 10 per cent. attorney's fees, as provided in the note. The prayer was for an order requiring the defendant to pay into court the amount of the principal, interest, attorney's fees, and costs, due on the note, in accordance with the requirements of the law in such cases made and provided, and that, in default thereof, the mortgage be foreclosed and the equity of redemption therein forever barred, in terms of the statute. No equitable relief was prayed. No process was attached to the petition, but attached thereto was a rule nisi, in the usual form, addressed to the defendant, requiring him to pay into court instantaneously the amount claimed to be due upon the note, and directing that, in default thereof, equitable foreclosure be granted to the First National Bank of Waycross of the mortgage, and the equity of redemption in the mortgaged property be forever barred, and that service of the rule be perfected on the defendant "according to law." Attached to the rule nisi was an acknowledgment of service, signed by W. J. Smith, dated May 30, 1911, acknowledging due and legal service of the petition and rule nisi, waiving time and all further service, and admitting the facts as therein set up to be true. Attached thereto was a consent agreement, signed by the attorney of the First National Bank of Waycross, and by W. J. Smith, agreeing:

"That the present May term, 1911, of Ware superior court, be and the same is hereby made the trial term of said cause, and that the rule absolute therein be granted at and during said term."

A rule absolute, dated May 30, 1911, was issued in which it was recited that at the present term of the court a rule nisi had issued, requiring W. J. Smith to pay the balance of the principal, interest, attorney's fees, and costs claimed to be due upon a certain note secured by mortgage, or show cause to the contrary, or, in default thereof, that the mortgage be foreclosed and the equity of redemption therein forever barred; that service of the petition and rule nisi had been duly acknowledged by the defendant, who agreed with the plaintiff that the May term, 1911, should be the trial term of the case, at which the rule absolute might be granted in accordance with the law in such cases made

and provided; and that the defendant had wholly failed and refused to pay the money as required by the rule nisi, and had shown no cause to the contrary, whereupon it was adjudged that the equity of redemption in the mortgaged premises be forever barred, and that the plaintiff have judgment against the defendant in the sums claimed, and that execution issue against the mortgaged premises for these sums.

During the trial, in various ways, the claimant raised the point that the judgment upon which the execution issued was void, for the reason that it appeared upon the face of the proceedings that the statute respecting the foreclosure of mortgages on real estate had not been pursued, and that there was no authority or jurisdiction of the court to grant a rule absolute at the same term in which the rule nisi was granted. The statute prescribes the procedure for the foreclosure of mortgages on real estate. The person entitled to foreclose the mortgage shall apply by petition to the superior court of the county wherein the mortgaged property is located, setting out the amount of his demand and a description of the property mortgaged, whereupon the court shall grant a rule directing the principal, interest, and costs to be paid into court on or before the first day of the next term immediately succeeding the one at which such rule is granted, which rule shall be served as provided in the statute. And upon failure of the mortgagor to pay as required in the rule, or his failure to sustain any defense against the foreclosure of the mortgage, the court shall render judgment for the amount due on the mortgage and order the mortgaged property to be sold in the manner and under the same regulations which govern sheriffs' sales under execution. Civil Code 1910, §§ 3276, 3283. This statutory proceeding contemplates that the rule nisi shall be granted at one term, and the rule absolute at a succeeding term. In the present case the rule nisi and the rule absolute were granted on the same day, by virtue of an agreement that the case should be finally disposed of at the first term. We are not called upon to decide whether a waiver and agreement of this kind will estop the defendant from thereafter asserting the invalidity of the proceedings, as not being in accordance with the statute. The point is made by a stranger to that record; and any waiver by the defendant will not bind third persons, nor confer such jurisdiction upon the court as will authorize it to render a judgment which will affect them. *American Grocery Co. v. Kennedy*, 100 Ga. 462, 28 S. E. 241. It appears upon the face of the proceedings that, at the time of the foreclosure, the defendant had conveyed the property to his wife, who was in possession of it. His wife was not a party to the foreclosure proceedings, and he did not even purport to act in her behalf. She has a right to

insist that her title and possession be not disturbed, except by a valid judgment. As to her, this judgment is invalid.

It is contended that the holder of a mortgage on real estate may foreclose his mortgage in equity, according to the practice of courts in equity proceedings, as well as by the methods prescribed in the Code. There is no doubt as to the correctness of this contention. Civil Code 1910, § 3305. The proceeding to foreclose the mortgage in the case at bar is in no sense an equitable foreclosure. There is no prayer for process, and no prayer for equitable relief, but, on the contrary, the petition, rule nisi, and rule absolute conform to the statutory remedy. The reference to the wife's possession of the land under an alleged purchase from her husband, and to her receiving the rents and profits, and the liability of the property to deteriorate in value, is but surplusage. It is irrelevant to the procedure which was pursued, and to any prayer contained in the petition.

Counsel for the defendant in error cite Civil Code 1910, §§ 5602, 5659, as authority for the proposition that when a petition is filed, and a rule nisi granted, the parties may consent that a trial be had at the first term. These two sections are taken from Acts 1895, p. 47, and have no reference to the procedure prescribed by statute for the foreclosure of mortgages. These sections apply, by their express terms, to cases where new parties are made during the pendency of a case. Where a party is brought into a case by amendment, under these code sections, the case thereafter may be tried at the first term by consent. The invalidity of the foreclosure proceedings being apparent upon the face of the record, the judgment, as to third parties, is void; and the court should have dismissed the levy of *fi. fa.* American Grocery Co. v. Kennedy, *supra*.

Judgment reversed. All the Justices concur.

(143 Ga. 526)

WEAVER et al. v. THOMPSON. (No. 372.)
(Supreme Court of Georgia. June 18, 1915.)

(Syllabus by the Court.)

PARENT AND CHILD — SERVICES TO CHILD — RECOVERY OF COMPENSATION — PETITION.

A father brought habeas corpus against the sister of his deceased wife and her husband to recover possession of a minor female child. The defendants set up a parol contract whereby the father relinquished his possession to the defendants. On the hearing the court awarded the custody of the child to the defendants. Subsequently the father again instituted a habeas corpus proceeding against the same defendants to recover possession of the child, based on circumstances occurring since the former judgment. On the hearing of this proceeding the custody of the child was given to the father. The losing defendants then sued the father to recover the value of their services to the child

while in their possession, setting out the foregoing facts. *Held*, that it was not erroneous to dismiss the petition on demurrer.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 77-85; Dec. Dig. ¶6.]

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action by W. B. Weaver and another against A. E. Thompson. Judgment for defendant, and plaintiffs bring error. Affirmed.

Jule Felton, of Montezuma, for plaintiffs in error. L. L. Woodward, of Vienna, and Crum & Jones, of Cordele, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(143 Ga. 513)

LANE v. IVEY. (No. 366.)

(Supreme Court of Georgia. June 17, 1915.)

(Syllabus by the Court.)

REAL ESTATE BROKER — RIGHT TO COMMISSION.

This case is controlled by the decision in the case of Toole v. Wiregrass Development Co., 142 Ga. 57, 82 S. E. 514.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between J. L. Lane and S. L. Ivey. From the judgment, Lane brings error. Reversed.

Walter A. Sims, of Atlanta, for plaintiff in error. Dodd & Dodd and Moore & Branch, all of Atlanta, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(143 Ga. 512)

BARNWELL v. VALDOSTA ST. RY. CO.
(No. 364.)

(Supreme Court of Georgia. June 17, 1915.)

(Syllabus by the Court.)

INSTRUCTIONS—DENIAL OF NEW TRIAL.

The court's instructions to the jury upon the controlling issues in this case are substantially correct, and the inaccuracies in other portions of the charge are not of a sufficiently grave character to work a reversal of the judgment denying a new trial, under the evidence in the case.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Action between Essie Barnwell, by next friend, and the Valdosta Street Railway Company. From the judgment, the party first mentioned brings error. Affirmed.

Dan R. Bruce, of Valdosta, for plaintiff in error. E. K. Wilcox, of Valdosta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(143 Ga. 522)

HAYES v. CARROLLTON BANK. (No. 370.)
(Supreme Court of Georgia. June 18, 1915.)

(Syllabus by the Court.)

1. BILLS AND NOTES — 508 — ACTION BY TRANSFEREE—EVIDENCE.

A promissory note, which purports to be indorsed in stencil by the payee, with the added words "by [a named person] pt.," is prima facie admissible in evidence as between the maker and transferee, on the trial of a suit brought by the latter against the former to recover the amount due on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1728-1732; Dec. Dig. — 508.]

2. BILLS AND NOTES — 537—FRAUD IN PROCUREMENT — DIRECTION OF VERDICT—EVIDENCE.

Where in a suit on a promissory note, brought by the transferee against the maker, the defense set up is fraud in its procurement, of which the transferee had notice before purchasing the note, and the evidence is not sufficient to show fraud in the procurement of the note, it is not error to direct a verdict for the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. — 537.]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by the Carrollton Bank against J. N. Hayes. Judgment for plaintiff, and defendant brings error. Affirmed.

I. N. Cheney, of Bremen, and Griffith & Matthews, of Buchanan, for plaintiff in error. James Beall and Buford F. Boykin, both of Carrollton, for defendant in error.

HILL, J. The Carrollton Bank obtained an attachment against John N. Hayes, on the ground that Hayes was disposing of his property subject to the payment of his debts, in order to avoid the payment thereof, or was threatening or preparing to do so. A petition in attachment was also filed by the bank against Hayes, alleging that the defendant was due the plaintiff the sum of \$500, besides interest, on a certain promissory note executed by Hayes to the Paul C. Jack Company, and due on the 1st day of November, 1910. It was alleged that the note was transferred in writing to the Carrollton Bank on or about March 1, 1910, for value, by the payee of the note. The defendant filed an answer averring that the note sued on was procured by fraud, in that Allen, Beddingfield & Co., who were agents and employes of the Paul C. Jack Company, induced the defendant to sign the note by false representations as to the value of the stock and what it would bring in the market, and guaranteed to the defendant that if he would sign the note they would sell the stock for double the amount of the note before it became due, all of which they failed to do, knowing at the time that the stock was worthless and of no value whatever. It was further alleged that the Car-

rollton Bank had full knowledge of the fraudulent means used in procuring the note, and knew that the note was without consideration and procured by fraud; that the president of the bank, J. T. Bradley, was one of the directors in the Paul C. Jack Company, and knew all about the inside management of that company, and knew that it was insolvent, and knew of the fraudulent means employed in securing the note; that the cashier of the Carrollton Bank was secretary of the above-named company, and likewise knew, at the time the bank secured the note sued on, that it was without consideration, and was procured by fraud. At the conclusion of the evidence, the presiding judge directed a verdict in favor of the plaintiff for the sum of \$500 principal, and \$144.44 interest. A motion for new trial was overruled, and the defendant excepted.

[1] 1. Error is assigned because the court admitted in evidence the notes sued on, over the objection of the defendant that there was no legal transfer of the note from the Paul C. Jack Company. The back of the note bears a stencil mark, "Paul C. Jack Company, by Paul C. Jack, pt." It is contended that this entry on the back of the note does not show that the transfer was made by any officer or agent of the Paul C. Jack Company, or by any one having authority to put the name of the company on the note in stencil; and that the addition of the letters "pt." after the company's name did not show such authority; and that the admission of the note in evidence, without proving authority from the company to transfer it, was error. We do not agree to this contention. The holder of the note with a transfer regular on its face will be held, prima facie, to have the right to it; and this will authorize the transferee to bring suit thereon.

[2] 2. Did the court err, under the pleadings and the evidence, in directing a verdict for the plaintiff? The defendant in his answer alleged that the note was without consideration and void; that the agents of the corporation who sold him the stock fraudulently represented it to be valuable, when in fact it was worthless, and this was known to the agents when they represented it to be valuable stock; and that the plaintiff was not a bona fide purchaser. We think this case falls within the rule as to "tradesman's brag," and "puffing, or dealer's talk," and the like. There is evidence tending to show that the agent (Beddingfield) represented that the stock at the time he sold it was good and valuable, but there is no evidence that at the time the stock was purchased it was not valuable, or that the company was insolvent as alleged. It may have subsequently become so, but there is no evidence to the effect that at the time of the sale of the stock the representations made to induce the plaintiff to purchase the stock were false and fraudulent as alleged. As long as the com-

pany was a going concern, meeting its obligations, and had assets consisting of solvent notes, office furniture, etc., which the uncontradicted evidence showed was the case, at the date of the sale, it could not be said that the stock was worthless. We do not think that the allegations of the answer and the evidence in support of it were such as would authorize the defendant to prevail in the suit. It is but another instance of an innocent citizen being made to part with his hard-earned money by the plausible "puffing" of the sales agent, which, though it leads to an unwise investment, is not shown to be fraudulent within the meaning of the law. Under the pleadings and the evidence, the court did not err in directing a verdict for the plaintiff.

Judgment affirmed. All the Justices concur.

(143 Ga. 508)

WARWICK GIN & COTTON CO. v. CONTINENTAL GIN CO. (No. 363.)

(Supreme Court of Georgia. June 17, 1915.)

(Syllabus by the Court.)

1. PROCESS \S 52 — SERVICE — DISQUALIFICATION OF OFFICER—COUNTIES.

Where a part of the territory of one county was, by the terms of an act of the Legislature, annexed to an adjoining county, and a resident of the territory thus annexed was made a deputy sheriff of the county to which the territory was annexed, and during his incumbency as deputy sheriff he served a copy of a suit and the process issued from the superior court of the county to which the legislative act purported to annex the territory referred to, the act of service was that of a de facto officer, and was not void and of no effect, although subsequently to the time of the service the act of the Legislature purporting to annex the territory to the county in which the suit was brought was by this court held to be unconstitutional, null, and void.

[Ed. Note.—For other cases, see Process, Cent. Dig. \S 59-63; Dec. Dig. \S 52.]

2. EXECUTION \S 166 — AFFIDAVIT OF ILLEGALITY—SERVICE OF PROCESS.

Where a defendant, in a suit of which service was made as stated in the foregoing headnote, was a resident of the territory annexed as stated, and, after the suit had matured to judgment, contested the validity of such judgment by filing an affidavit of illegality to the levy of the fi. fa. issued on the judgment, upon the grounds that he had never been served and had never appeared nor pleaded, the affidavit of illegality was properly dismissed, where the evidence showed service as above set forth; it not appearing from a production of the record of the court in which the judgment was rendered, or by other competent evidence, that there had been no waiver of the alleged want of jurisdiction—it not being sufficient merely for the defendant to show that it had neither appeared nor pleaded.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 485, 486; Dec. Dig. \S 166.]

Error from Superior Court, Crisp County; W. F. George, Judge.

Action by the Continental Gin Company against the Warwick Gin & Cotton Company.

Judgment for plaintiff, and defendant brings error. Affirmed.

An execution in favor of the Continental Gin Company, issued upon a judgment of the superior court of Crisp county, was levied upon certain property as the property of the Warwick Gin & Cotton Company. The last-named company, defendant in fi. fa., interposed an affidavit of illegality, setting up that the execution was proceeding illegally on the grounds: (1) That the defendant in fi. fa. had had no service or notice of the filing of or the pendency of the suit which resulted in the judgment upon which the execution was based, nor had it waived service, or authorized any one to do so for it, and that it did not appear and defend said suit; and (2) that the defendant in fi. fa. was, at the time of the filing of the suit and at the time of the filing of the affidavit of illegality, a resident of Worth county, Ga., and not of Crisp county, and that the superior court of Crisp county did not have jurisdiction of the case, the defendant having neither appeared nor pleaded. The case was before the judge without the intervention of a jury, upon an agreed statement of facts, which was in substance as follows:

The Continental Gin Company filed suit in the superior court of Crisp county, on the 29th day of October, 1912, upon certain promissory notes signed by the Warwick Gin & Cotton Company. The petition alleged that the defendant was a corporation having an office and place of business in Crisp county. Process was issued by the clerk of the superior court of Crisp county, directed to the sheriff of Crisp county and his lawful deputies. An entry of the service of the petition and process was made upon the petition by J. C. Dupree, as deputy sheriff of Crisp county. The entry recited that service had been perfected upon the Warwick Gin & Cotton Company by personal service upon its president, John F. Wise. At the February term, 1913, verdict and judgment were rendered in favor of the plaintiff; the defendant having neither appeared nor pleaded. On this judgment execution issued, and upon the levy thereof the defendant interposed an affidavit of illegality, and duly filed its traverse of the entry of service. At the time of the filing of suit and the rendition of judgment, the defendant was a corporation chartered by the superior court of Worth county, with its principal office and place of business fixed by charter and in fact located at Warwick, which place was, at the time of the filing of the suit, and still is, in the county of Worth. At the time of the filing of the suit, and at all times since, Worth county had a sheriff in commission and laboring under no disability or legal impediment. Dupree, who as deputy sheriff of Crisp county made the service upon the defendant, was at the time a resident of Worth county. Prior to the time of filing the suit

an act of the Legislature of this state had been passed, purporting to authorize a change of county lines between the counties of Worth and Crisp, so as to annex to Crisp county that part of Worth county in which Warwick is situated. In pursuance of the terms of said act an election had been held, and the result was duly declared according to the terms of said act, annexing that particular territory to Crisp county. At the time of the filing of the suit and the service of process, jurors from this territory had been rejected in the courts of Worth county, and the coroner of Worth county had refused to hold inquests there. Civil and criminal jurisdiction was being exercised over said territory by the courts and officials of Crisp county. Jurors were placed in the jury box of Crisp county from said territory and at times served as such in the courts of said county. Suits were filed in Crisp county against residents of that territory, and deeds were recorded by the clerk of the superior court of Crisp county to lands in that territory. On the 31st day of August, 1912, Worth county filed in the superior court of Crisp county its petition against Crisp county, asking that Crisp county be enjoined from exercising jurisdiction and dominion over the territory in which Warwick was situated, and upon the final hearing of said case in the Supreme Court the act purporting to annex said territory to Crisp county was declared unconstitutional, null, and void, which decision was rendered prior to the date of the judgment upon which the execution in this case issued, but after filing, service, and the appearance term of said court. Prior to the filing of said suit officials of both counties had acquiesced in said legislative act.

Upon this statement of facts the judge of the superior court rendered judgment dismissing the illegality and authorizing the levy of the execution to proceed. The defendant excepted.

E. F. Strozier, of Cordele, for plaintiff in error. J. W. Dennard, of Cordele, and Peacock & Gardner, of Camilla, for defendant in error.

BECK, J. (after stating the facts as above). [1, 2] The court properly held that the illegality should be dismissed and that the *fi. fa.* should proceed. Under the agreed statement of facts set forth above, the defendant was duly served. Although the officer serving the suit and process upon the defendant in *fi. fa.* was, at the time of making such service, a nonresident of Crisp county, and for that reason ineligible to the office which he was filling (because the act which annexed the territory in which he was living to the county of Crisp was unconstitutional, null, and void), still he was a *de facto* officer, and, having in good faith made the service, this service was not void. An official act of the character under consideration by a *de facto* officer cannot

be treated as of no effect. See *Godbee v. State*, 141 Ga. 515, 81 S. E. 876, and cases there cited. If the defendant did not appear and plead, and had not waived the question of jurisdiction, as he contends, he should have made this appear from the record, or other competent evidence. It is true that under the agreed statement of facts it is shown that the defendant did not appear nor plead; but that was not sufficient to resist the enforcement of the *fi. fa.* He should have shown by competent evidence that he had not waived the want of jurisdiction. In the case of *Analey v. O'Byrne*, 120 Ga. 618, 620, 48 S. E. 228, it was said:

"A defendant who has had his day in court cannot go behind the judgment for the purpose of showing that it ought never to have been rendered, nor will a claimant be allowed any such right. *Horne v. Powell*, 88 Ga. 639, 15 S. E. 688; *New England Mortgage Co. v. Watson*, 99 Ga. 735, 27 S. E. 100; *Osborne v. Rice*, 107 Ga. 282, 33 S. E. 54. If, then, this be the test, it is manifest that the court below properly refused the motion to dismiss the levy on the present execution. *Prima facie* it was good against the defendant. It issued from a court of general jurisdiction, with all the presumptions in favor of the validity and regularity of the judgment on which the *fi. fa.* was based. If the defendant had filed an affidavit of illegality, it would not have been sufficient to prove, as here, that she had 'never pleaded.' It would have been necessary to show that there was no waiver of the alleged want of jurisdiction. *Le Master v. Orr*, 101 Ga. 764, 29 S. E. 32. This presumption in favor of a writ issuing from a court of general jurisdiction can in no event be overcome by the testimony of a third person that the defendant did not plead; that he was her agent, and would have known it if she had done so. Even if this negative testimony be sufficient to establish her failure to plead, it does not establish that there was no waiver, and, according to the Civil Code [1895], § 5079 [1910, § 5663], while one cannot give jurisdiction, it may be waived so far as the parties themselves are concerned."

It follows, from what we have said above, that the court did not err in dismissing the affidavit of illegality.

Judgment affirmed. All the Justices concur.

(143 Ga. 492)

DILLARD et al. v. CUSSETA NAVAL STORES CO. (No. 360.)
(Supreme Court of Georgia. June 15, 1915.)

(Syllabus by the Court.)

1. INJUNCTION — § 118 — PETITION — SUFFICIENCY.

Where an equitable petition was filed seeking to enjoin the cutting of timber on certain land, and the plaintiffs alleged that one holding under the owner of the fee-simple title, and with the consent of the latter (who received the consideration), made a lease for turpentine purposes for ten years, and conveyed all the growing trees of a certain character on the land, with certain rights and easements, and that the plaintiffs were the owners and entitled to hold and enjoy all of the rights, privileges, benefits, claims, and advantages set forth in the lease contract, "as the transferees and assignees thereof through successive assignments in writing of the said lease contract", the transfer and

assignment of such rights, privileges, and claims being made and executed to your petitioners on the seventh day of February, 1913," such allegations were subject to special demurrer on the ground that they did not show who made the "successive assignments," or sufficiently describe or set them forth.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. ¶118.]

(Additional Syllabus by Editorial Staff.)

2. LOGS AND LOGGING ¶3—CONVEYANCE OF GROWING TIMBER—"INTEREST IN REALTY"—TRANSFER.

A conveyance of growing trees is a conveyance of an interest in the realty; and a mere transfer of the instrument by which the conveyance is made does not, without more, transfer such interest in the realty.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ¶3.

For other definitions, see Words and Phrases, First and Second Series, Interest.]

Error from Superior Court, Chattahoochee County; S. P. Gilbert, Judge.

Equitable action by the Cusseta Naval Stores Company against J. W. Dillard and others. Judgment for plaintiff, and defendants bring error. Reversed.

The Cusseta Naval Stores Company, a firm, brought an equitable petition against Dillard and others, alleging in substance as follows: On October 21, 1907, Shirling, Nisbit & Cook entered into a contract with one Kissick, by the terms of which they leased and purchased from him all of the growing trees, for turpentine purposes, located upon certain described land, and also rights of ingress and egress, the lease to continue for a term of 10 years. There was also conveyed by the contract all of the pine timber then upon the land which was suitable "for saw and wood purposes." At the time of the execution of the contract of lease, Kissick was in possession of the land under an agreement of sale and purchase from E. J. Wynn, the owner of the fee-simple title thereto. The lease contract was made by and with the approval and consent of Wynn, who prepared it and received the entire purchase money paid by the lessees. Upon the execution of the lease contract, Shirling, Nisbit & Cook, the lessees and purchasers, entered upon the land and commenced to exercise the rights and privileges granted, and such rights and privileges have been continuously exercised by the lessees and their transferees and assigns ever since.

"Your petitioners are now the owners of and are entitled to have, hold, and enjoy all the rights, privileges, benefits, claims, and advantages enumerated in and set forth in said lease contract, as the transferees and assignees thereof, through successive transfers and assignments in writing of said lease contract, the transfer and assignment of such rights, privileges, and claims being made and executed to your petitioners on the seventh day of February, 1913."

On December 7, 1909, Wynn sold the tract of land to the defendants, and they are now the owners in fee simple, subject, however, to all of the rights, privileges, and claims

set forth in the lease contract, "and which is [are] given to petitioners as the transferees and assignees thereof." At the time of the purchase of the land by the defendants, the lessees in the lease contract were in the actual possession, use, and enjoyment of the rights, privileges, and claims enumerated therein, and defendants had notice of such possession and use, as well as knowledge of said lease contract at the time the purchase was made. "The rights, privileges, and claims which were sold and granted to the lessees and purchasers, their transferees and assignees, by the terms of said lease, have been continuously exercised, carried on, and conducted by such lessees, transferees, and assignees ever since said lease contract was executed." The timber has been worked for turpentine in the usual manner and with full knowledge of the defendants, and without hindrance, molestation, or interference upon their part, until February of the present year, when the defendants entered upon portions of the land and began cutting and felling the growing timber which had been leased to be worked for turpentine. They have already cleared 25 acres or more, having cut timber of the value of \$300. They are threatening to enter upon other portions of the land and to cut growing pine timber therefrom, which has been boxed and is being worked by the plaintiffs for turpentine purposes, "and which belongs to your petitioners by terms of said lease agreement." The prayers were for a judgment for the damages already accrued and for an injunction against a continuation of the alleged trespass. By amendment the plaintiffs added the following allegations:

"That your petitioners are now, and have been since they purchased the rights, privileges, benefits, claims, and advantages enumerated and set forth in said original lease contract, in the actual possession and enjoyment of the rights, privileges and benefits therein conferred, and are using and boxing said timber for turpentine purposes by boxing and chipping the growing timber therein, and removing the same therefrom."

The defendants demurred to the petition. The demurrer was overruled, and they excepted.

A. W. Cozart, Wynn & Wohlwender, and S. T. Pinkston, all of Columbus, for plaintiffs in error. T. T. Miller, of Columbus, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] The plaintiffs alleged that one Kissick was in possession of a tract of land under an agreement of purchase; that, with the consent of the owner of the fee, Kissick sold and leased to a named firm the growing trees for turpentine purposes, and also sold all the trees suitable "for saw and wood purposes"; that the plaintiffs were "the owners" of the rights included in the written contract, as the transferees and assignees thereof, through successive transfers and as-

signments in writing of said lease contract, "the transfer and assignment of such rights, privileges, and claims being made and executed to your petitioners on the seventh day of February, 1913." A demurrer was filed, one ground of which raised the point that it was not alleged who made the successive transfers and assignments, and another that the assignments or transfers were not sufficiently set forth or described. We can perceive no good reason why the plaintiffs should be allowed to allege that they are the owners of timber, turpentine rights, and easements under successive assignments and transfers of a written contract known as a timber and turpentine lease, and refuse to give the defendants any information as to who made the successive assignments and transfers mentioned.

[2] A conveyance of growing trees is a conveyance of an interest in the realty; and a mere transfer of the instrument by which the conveyance is made does not, without more, suffice to transfer such interest in the realty. *Tillman v. Bomar*, 134 Ga. 660, 68 S. E. 504; *Gaskins v. Green*, 141 Ga. 552, 81 S. E. 882. If the transfer is not merely of the contract, but of the rights, privileges, or property described therein, this may suffice. If the pleadings contained sufficient allegations as to the facts, it could be determined what was the effect of the transfers. But the allegations in this case were not sufficient to withstand a special demurrer.

The plaintiffs showed that the rights sought to be protected were granted to others, but failed to connect themselves with such others by any proper allegations.

The rules as to evidence which will serve to show a prima facie title to realty, and that an equitable title may be protected, do not authorize insufficient allegations of fact. The fourth and fifth grounds of the demurrer should have been sustained.

Judgment reversed. All the Justices concur.

(143 Ga. 486)

ROACH v. ROACH. (No. 358.)

(Supreme Court of Georgia. June 15, 1915.)

(Syllabus by the Court.)

ADVERSE POSSESSION ⚡60—LIMITATION OF ACTIONS ⚡83 — PARTNERSHIP ⚡68—ACCOUNTING—LAND JOINTLY OWNED.

Where two persons enter into a parol partnership agreement to buy, hold, and sell certain land, and one of the two takes the legal title to the land in himself, both having contributed to the purchase price, and both having entered into possession, the one in whom the legal title is taken will be considered as acting for the firm, and the members will be considered as equitable owners and equitable tenants in common of the land.

(a) Where, in such a case, both members of the firm went into possession of the land in 1883 as joint owners, and so remained until 1899, when one partner died, and the other remained in possession, promising the heirs of the deceased partner, until his death in 1910, that he would settle with them as soon as he could

sell the land to advantage, and acknowledge their being entitled to a half interest in the land, a suit brought in 1913 by the administrator of the partner first deceased, against the executor of the surviving partner, to recover a half interest in the land and mesne profits for four years, was not barred.

(b) But a cause of action, as set out in an equitable petition filed by the administrator of the partner first dying, against the executor of the partner last dying, for an accounting and for a recovery of the value of one-half interest in the personal property belonging to the partnership, is barred after the lapse of nine years from the death of the partner first referred to.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 282-312, 323, 328; *Dec. Dig. ⚡60*; *Limitation of Actions*, Cent. Dig. §§ 426, 431-438; *Dec. Dig. ⚡83*; *Partnership*, Cent. Dig. §§ 101-111; *Dec. Dig. ⚡68*.]

Error from Superior Court, Forsyth County; H. L. Patterson, Judge.

Action by G. S. Roach, administrator of Moses Roach, deceased, against Wayne Roach, executor of the will of James Roach, deceased. Judgment for defendant, and plaintiff brings error. Affirmed in part, and reversed in part.

Geo. F. Gober, of Atlanta, G. B. Walker, of Alpharetta, and C. L. Harris, of Cumming, for plaintiff in error. H. H. Perry, of Gainesville, J. Z. Foster, of Marietta, L. E. Wisdom, of Cumming, and J. P. Brooke, of Alpharetta, for defendant in error.

HILL, J. An equitable petition was brought by G. S. Roach, the administrator of Moses Roach, against the executor of the will of James Roach, to recover a half interest in certain land and personal property, the legal title to which was in James Roach until his death in 1910. The petition alleged that the land and personalty were partnership property of Moses Roach and James Roach; that, on the death of Moses Roach in 1899, James Roach, as surviving partner, came into possession of them as partnership property; that his estate is liable to the administrator of the estate of Moses Roach, on an accounting, for one-half thereof, with interest and mesne profits; and that James Roach in his lifetime, after the death of Moses, held the interest of Moses therein under an implied trust for the partnership. Moses Roach died in July, 1899, and James Roach in July, 1910. The plaintiff was appointed administrator upon the estate of Moses Roach in August, 1913; the application for administration having been made in 1911. The present suit was filed on September 4, 1913. From the petition it appears that the partnership between Moses and James Roach was formed in parol in 1883, was conducted in the name of James Roach, and was for the purpose of buying, selling, and working farm lands for profit. Moses contributed \$5,500 and James \$3,200, all of which was invested in the "Rogers farm," with the legal title in James for the alleged purpose of convenience and facility. Moses conducted the farming operations, and

both partners were in possession until the death of Moses in 1899, when, it is alleged, James remained in possession as the surviving partner and as trustee for the partnership until his death in 1910. It is alleged that, from the profits and increase of this farm, other real and personal property was accumulated, of all of which the executor of James took possession soon after his death and received the rents and profits therefrom, and now claims them as belonging to his testator's estate. James disposed of all the partnership property as his own by will, to the exclusion of the heirs of Moses. No suit was brought by the heirs of Moses, in the lifetime of James, to recover the interest of Moses in the partnership business, for the reason (as alleged by the plaintiff) that James, when approached for a settlement of the partnership business, begged the heirs of Moses to indulge him until he could collect what was due to the partnership, and until such time as the land could be sold to the best advantage, when he would settle. It is alleged that he always recognized the interests of the heirs of Moses in one-half the partnership property up to and until the date of his death in 1910, and always promised the heirs of Moses that he would settle with them for their half, and that, if he died before doing so, one-half of the property would be theirs after his death. The court sustained general and special demurrers, holding that the petition on its face showed that the plaintiff's right of action was barred by reason of the laches of the heirs of Moses Roach. To this judgment the plaintiff excepted.

According to the allegations of the petition, the partnership agreement between Moses and James Roach was in parol, and the legal title to the land was in James Roach from 1883 to the date of his death in 1910. This suit was brought to compel the estate of James to account for a half interest in all the property 30 years after the deed to the land was taken in the name of James, and 11 years after the death of Moses, and 3 years after the death of James. It is insisted that under the allegations of the petition, which are to be taken as true on demurrer, though the legal title was in James, the equitable title was in the partnership, of which Moses was a member, on account of the implied trust by which James held it as trustee for the partnership. If, therefore, the estate of James is bound to an accounting to the estate of Moses, it is because of some rule of law which would imply an obligation on it to become so bound under the facts. No express trust is alleged, and no written agreement as to the partnership or other written obligation is set out, whereby James or his estate was to become bound to Moses or his estate. A parol agreement to purchase and hold land in trust for another is within the statute of frauds, and is not enforceable as an express trust. 39 Cyc. 49 (c). See Coll-

yer's Law of Partnership, 224 (note). An express trust cannot be ingrafted on a deed by parol. *De Loach v. Jefferson*, 142 Ga. 436 88 S. E. 122. But where land is bought by the members of a partnership with the money belonging to the firm, and the legal title is taken in the name of only one member, an implied trust arises in favor of the partnership, and the members become equitable owners and equitable tenants in common of the land. *Cottle v. Harrold*, 72 Ga. 830 (3); 1 Devlin on Real Est. (3d Ed.) § 49, p. 72. See *Black v. Black*, 15 Ga. 445 (3), 449; 17 Am. & Eng. Enc. Law, 944 et seq.; 1 Bates on Partnership, § 281. Under the allegations of the petition, considered on demurrer as true, the partner last dying declared, until his death in 1910, that each partner had an individual half interest in the partnership property and its proceeds. Taking this to be true, there was no adverse possession as to the land until the death of James in 1910, when his executor set up an adverse claim. It follows, therefore, that where land was purchased by the two brothers as partners in 1883, each contributing different amounts towards the purchase, with the legal title taken in one partner, and both continued in possession and exercised acts of joint ownership until the death of the other partner in 1899, and afterwards the holder of the legal title continued in possession until his death in 1910, the administrator of the partner who died in 1899 is not barred by laches on a suit brought in 1913 for the recovery of one-half interest in the partnership land and mesne profits thereof for four years. Real property, which was treated as partnership assets during the life of the partners and the existence of the partnership, is to be so regarded in equity, and the legal title held by the surviving partner is so held as an implied trust for the partnership. And where, after the death of one partner, the survivor continues to hold the land and declares that it is partnership property up to and until his death, it cannot be said that he is holding the property adversely; and a suit by the administrator of the partner first dying, for recovering a half interest in the land, brought within less than the statutory period of limitation from the death of the partner last dying, is not barred.

Could there be an accounting for the value of the personal property alleged to have belonged to the firm? Section 4377 of the Civil Code provides that the time between the death of a person and representation taken upon his estate shall not be counted against creditors of his estate, provided such time does not exceed five years. At the expiration of that time the limitation shall commence. We think the heirs of Moses stood in the relation of creditors, with respect to an accounting for the value of the personal property after the death of James. Moses died in 1899. There was no administration on his estate until 1913. Counting the five years

allowed by the statute for administration, plus four years for the open account to become barred, making nine years, the suit as to an accounting was barred after the expiration of nine years. No suit was filed by the administrator of Moses until 1913, or 14 years after his death. Under these circumstances, the account against the estate of James for the interest of Moses in the personal property was barred at the commencement of the present suit. See Shumaker on Partnership, 200, and note; Knox v. Gye, L. R. 5 H. L. Cases, 656; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889, note "b." We hold that, under the allegations of the petition, a cause of action is set forth and is not barred, as to a half interest in the "Rogers farm" and mesne profits thereof for four years; but that the action is barred as to the personal property.

Judgment affirmed in part, and reversed in part. All the Justices concur.

(143 Ga. 490)

LAMB et al. v. McELWANNEY.

ATLANTA, B. & A. R. CO. v. SAME.

(No. 359.)

(Supreme Court of Georgia. June 15, 1915.)

(Syllabus by the Court.)

1. PROCESS \S 24, 163—RECEIVERS \S 180—VALIDITY—AMENDMENT—SUFFICIENCY OF SERVICE—AGENT OF RECEIVERS.

Though the language of the petition and process is equivocal, properly construed it sufficiently appears that the process refers to the petition and includes the receivers who were sued as parties defendant. So construed, the process was valid. *Carey v. Hillhouse*, 5 Ga. 251; *Turpin v. Taylor*, 143 Ga. 224, 84 S. E. 547. On its facts the case differs from that of *Neal-Millard Co. v. Owens*, 115 Ga. 969, 42 S. E. 266.

(a) In order to remove equivocal features and give symmetry to the record, the court properly allowed the amendment. *Carey v. Hillhouse*, *supra*.

(b) The service of the petition and process upon the agent of the receivers was a valid service upon the receivers. Civil Code 1910, \S 2788, 2789.

[Ed. Note.—For other cases, see Process, Cent. Dig. \S 9, 19, 224-238; Dec. Dig. \S 24, 163; Receivers, Cent. Dig. \S 358; Dec. Dig. \S 180.]

2. APPEAL AND ERROR \S 144—WRIT OF ERROR—JUDGMENT REFUSING TO DISMISS.

The order allowing the amendment, together with the judgment sustaining the traverse to the sheriff's return, as effectually removed the railroad company from the case as if in terms it had been dismissed from the suit, and it was unnecessary for the railroad company to sue out a writ of error to this court to review the judgment refusing to dismiss the case. Accordingly, the writ of error sued out by the railroad company is dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 923; Dec. Dig. \S 144.]

3. JUDGMENT \S 128—UNLIQUIDATED CLAIM—PROOF OF AMOUNT—NECESSITY—DIRECTION OF VERDICT.

The damages claimed in the case being unliquidated, it was necessary to a recovery by the plaintiff to prove the amount of damages,

although the receivers did not file any plea or answer. Civil Code 1910, \S 5687; *Cooley v. Tybee Beach Co.*, 99 Ga. 290 (2), 291, 25 S. E. 691. There being no evidence demanding a verdict for any given amount, it was error to direct a verdict in favor of the plaintiff for the amount alleged in the petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 223, 224, 228-230; Dec. Dig. \S 126.]

Error from Superior Court, Fayette County; Robt. T. Daniel, Judge.

Action by Paul McElwaney against the Atlanta, Birmingham & Atlantic Railroad Company and H. M. Atkinson and another, receivers thereof. Judgment for plaintiff, and the railroad company and the receivers file separate bills of exception. Reversed as to the receivers, and writ of error dismissed as to the railroad company.

Paul McElwaney instituted an action for damages for the tortious killing of a mule, returnable to the September term, 1913, of the superior court of Fayette county. The petition alleged that "the Atlanta, Birmingham and Atlantic Railway Company, hereinafter called the defendant company, * * * is now in the hands of two receivers, to wit, H. M. Atkinson and E. T. Lamb, who are sued as joint receivers of said line of railway, and who will hereafter be called the defendants," and that "said defendants, * * * by the operation of their train," committed the injury under circumstances fully set forth. Process was prayed against "said defendant company, through its said receivers." The process contained the caption, "Paul McElwaney v. Atlanta, Birmingham & Atlantic Railroad Company," and required "the defendant, Atlanta, Birmingham & Atlantic Railroad Company, through its said receivers," to appear at the next term of court, "to answer the plaintiff's demand in an action of complaint." The sheriff's return recited that he had "served the defendant with a true copy of the within writ by handing the same to its agent R. M. Hagler, at Tyrone in said county, in person." At the appearance term the Atlanta, Birmingham & Atlantic Railroad Company filed a traverse to the sheriff's return, alleging:

"That the said R. M. Hagler, named as agent for this defendant, is not now, and was not at the time of the said alleged service, agent for this defendant. * * * This defendant moves that said case be dismissed for want of service."

The railroad company filed an answer subject to its traverse. The receivers did not answer or make any appearance. The case was not marked in default. At the March term, 1914, by consent of counsel, the issues upon the traverse and motion to dismiss were submitted to the court for decision, without the intervention of a jury, upon evidence as follows:

"It is agreed that R. M. Hagler, at the time of the bringing of said suit and at the time said suit was served upon him, was the agent of

E. T. Lamb, the receiver of the Atlanta, Birmingham & Atlantic Railroad Company, and the said R. M. Hagler was not the agent of the Atlanta, Birmingham & Atlantic Railroad Company at the time of the filing and bringing of said suit and at the time of the service of said suit, but the said Hagler was only the agent for the receivers of said road and was in charge of the railroad office Tyrone, Ga."

After the facts were so agreed upon, and before the decision of the court upon the traverse of the return of service, the plaintiff tendered an amendment to the process, which was allowed. The amendment purported to insert the words, "H. M. Atkinson and E. T. Lamb, receivers of," just after the word "defendant" in the process and before the words, "Atlanta, Birmingham & Atlantic Railroad Company." After the allowance of the amendment, the judge entered a judgment, which (omitting the formal parts) contained the following:

"It is ordered that the Atlanta, Birmingham & Atlantic Railroad Company has not been served with a copy of the suit and process in the within case, and the traverse is sustained as to that issue. The motion to dismiss the case is refused."

No evidence was introduced, but, the receivers having failed to answer, the judge directed a verdict "for the plaintiff" for the amount alleged in the petition. The railroad company and the receivers filed separate bills of exceptions.

J. W. Culpepper, of Fayetteville, and Colquitt & Conyers, of Atlanta, for plaintiff in error. J. W. Wise, of Fayetteville, for defendant in error.

ATKINSON, J. Judgment reversed in the first case. Writ of error dismissed in the second. All the Justices concur.

(143 Ga. 588)

WILKES et al. v. DIXIE COTTON CO.
(No. 399.)

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

1. FINDING OF AUDITOR.

The auditor's finding of fact was in accord with the evidence set out in the exception thereto, and the exception was properly disproved.

2. SALES \S 816—REMEDY OF SELLER—RECOVERY OF GOODS—"PLANTER."

The right of action given by the Civil Code 1910, \S 4126, to a planter for the recovery of cotton sold on cash sale, but not paid for, is to a planter who owns the cotton, and not to a planter who sells the cotton as the agent of another, even though his principal be his tenant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. $\S\S$ 890-895; Dec. Dig. \S 316.]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Trover by Ruthie M. Wilkes and another, as executors of John Wilkes, against the Dixie Cotton Company. Judgment for de-

fendant, and plaintiffs bring error. Affirmed.

J. S. Adams, of Dublin, for plaintiffs in error. Davis & Sturgis, of Dublin, for defendant in error.

EVANS, P. J. The action is in trover, brought by Ruthie M. and Walter Wilkes, as executors of John Wilkes, against the Dixie Cotton Company, to recover 16 bales of lint cotton. The case was referred to an auditor, who reported that the plaintiffs, on December 10, 1911, sold the cotton described in the petition to one E. M. Lott, upon a cash consideration; that Lott gave to the executors in payment for the cotton a draft which was never paid; that Lott sold the cotton to the defendant; that one of the executors, acting for both, sold the cotton to Lott at 9 cents per pound, and to the aggregate amount of \$711.18; that in the transaction the executors sold the cotton for their tenants and were acting for them in its sale; that the tenants were indebted to the estate for rents and supplies in an amount equal to that which the cotton brought at the sale to Lott, which sale was made by one of the executors, acting for both, with the consent and approval of the tenants; and that the executor credited the rent notes and supplies account of the tenants with the amount which the cotton brought. The auditor further found that, under these facts, the plaintiffs did not have such title as would authorize them to recover the cotton, or the value thereof, from the defendant. The plaintiffs filed exceptions of fact and of law, both of which were overruled, and they bring error.

[1] 1. There was no error in overruling the exception of fact. A careful comparison of the evidence contained in the exception, as demanding a contrary finding with the report of the finding of fact by the auditor, leads us to the conclusion that the evidence demanded the finding of the auditor.

[2] 2. The action is predicated upon Civil Code 1910, \S 4126, which declares that cotton and other agricultural products sold by planters on cash sale shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer. Under this section, where there is a delivery of cotton by a planter on cash sale, the title of the seller remains undivested until payment in full of the purchase price, and may be asserted by him even as against a bona fide purchaser from his vendee. Flannery v. Harley, 117 Ga. 483, 43 S. E. 765. A "planter," as used in this section, is one who is engaged in the business of producing crops from the soil; and it is immaterial whether he sows and reaps with his own hand, or the hand of a tenant, or the hand of a cropper, or the hand of hired labor. He may avail himself of the protection of this section in any cash sale of cotton grown on his land

which he may have acquired by purchase from his tenants. *Butler v. Georgia & Alabama Railway*, 119 Ga. 950, 47 S. E. 320. If the landlord in this case had purchased the cotton from his tenants, in payment of his lien for rent and supplies, there can be no question that he would have the right to recover in the present action. But the transaction had with his tenants did not clothe him with the title to the cotton. The landlord sold the cotton as the agent of the tenants, and, after the sale, believing that the draft would be paid, he credited the accounts of the tenants with the amounts represented by their respective shares in the purchase price. The tenants never parted with their title to the landlord. He was simply their agent in conducting the sale; and the right to recover, according to the undisputed facts, is in the tenants, and not in the landlord. The statute is for the benefit of planters who sell their own crops, and is not applicable to a case where he sells the crop of another as agent, even though that other be his tenant.

Judgment affirmed. All the Justices concur.

(143 Ga. 585)

SOUTHERN COTTON OIL CO. v. CALEB.

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇨296—INJURY TO SERVANT—FAILURE TO INSTRUCT—CONTRIBUTORY NEGLIGENCE.

Under the pleadings and the evidence in the case, it was erroneous not to charge the principle of law that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, he could not recover, although the court was not requested in writing to so charge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. ⇨296.]

2. MASTER AND SERVANT ⇨291—INJURY TO SERVANT—INSTRUCTIONS—ISSUES.

The court should not have instructed the jury, as to one question involved in the case, so as to confine the jury's attention to that question to the exclusion of other important issues involved under the pleadings and the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1183, 1134, 1136-1146; Dec. Dig. ⇨291.]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Action by Ezekiel Caleb against the Southern Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Reversed.

Ezekiel Caleb brought suit against the Southern Cotton Oil Company, to recover damages for personal injuries, alleging in the petition that, being an employé of the defendant, he was ordered by its superintendent, who was in charge at the time and who had supervision over petitioner, with the right to order and control his conduct at the company's mills, to hold in his hand a scantling raised upright, with the end resting

against a shafting near the ceiling; that while he was in this position, standing on the floor and holding the scantling as he was ordered to do, and while the superintendent was working at some pulleys or shafting located in the ceiling directly above where petitioner was standing, the superintendent carelessly and negligently let fall a heavy block, which struck petitioner upon the head, and thereby inflicted serious injuries upon him; that the superintendent was negligent in ordering petitioner to assume a perilous position; that the block was negligently dropped; that the plaintiff himself was free from negligence; and that his injuries were due entirely to the negligence and carelessness of the superintendent. Upon the trial of the case the jury returned a verdict for the plaintiff. The defendant made a motion for a new trial, which was overruled, and it excepted.

Davis & Sturgis, of Dublin, for plaintiff in error. J. S. Adams, of Dublin, for defendant in error.

BECK, J. (after stating the facts as above).

[1] 1. Error is assigned upon the failure of the court to charge the jury that if the plaintiff could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover, as provided in section 4426 of the Code of 1910, in regard to diligence upon the part of the plaintiff. The plaintiff had testified to acts showing negligence upon the part of the defendant's employé, but he also testified to certain facts which would have authorized the jury to find that by the exercise of diligence on his own part he could have avoided the results of the negligence of the person to whom he refers in the case as the superintendent of the defendant company, and who, at the time of the injury, was working at certain shafting in a position about 10 or 15 feet directly over the head of the plaintiff. It appears from the plaintiff's own testimony that while the person to whose negligence he attributes his injuries was working upon the shafting in the position just referred to, the plaintiff knew that there were certain objects which might, unless he exercised due care for his safety, be dropped upon him; for, shortly before the block was dropped which struck him, a hatchet had been dropped, and he knew there were other objects above him which might be caused to fall, if the person engaged in working upon the shafting should not exercise care; and, according to his own testimony, he called out, cautioning that care should be used. Under these circumstances it seems perfectly clear that the question as to whether the plaintiff could have avoided the consequences of the defendant's negligence was directly involved in the case; and it was the duty of the court to instruct the jury as to the principle of law which would

defeat the plaintiff's right to recover in case he failed to exercise due diligence to avoid the result of negligence upon the part of the defendant's other employé. *A., K. & N. Ry. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818.

[2] 2. Complaint is also made of the following charge of the court:

"Now, the question in this case is whether or not the plaintiff in the case, at the time he entered into the employment of the defendant, assumed the risk of the danger of the falling of this piece of timber. In other words, was that one of the ordinary risks that he assumed when he went into the employment of the company? and that is the question for you to determine from the evidence in this case."

This charge is criticized upon the ground that in giving it the court limited the jury to the sole question of his assuming this risk at the time he entered into the employment of the company, and thereby excluded other questions from the consideration of the jury. The criticism of the charge is pertinent and the exception well taken. The question stated may be one of the questions involved; but the charge is too restrictive, and tends too much to confine the attention of the jury to the question stated. As we have indicated in the preceding division of this opinion, the question as to whether or not the plaintiff by the exercise of ordinary care could have avoided the consequences of the defendant's negligence, if the defendant was negligent, is directly involved in the case; and the charge last quoted tended to exclude that as one of the issues for the consideration of the jury. And we could with propriety add here, although there is no distinct assignment of error upon any part of the court's charge raising the question, that it is a question under the evidence as to whether or not the person alleged to have been the superintendent was merely a fellow servant, in view of the work in which he was engaged in connection with the plaintiff at the time the latter received the injuries for which he brings suit. The fault in the charge under consideration affects other portions of the charge complained of; but, having indicated the vice in this charge, it is not necessary to take up the other grounds of the motion for a new trial where it is apparent, and deal with them separately.

Except as indicated, there were no errors in the other rulings of the court as shown in the motion for a new trial.

Judgment reversed. All the Justices concur.

(143 Ga. 602)

McCLELLAN v. RAWLING.

(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

APPOINTMENT OF RECEIVER.

Under the evidence, the court did not err in granting the prayer for receiver at the hearing of this case.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by William Rawling against I. B. McClellan. From a judgment appointing a receiver, defendant brings error. Affirmed. See, also, 84 S. E. 616.

Lavender R. Ray, of Atlanta, for plaintiff in error. Bryan & Middlebrooks, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(143 Ga. 587)

SMITH v. R. A. JOHNSON & CO.

(No. 398.)

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There being no exception to the charge of the court nor to any ruling made pending the trial, and the evidence being sufficient to support the verdict, the judgment refusing a new trial will be affirmed.

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Action between J. F. Smith and R. A. Johnson & Co. From the judgment, Smith brings error. Affirmed.

J. S. Adams, of Dublin, for plaintiff in error. Davis & Sturgis, of Dublin, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(143 Ga. 513)

CLARK et al. v. LUNSFORD. (No. 367.)

(Supreme Court of Georgia. June 17, 1915.)

(Syllabus by the Court.)

1. JUDGMENT ~~§~~101—VALIDITY—PLEADINGS.

A petition declared against A., B., and C. individually on a note having the following suffix to their signatures: "Trustees of B. S. & D. of Hebrews No. 52"—and judgment by default was rendered against the defendants as individuals. Held, that the judgment is not valid, because not authorized by the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 168-170; Dec. Dig. ~~§~~101.]

2. JUDGMENT ~~§~~133 — DEFAULT JUDGMENT—CONDITIONAL CONTRACT.

A default judgment in the superior court, rendered by the court on a promissory note for principal, interest, and attorney's fees (stating these amounts separately), will not be treated as an absolute nullity. The judgment will be held good as to the principal and interest, and void as to the attorney's fees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 243; Dec. Dig. ~~§~~133.]

Error from Superior Court, Newton County; C. S. Reid, Judge.

Action by Evans Lunsford against William Clark and others. Judgment for plaintiff, and defendants bring error. Affirmed, with directions.

Rogers & Knox, of Covington, for plaintiffs in error. C. C. King, of Covington, for defendant in error.

EVANS, P. J. Evans Lunsford brought suit against William Clark, Jerry Wingfield, and B. G. Gaither, to recover a balance alleged to be due on a note signed by these defendants, who affixed to their names the words "Trustees of B. S. & D. of Hebrews No. 52." The note provided for the payment of attorney's fees, and in the petition there was a recital that the statutory notice to claim attorney's fees in the judgment had been given. A judgment was entered against the defendants for the principal, interest, and attorney's fees claimed in the suit. Execution issued upon this judgment and was levied upon property of the defendants, who filed an affidavit of illegality on the grounds that the judgment was void, because founded on a note signed by the defendants as "trustees of B. S. & D. of Hebrews No. 52," a corporation, and the note only bound them as trustees, and not individually, and that the judgment included attorney's fees, and was entered by the court, without the intervention of a jury, as being upon an unconditional contract in writing, whereas the defendants averred that the note sued upon was not an unconditional contract in writing, because it contained a promise to pay attorney's fees, and no judgment could be entered for attorney's fees without allunde proof, and the judgment is therefore void. The defendants also filed a motion to set aside the judgment, on the ground that it was a default judgment, and was entered by accident or mistake against them individually, when their liability was only as trustees of the corporation. The cases were consolidated and tried together, and the court rendered a judgment overruling and dismissing the illegality, and refusing to set aside the judgment. Exception is taken to this judgment.

[1] 1. There is no merit in the contention that the judgment is void because the note which was the foundation of the suit was signed by the defendants as trustees. The suit was against the defendants as individuals, and judgment was prayed against them as such. The suffix to their signatures, "trustees of B. S. & D. of Hebrews No. 52," is but descriptio personæ. There is nothing in the note to indicate that it was a corporate debt, or that the defendants were trustees of a corporation, or represented a corporation. They were sued as individuals, and they failed to defend. It is too late now to raise any question of their liability in that suit.

[2] 2. The other ground of illegality is that the judgment is void because rendered by the court on a contract which was not unconditional. The Constitution declares that:

"The court shall render judgment without the verdict of a jury, in all civil cases founded on

unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation." Civil Code (1910), § 8516.

In the recent case of *Merritt v. Bank of Cuthbert*, 143 Ga. 394, 85 S. E. 104, it was held that the obligation in a note to pay attorney's fees is enforceable only on compliance with the statutory requirements, and in a suit on a note judgment cannot be rendered by the court for such fees, but that, where judgment is rendered by the court separately for principal, interest, and attorney's fees, this court, on exception to the judgment, may require it to be purged of the attorney's fees. The note in the instant case was an absolute, unconditional promise to pay the principal and interest at a particular time. It also contained a promise to pay 10 per cent. attorney's fees in case of collection by suit. The obligation to pay the principal and interest is not conditioned upon the liability to pay attorney's fees. If the plaintiff had brought his action for the principal and interest, it would hardly be contended that the contract as to that claim was not unconditional, and that a judgment could not be rendered by the court. In addition to the contract to unconditionally pay the principal and interest, the defendants further contracted to pay 10 per cent. attorney's fees in case of suit. The statute does not permit the enforcement of this obligation unless the necessary notice of the time of bringing suit is given.

We think the proper practice in suits upon notes where attorney's fees are claimed is to take a verdict for the whole; but where the contract is unconditional as to the principal and interest, and only conditional as to attorney's fees, we think the court would have jurisdiction under the Constitution to enter up judgment for the principal and interest. If, however, he included in that judgment attorney's fees, in a separate item, so much of the judgment as relates to the recovery of attorney's fees will be treated as void. The whole judgment would not be void; it will be held to be valid as to the principal and interest, and void as to the attorney's fees. Accordingly the judgment is affirmed, with direction that the court amend the judgment, directing the *fi. fa.* to proceed for the principal and interest.

Judgment affirmed, with direction. All the Justices concur.

(143 Ga. 561)

ATLANTIC COAST LINE R. CO. v. ARANT.
(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR—§1066—GROUND FOR REVERSAL—INSTRUCTIONS—NATURE OF ACTION.

In this case the charge was not properly adjusted to the pleadings and the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. §1066.]

Error from Superior Court, Echols County; W. E. Thomas, Judge.

Action by R. L. Arant against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Arant brought an action against the Atlantic Coast Line Railroad Company to recover 476 cypress cross-ties and 237 pine cross-ties, which the plaintiff alleged were his property, and had been wrongfully taken possession of by the defendant and converted to its own use. The value of the property was alleged to be \$294.70. The answer of the defendant denied the substantial allegations of the plaintiff's petition. On the trial the evidence on behalf of the plaintiff showed that he sold to the defendant cross-ties; that they were inspected, and those which were rejected were placed in a pile and marked with a red cross on the ends of the ties; that 713 rejected ties had accumulated beside the track of the defendant; and that they disappeared from that place. There was other evidence tending to show that the employes of the railroad company were engaged at one time in carrying away cross-ties from the pile, and that, shortly after the rejected ties had disappeared, a witness found signs of their having been loaded on a train. There was some evidence, on behalf of the defendant, tending to show that there were not as many rejected ties as the plaintiff claimed, and some evidence as to the value of such ties. The defendant admitted that 250 ties were taken, but denied that it took possession of more than that number. The jury found for the plaintiff \$192.51, with interest. The defendant moved for a new trial, which was refused, and it excepted. The following was the entire charge of the court, except the definition of preponderance of evidence, which was given in the language of the Code:

"Gentlemen of the jury, you will find in favor of that party, plaintiff or defendant in the case, the one or the other with whom you find the preponderance of testimony lies upon the issues in the case which is submitted to you by the pleadings. The plaintiff has brought suit against the defendant for the purchase price of certain cross-ties which the plaintiff alleges were sold and delivered to the defendant. In any event you will find in favor of the plaintiff for some amount. It is left to you to determine just what amount; and, whatever your finding may be with respect to the amount, the form of your verdict will be, 'We, the jury, find in favor of the plaintiff,' stating the amount of dollars and cents principal, and also stating the amount of interest thereon from the amount you find to be due, calculated at 7 per cent. from the date it ought to have been paid. You can calculate the interest and write it in your verdict, both principal and interest, and let your verdict be dated, signed by your foreman, and returned into court."

Bennet & Branch, of Quitman, for plaintiff in error. E. K. Wilcox, of Valdosta, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The plaintiff brought an action to recover 713 cross-ties. He had been selling cross-ties to the defendant, which were inspected by an agent of the latter, and those rejected were piled beside the railroad track and marked with a red cross. After a considerable number of ties had been thus rejected and placed in a pile (the plaintiff contended that they aggregated 713), the defendant carried away a number of them. It admitted having taken 250, and the issues were how many of the cross-ties it had taken, and what was their value. The judge of the trial court, in some manner, misapprehended the nature of the action on trial, and instructed the jury that:

"The plaintiff has brought suit against the defendant for the purchase price of certain cross-ties which the plaintiff alleges were sold and delivered to the defendant."

Doubtless this confusion grew out of the fact that the plaintiff was selling cross-ties to the defendant, and that those involved in the present action were rejected, but some or all of them were afterward carried away by the defendant. The suit was not for their purchase price under the contract of sale, but for their conversion after having been rejected. In the brief charge the instruction quoted above was the only one given by the judge as to the character of the case or the issues involved. He informed the jury that they should find in favor of the plaintiff for some amount, and report a verdict for the plaintiff for the principal, and also for interest at 7 per centum "from the date when it ought to have been paid." These instructions were inapplicable to the case made by the pleadings and evidence, nor were apposite instructions given. It cannot be said that the evidence so clearly demanded the verdict found by the jury that it should be sustained regardless of the error in the charge.

Judgment reversed. All the Justices concur.

(76 W. Va. 461)

CROSTON v. McVICKER. (No. 2596.)

(Supreme Court of Appeals of West Virginia.
June 8, 1915.)

(Syllabus by the Court.)

1. EJECTMENT \S 125 — DAMAGES RECOVERABLE — RENTAL VALUE — DESTRUCTION OR WASTE.

In ejectment, plaintiff may recover the rental value of the land for purposes to which it is reasonably adapted, and damages for destruction or waste wrongfully caused by defendant while in possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 436 $\frac{1}{2}$; Dec. Dig. \S 125.]

2. EJECTMENT \S 111 — VERDICT — BOUNDARIES OF LAND — JUDGMENT.

To serve as the basis for a judgment for plaintiff in ejectment, the verdict must fix with reasonable certainty the exterior boundaries of

the land in controversy; otherwise no such judgment can be entered thereon.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 327-345; Dec. Dig. § 111.]

3. EJECTMENT § 136—CLAIM FOR DAMAGES—TIME FOR FILING.

A plaintiff in ejectment may file his claim for damages at any time before the selection and impanelment of the jury, subject, however, to the right of defendant to a continuance upon his motion, made in due time and sustained by proof of fraud or surprise operating to his prejudice.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 461, 463; Dec. Dig. § 136.]

Error from Circuit Court, Taylor County.

Ejectment by Elsworth Croston against Benjamin Franklin McVicker. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

John G. St. Clair and Warder & Robinson, all of Grafton, for plaintiff in error. C. M. Murphy, of Philippi, and J. Guy Allender, of Grafton, for defendant in error.

LYNCH, J. In ejectment, plaintiff recovered judgment for the possession of 2½ acres of land situate in Taylor county and \$450 damages for its detention; and defendant, for reversal, assigns uncertainty in the verdict and excessiveness in the quantum of damages awarded.

The declaration describes the tract as—"beginning at a dogwood and running thence S. 63° E. 32 to a chestnut, thence S. 55° W. 28 to Pleasant creek, thence N. 10° W. 31½ to the beginning."

These are the calls in the deed for the same land from Knotts to Bartlett made in 1864. The deeds from Bartlett to Loudin of June 13, 1902, and from Loudin to plaintiff of March 16, 1907, describe the land, not by any definite courses and distances, but as—"lying on the waters of Pleasant creek, bounded on the south by lands of B. F. McVicker, on the east and north by lands of C. E. Conway, and on the west by Pleasant creek."

The verdict follows the description in the declaration and in the Knotts-Bartlett deed. Not finding the dogwood called for as the beginning corner, Morrow, the county surveyor, to whom the case was referred with direction to do any surveying required by either party, began at the chestnut and, with corrections for magnetic variation, ran the second call S. 57° 24' W. 28 poles to a stake on a bank designated by defendant as the bank of the old creek bed; thence N. 70° 36' W. 508 feet. Returning to the chestnut, he ran N. 60° 36' W. 31.75 rods, that being the call from the dogwood corrected and reversed to the chestnut, and, at the intersection of the two lines N. 60° 36' W. and N. 7° 36' W., located the corner designated as a dogwood. About half the distance from the dogwood to the stake on the creek bank, the N. 7° 36' W. line coincides with the bed of Pleasant creek, but for the other half the creek veered outward from that line, thus virtually ex-

cluding the land actually in controversy from the area embraced by the boundary lines called for in the Knotts-Bartlett deed. Evidently to include this parcel, the report says:

"Plaintiff then had the S. 57° 24' line extended from the stake on the bank of old creek to center of new creek, a distance of 9.65 rods."

[2] It is clear, therefore, that, although the jury found for the plaintiff, its verdict left undetermined the ownership and right to possession of the disputed parcel; because it followed the calls of a deed made in 1864, without any correction for variation from the true magnetic meridian or reference to the Morrow survey or to the land really in controversy. It settled nothing of vital importance to plaintiff or defendant. Of course, where the jury finds for the plaintiff the premises as described in a declaration containing a reasonably certain description of the land, which the proof supports, the verdict will usually be deemed sufficient. *Mes-sick v. Thomas*, 84 Va. 891, 6 S. E. 482; *Timber Co. v. Ferrell*, 67 W. Va. 14, 67 S. E. 69. But where, as in *Miller v. Holt*, 47 W. Va. 7, 34 S. E. 956, there is a definite call for course and distance as the division line between plaintiff's and defendant's lands, the true location of which is the real controversy in the suit, the jury must ascertain and fix the location of such line, and a verdict which merely finds for the plaintiff the land as described in the declaration does not determine the question raised by the pleadings. To suffice as a basis for judgment, the verdict must identify the land claimed, with reasonable certainty, by fixing its exterior boundaries. The same rule obtains in an action of detinue. *Timber Co. v. Ferrell*, supra.

Defendant's disclaimer by the metes and bounds stated in the declaration, without designating the creek claimed by the plaintiff as the true boundary line, did not entitle him to a dismissal of the action. Obviously he did not disclaim title to the strip lying between the old and new creek beds, the right to which is the sole foundation of this litigation.

[3] Nor was defendant prejudiced by the filing of plaintiff's statement of damages after the panel of 20 jurors were sworn on their voir dire, but before any further proceeding towards the selection of the trial jury. Such statement may be filed at any time before the trial. Permission to file it after the commencement of the trial, however, should be refused, if filing of the statement would operate as a surprise or fraud upon defendant. Whether it may be filed after the defendant has appeared and pleaded to the action is a matter within the discretion of the trial court; but such discretion should be exercised so as to avoid surprise and injustice to him. *Witten v. St. Clair*, 27 W. Va. 762; *McCann v. Righter*, 34 W. Va. 186, 12 S. E. 497. Defendant did not move a con-

tinuance, nor attempt to show any fact upon which to base such motion.

The damages allowed plaintiff are not sufficiently supported by the proof. His claim consists of four separate items: Injury to and destruction of fruit trees and crops on the disputed land, \$100; destruction of a fence along Pleasant creek, \$50; denial of access to Pleasant creek to secure water for stock and domestic use, \$150; deprivation of the use of a coal mine, \$500. But little evidence tends to sustain the first item. Neither the number nor the value of the fruit trees appears, except plaintiff's statement that "about a hundred of them were peach trees" grown by him from seed, and "some of the apple trees I had got two years before that, and some I had got about a year before that" and "some came down as low as 15 cents, and they ran on up." Of the crops he said: "I had some nice bunch beans and a nice potato patch, and they destroyed everything I had—didn't raise anything that summer—and a nice strawberry patch" scattered at different places over "about half an acre." The evidence concerning the destruction of the fence is still more meager and indefinite:

"Q. You have an item here for destroying fence, \$50. A. Well, I had a nice lot of posts laying there, and he hauled them along with the others. I think there were 80 or 90 of them. Q. What damage did you sustain by reason of his removing that fence? A. Well, \$100."

Asked as to the third item, plaintiff said: "Well, I had some cows, and had to get water for my cattle and everything in my house, and they cut me off from the creek, and I had to carry it away over from another place nearly a mile, I expect"

—during the two years of detention by defendants. But the principal item is that of \$500 for depriving plaintiff of the use of his coal mine for two years, and apparently upon the evidence concerning it the jury in large part based its award of damages. Through an opening on the western side of the creek and near to it, plaintiff, prior to the interruption of his possession by defendant, had mined coal from the 2½ acres for local customers, transporting it over a private way along the stream and by the mouth of the mine. During the two years immediately prior to the suit, defendant, holding hostile possession of the disputed strip, built and maintained a barbed-wire fence along the creek, thereby closing the mouth of the mine and obstructing plaintiff's use of the roadway. Thus he was prevented from marketing coal from his lands. The evidence in support of the \$500 item consists solely of estimates, ranging from \$250 to \$500, made by various witnesses, of the extent of his damage by reason of his exclusion from the mine. These statements were based upon profits plaintiff would have made from the coal he could have mined, but was prevented

from mining, during the two years of defendant's detention.

[1] Was this the proper measure of such damages, even if sustained by sufficient proof? Section 30 (serial sec. 4098) c. 90, Code, authorizing recovery therefor in ejectment, provides that the jury shall—

"Assess the damages for mesne profits of the land for any period not exceeding five years previously to the commencement of the suit until the verdict, and also the damages for any destruction or waste of the buildings or other property during the same time for which the defendant is chargeable."

Here, of course, there was no destruction or waste of the coal. It remained intact in the ground. Some authorities define mesne profits to be compensation for use and occupation. *Henry v. Davis*, 149 Ala. 359, 43 South. 122, 13 Ann. Cas. 1090. But the usual measure for recovery in such case is the annual rental value of the land. *West v. Hughes*, 1 Har. & J. (Md.) 574, 2 Am. Dec. 539; *Mitchell v. Mitchell*, 10 Md. 234; *McLaughlin v. Barnum*, 31 Md. 425; *Credle v. Ayers*, 126 N. C. 11, 35 S. E. 128, 48 L. R. A. 751; 15 Cyc. 205. It is the standard contemplated by our statute as compensation for detention. Plaintiff, therefore, can recover only a fair rent for the use and occupation of the premises for the purposes to which they are reasonably adapted. "This constitutes the rents and profits, in the legal sense of the terms, of such property, and is all the owner can justly claim in this shape from the occupier." *Worthington v. Hias*, 70 Md. 172, 16 Atl. 534, 17 Atl. 1026. In *Bolling v. Lerner*, 26 Gratt. (Va.) 37, the vendor of land refusing delivery of possession after payment of the purchase money, the vendee by suit procured a decree for specific performance and for an account of the rents and profits. The court held:

"In estimating the rents and profits of the land thus held by the vendor, the annual value of the land in the hands of a prudent and discreet tenant upon a judicious system of husbandry is the proper rule in the case, to be influenced in some measure by the mode of treatment of the land by the occupant. Though in such case the rents are estimated, it is proper to charge interest upon them."

So in *Lyons v. Real Estate Co.*, 71 W. Va. 754, 77 S. E. 525, it was held:

"In an action by an owner of land for damages for a trespass, consisting of the building and maintenance of a structure on his land by an owner of adjacent land, only temporary damages are recoverable, and the measure thereof is the rental value of the land, together with compensation for loss of crops, trees, shrubbery, and the like, and injury to the residue of the lot or tract."

To afford opportunity for correction of the various erroneous rulings and findings discussed, we reverse the judgment, and remand the case for new trial.

ROBINSON, J., absent.

(76 W. Va. 426)

GAINER v. GRIFFITH. (No. 2761.)
(Supreme Court of Appeals of West Virginia.
June 1, 1915.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT ⇐101—TERMINATION OF TENANCY—PARTIAL DESTRUCTION OF PROPERTY.

Partial destruction of the subject-matter of a tenancy, by fire or otherwise, does not terminate the tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 814, 815; Dec. Dig. ⇐101.]

2. LANDLORD AND TENANT ⇐101—TERMINATION OF LEASE—DESTRUCTION OF PROPERTY.

The lease of a building impliedly carries the land under it, wherefore destruction of the building by fire does not terminate the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 314, 315; Dec. Dig. ⇐101.]

3. LANDLORD AND TENANT ⇐109—TERMINATION OF TENANCY—ABANDONMENT OF PREMISES.

A tenant's temporary abandonment of the leased premises, in consequence of the destruction of the building by fire, and re-entry of the landlord for the purpose of rebuilding, are not conclusive evidence of a surrender by operation of law.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350-360, 363-365, 368-371; Dec. Dig. ⇐109.]

4. APPEAL AND ERROR ⇐1010—FINDINGS OF FACT—EVIDENCE.

A trial court's finding on an issue of fact, sustained by a decided preponderance of the evidence, cannot be disturbed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ⇐1010.]

Error to Circuit Court, Gilmer County.

Action by Lee Gainer against C. L. Griffith. Judgment for plaintiff, and defendant brings error. Affirmed.

J. D. Jones, of Glenville, and John M. Hamilton, of Grantsville, for plaintiff in error. O. M. Bennett, L. H. Barnett, R. F. Kidd, and Linn, Brannon & Craddock, all of Glenville, for defendant in error.

POFFENBARGER, J. The judgment here complained of, awarding the plaintiff in an action of unlawful detainer the possession of a certain barn, rests upon findings of fact by the court, a jury having been waived and the case submitted to the court in lieu thereof.

The defenses are three in number: (1) The destruction of the subject-matter of the contract and tenancy by fire, working a termination of the lease; (2) abandonment or surrender of the premises; and (3) estoppel on the part of the plaintiff.

[1] The first of these is founded upon the nature of the subject-matter of the contract and the terms in which it was demised, and the other two upon acts and conduct of the parties, after the destruction of the barn by

fire, and conflicting testimony as to the terms of an agreement or understanding between them.

From both the written lease and the oral testimony an inference arises that the barn was in some way connected with another one owned by the lessor and occupied by B. G. Stump. The lease described it as a livery barn situate near a bridge immediately opposite the Glenville Roller Mill in the town of Glenville, "being the main barn and not to include the barn now occupied by B. G. Stump." Though the plaintiff declares the Stump barn was not a part of the barn leased by him, he admits it was "an ell." Nothing further pertaining to the relation of the two barns is disclosed by the evidence.

The term of the lease was five years, commencing July 3, 1912, and the consideration or rental \$15 per month. The lessor reserved, for a period of 30 days from the date of the lease, the use of three box stalls and space for his "rigs." He also reserved the right to build a shed along the side of the building and upon the lot on which it was situated, but not so as to interfere with the passageway to the barn through the lot, and conceded to the lessee the use of one end of said shed for the deposit of the manure from the barn. After about one year of occupancy under the lease, the barn and the one adjacent to it, together with practically all their contents, except an automobile and the horses, were completely destroyed by fire. As the lease contained no covenant on the part of the lessee to rebuild, neither he nor the lessor was bound to do so, but, in about one month after the fire, the lessor commenced the building of a new barn of the same general dimensions and plan, on the old foundation, which he completed in about three months from the date of the fire. During the interval between the date of the fire and the completion of the barn, there was neither payment nor tender of rent nor demand therefor. On the completion thereof, or soon thereafter, the lessee tendered his rent and demanded possession, but the lessor declined his offer and withheld possession of the barn.

The divergence in the argument, in so far as it pertains to the first ground of defense, is found in the application of certain agreed legal propositions, it being contended, on the one hand, that the lease included the land on which the barn stood, and that therefore the entire subject-matter of the lease was not destroyed by the fire; and, on the other hand, that the lease covered and included the barn only, and that therefore the entire subject-matter of the lease was destroyed, in consequence of which the tenancy came to an end. No land is demised eo nomine. The lease conferred, in terms, right of access to the barn through and over a lot described as lying between it and a store building, but, in the leasing or granting clause the barn only was mentioned.

However the barn demised may have been connected with the other one mentioned in the lease, it was regarded and treated as a separate, distinct, and entire building. Intent to demise it as an entirety is disclosed by the reservations of certain stalls and space and right to build an addition to it for partial use of the lessor. For the term specified, the barn was made the property of the lessee, the lessor reserving for a limited time only certain space in it. So amply did the lease cover it that the lessor felt the necessity of reservation of right to build an addition to it. Though the neighboring or adjacent barn is described by the lessee as being "an ell," the one demised was so far separate and distinct as to be deemed susceptible of intelligent and fair description by the use of the terms "livery barn," and he adds that the Stump barn was no part of it. Upon these facts, the trial court could consistently find and hold that the subject-matter of the tenancy was an entire building.

[2] A lease of a room, apartment, or space in a building carries no interest in the land on which the building stands. *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; *Winton v. Cornish*, 5 Ohio, 477; *Graves v. Berdan*, 26 N. Y. 502; 18 Am. & Eng. Ency. L. 308; 24 Cyc. 1044; 2 Taylor, Land. & Ten. § 520; *Jones, Land. & Ten.* § 102. But the lease of a building, eo nomine, carries such land. "So the general rule is well settled to-day that the grant of a house, store, mill, or other building carries with it the land under the building." *Jones, Land. & Ten.* § 102. "Ought there to be any doubt that, if this was a demise of the building when erected, it was also a demise of the ground upon which it stood?" *Sharswood, J.*, in *Bussman v. Ganster*, 72 Pa. 285, holding the lease of a building includes the land whereon it stands. See, also, 24 Cyc. 1044.

It is not contended that anything short of destruction of the entire subject-matter of the tenancy terminates it, and, of course, the ground passing into the tenancy by implication, arising from the lease of the building, remains. Hence the obligation to pay rent and the reciprocal right of possession in the lessee continued after the fire. "Whether a lease has been terminated by abandonment on the part of the lessee and the acceptance of, or re-entry upon, the premises by the lessor is a question of intention. Though a lease, so terminated, is said to have come to its end by operation of law, the legal result arises from the acts of the parties. The intention, on the part of the lessee, to abandon, and, on the part of the lessor, to resume possession of the premises on his own account and treat the lease as having been surrendered, ascertained from their acts and conduct, is the test. It is not an express surrender, but a surrender which the law declares and enforces when the tenant leaves

the premises with the intention not to return thereto and the landlord takes possession of the same with intention to release the tenant from the obligation of his contract and refuse to let him come again into possession of the property." *Sult v. A. Hochstetter Oil Co.*, 63 W. Va. 329, 61 S. E. 313.

[3, 4] Any inference of abandonment and resumption of possession, working a surrender by operation of law, arising from lack of occupancy of the premises, during the interval between the fire and completion of the new barn, and the entry by the lessor for the purpose of rebuilding, is rebutted and overthrown by the trial court's finding as to express intent, manifested by the interlocution of the parties after the fire, provided that finding is sustained by the evidence. That it is there can be no doubt. Against the uncorroborated statement of the lessor to the effect that it was agreed he was not to rebuild for the purposes of the tenancy, the court had the positive evidence of the lessee, his son and another witness, to the exact contrary. Admitting his protest of inability conveniently to do so, two of them say the lessee insisted upon it, and that he acquiesced, and the third says he heard him tell Gainer he would "look around and get after the lumber as quick' as he could." Since the evidence thus heavily preponderates in favor of the plaintiff, it is hardly necessary to say the finding cannot be disturbed.

In view of this insuperable finding, the lack of an estoppel is perfectly distinct and obvious. The conduct of the plaintiff was perfectly consistent with the right he claims, and the defendant could not have been misled by anything he said or did.

Seeing no error in the judgment, we will affirm it.

(76 W. Va. 339)

STATE ex rel. PUBLIC SERVICE COMMISSION v. BALTIMORE & O. R. CO.

(No. 2883.)

(Supreme Court of Appeals of West Virginia.
June 1, 1915.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW § 62—DELEGATION OF POWER—PUBLIC SERVICE COMMISSION—VALIDITY OF STATUTE.

Section 5, of chapter 9, Acts of the Legislature, 1913 (Code 1913, c. 150 [sec. 640]), is not an invalid attempt to delegate to the Public Service Commission the power specifically limited by section 9, article XI, of the Constitution, to the Legislature to "from time to time, pass laws, applicable to all railroad corporations in the state, establishing reasonable maximum rates of charges for the transportation of passengers and freights," etc.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.]

2. CONSTITUTIONAL LAW § 62—DELEGATION OF POWER—PUBLIC SERVICE COMMISSION—VALIDITY OF STATUTE.

Said section but confers upon the Public Service Commission powers of a quasi-legislative and quasi-judicial nature, limited to intra-

state rates, similar to those conferred by Congress upon the Interstate Commerce Commission, limited to interstate transportation, and to administer and carry into effect the general laws of the State, regulating railroads and other public service corporations, enacted in pursuance of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. ☞ 62.]

3. CONSTITUTIONAL LAW ☞62—DELEGATION OF POWER—PUBLIC SERVICE COMMISSION.

While it is now established law by state and federal decisions, that the making of reasonable maximum rates for general application is primarily a legislative function, it is equally settled that legislative control over railways and other public service corporations may, within constitutional limitations, be delegated to Public Service Commissions, the reason for such regulative laws being the distinction between prescribing rates generally, without complaint, controversy or investigation, and directing the observance of a particular rate or schedule after judicial or quasi-judicial investigation of its propriety.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. ☞ 62.]

4. CARRIERS ☞12—RATES—OPERATION OF STATUTE—PUBLIC SERVICE COMMISSION.

Chapter 41, Acts of the Legislature, 1907 (Code 1913, c. 54, §§ 71fi, 71fii [secs. 3020, 3021]), limiting railroads to the rate of two cents per mile for carrying intrastate passengers and baggage remains the paramount law, binding upon the carrier, until in the first instance upon application by the carrier, or by some one injuriously affected thereby, or upon the initiative of the Public Service Commission, such rate has been investigated by the Commission and judicially determined to be unreasonable or confiscatory as to a particular carrier, and therefore invalid, and until then or until such law has been otherwise amended or lawfully nullified, the Public Service Commission has jurisdiction, as prescribed by the act creating it, to compel observance by a carrier of such law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. ☞12.]

5. CORPORATIONS ☞394—REGULATION—PUBLIC SERVICE COMMISSION—CONSTRUCTION OF STATUTE.

Since the decision of this Court in *Coal & Coke Railway Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613, the Act of 1913, creating the Public Service Commission, inaugurated a new system of regulating public service corporations, and that act must be read and interpreted along with chapter 41, Acts of 1907 (Code 1913, c. 54, §§ 71fi, 71fii [secs. 3020, 3021]), and all other previous regulatory statutes, not repealed thereby, as in *pari materia* therewith, and as together constituting the law of the State regulating and controlling all public service corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1576; Dec. Dig. ☞394.]

6. CARRIERS ☞18—REGULATION OF RATES—PUBLIC SERVICE COMMISSION—INJUNCTION.

Until the Public Service Commission, pursuant to the authority conferred upon it by said act, has investigated and determined that a particular rate complained of is unreasonable, and invalid as to a particular carrier, the courts cannot interfere by injunctive process, or otherwise, to stay the hand of the Commission in the performance of its proper duties and functions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. ☞ 18.]

Mandamus by the State, on the relation of the Public Service Commission, against the Baltimore & Ohio Railroad Company. Peremptory writ awarded.

A. A. Lilly, Atty. Gen., Frank Lively, Asst. Atty. Gen., and S. B. Avis, of Charleston, for petitioner. Conley & Johnson, of Charleston, for respondent.

MILLER, J. By mandamus relator seeks to enforce obedience by defendant of its special supplemental order, of April 26, 1915, requiring it to obey, comply with, and conform to the provisions of chapter 41, Acts of the Legislature of 1907 (Code 1913, c. 54 §§ 71fi, 71fii [secs. 3020, 3021]), limiting railroads "in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile," etc., and prohibiting it from putting into effect its proposed increased passenger rates, fares and charges, and its proposed regulations and practices, stated and contained in certain tariffs and schedules, filed by it on April 1, 1915, and from making or putting into effect any other or different passenger rates, fares, regulations and practices, from those prescribed in said chapter, and now in practice, in so far as they relate to the transportation of persons with ordinary baggage, between points and stations within the State of West Virginia, until the 1st day of June, 1915, unless otherwise ordered by the Commission.

The order referred to was supplementary to an order entered on April 24, 1915, which was supplementary to a prior order, entered on April 20, 1915. By the first of said orders the Commission took note of the filing of said tariffs and schedules, on or prior to the 1st day of April, 1915, and of the proposal of the defendant to put them into effect May 1st, 1915, and that such passenger rates, fares and charges were in excess of those allowed by the act of 1907. And in view of said proposed changes it was considered and ordered that the Commission should enter upon a hearing or investigation concerning the propriety and lawfulness of said new tariffs and schedules, and being of opinion that the defendant should obey and comply with the provisions of said act until the Commission should have heard, investigated and finally determined the propriety of said increases, and the lawfulness of the proposed passenger rates, fares, charges and regulations, it was ordered that defendant be forthwith served with a copy of said order, and that it be required to appear before said Public Service Commission on April 24, 1915, and then and there present for consideration any reasons it might desire to present why it should not obey said statute, and why it should not be prohibited from putting into effect such proposed increased passenger rates, fares, etc., for a reasonable time, until the Commission

should have heard, investigated and finally determined the propriety thereof.

On the day so appointed the defendant entered a special appearance, solely and only for the purpose of objecting to any further proceeding or action on the part of the Commission in respect of or in relation to the matters referred to, and filed a statement in writing setting out the grounds of its objection to the jurisdiction of the Commission of the matters and things under investigation and hearing. On consideration whereof, the Commission was of opinion and so ordered, that the grounds of objection were not sufficient, and that it had jurisdiction of the matters therein referred to, and that said special appearance be rejected. Thereupon, on request of the counsel for defendant, additional time was given until April 26, 1915, to enable it to determine what further appearance, if any, it should make in said investigation and hearing, and on the day to which said hearing was continued, defendant failing to enter any further appearance, the second supplemental order, of April 26, 1915, was duly entered.

By respondent's special appearance, on April 24, 1915, jurisdiction was challenged upon the following grounds: First: That relator was without lawful power or authority, (a) to make any order affecting passenger rates, (b) to require appearance by respondent, (c) to require respondent to present reasons why it should not obey or comply with the provisions of chapter 41, of the Acts of 1907, or (d) to make any order prohibiting respondent from putting into effect and operating under the proposed increased passenger rates, fares and charges, referred to in the order of April 20, 1915.

Second: That on April 23, 1915, respondent had instituted its suit in equity in the circuit court of Kanawha County, West Virginia, against the Attorney General, and all the prosecuting attorneys of the several counties of said state, through which respondent's lines of railroad run, and against the several members of the Public Service Commission, to enjoin them and each of them from instituting or in any manner prosecuting respondent, or any of its agents, officers, or employes, for alleged violations of said act, and from in any manner whatsoever interfering with or impeding respondent from putting into force and operating thereunder the rates, tariffs, fares, etc., aforesaid; and attacking in said suit said chapter 41, of the Acts of 1907, as unconstitutional, null and void, and exhibiting with said special plea or appearance a copy of said bill, and alleging that process thereon of said court had been served on relator on April 23rd, 1915, and that notice had been given relator that application for said injunction would be made to said court on May 3rd, 1915. Wherefore, it was alleged, the Public Service Commission could take no action. And the prayer of said special appearance was that

respondent be not required to further appear or answer.

By demurrer, motion to quash, and return to the alternative writ, respondent has presented and relies on the same grounds as a defense to the writ.

It is conceded that the Public Service Commission, purely a creature of the statute, possesses only such powers and authority in the premises as are expressly conferred, or are necessarily implied, in order to properly perform its functions and to carry into effect the plans and purposes of the act creating it. *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 80 S. E. 931. As the statute was construed in that case the functions of the Commission as an administrative board are quasi-judicial and quasi-legislative.

[1] The first ground of attack, in orderly sequence, is alleged want of constitutional authority in the Legislature to delegate to the Public Service Commission the power of making rates. And it is contended that if the Legislature has attempted to confer such authority and jurisdiction upon the Public Service Commission, the act to that extent is void and inoperative, on constitutional grounds.

Section 9, of Article XI, of the Constitution, relied on, provides:

"Railroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law; and the Legislature shall, from time to time, pass laws, applicable to all railroad corporations in the State, establishing reasonable maximum rates of charges for the transportation of passengers and freights, and providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties."

[2] This section is the same as originally adopted in the Constitution of 1872. By acts of the Legislature 1872-3, chapter 227, now contained in chapter 54, § 71a1 Code 1913, serial sections 2996, etc., the Legislature, in the exercise of this constitutional power, classified all railroads and undertook to establish reasonable maximum rates and charges for the transportation of passengers and freights, and to limit railroads thereby. The law as thus enacted remained undisturbed until the passage of chapter 41, Acts of 1907, limiting all railroads to two cents per mile, or fractional part of a mile, except railroads under fifty miles in length, and imposing penalties for violations of the statute, and repealing all acts or parts of acts inconsistent therewith. Thus the maximum rate of two cents per mile, instead of the rates fixed by Acts of 1872-3, was established.

That the Legislature by these statutes undertook to comply with the mandate of the Constitution is manifest, and nowhere has it undertaken to delegate to any board or Pub-

lic Service Commission its legislative authority under the Constitution to establish reasonable maximum rates, or to promulgate and establish tariffs and rates for passengers or freights, to have general application to all railroads. Chapter 9, of the Acts of the Legislature of 1913 (Code 1913, c. 150, §§ 1-21 [secs. 636-656]), establishing the Public Service Commission, and prescribing its powers and duties, unless in the particulars pointed out by counsel for respondent, neither abrogates nor delegates legislative authority imposed by the Constitution, and is but the reasonable exercise by the Legislature under said section of the Constitution, of its authority to regulate tariffs and rates and to provide "for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public," etc.

Section 5, of that act, relied on by relator as warranting the relief sought, is as follows:

"The commission is hereby given the power to investigate all methods and practices of public service corporations, and to require them to conform to the laws of the state. The commission may compel obedience to its lawful orders by proceedings of mandamus or injunction or other proper proceedings in the name of the state in any circuit court having jurisdiction of the parties or of the subject matter, or the supreme court of appeals direct, and such proceedings shall have priority over all pending cases. The commission may change any intrastate rate, charge or toll which is unjust or unreasonable and may prescribe such rate, charge or toll as would be just and reasonable, and change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism as between persons, localities or classes of freight; provided, that the commission shall not reduce any rate, toll or charge within ten years after the completion of the railroad or plant to be used in the public service below a point which would prevent such public service corporation, person, persons or firm from making a net earning of eight per cent. per annum on the cost of the construction and equipment of said railroad or plant. But in no case shall the rate, toll or charge be more than the service is reasonably worth, considering the cost thereof.

"Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in such order, or until revoked or modified by the commission, unless the same be suspended, modified or revoked by order or decree of a court of competent jurisdiction."

We fail to find in this section any delegation of legislative power, specifically imposed by the Constitution on the Legislature. Powers conferred by this act upon our Public Service Commission are similar in character to those conferred by Congress from time to time upon the Interstate Commerce Commission, and by many of the states upon commissions of like character, for the control and regulation of public service corporations.

In the early history of the Interstate Commerce Commission, though not specifically conferred, jurisdiction was assumed not only to investigate and determine and report

whether a specific rate was unreasonable, but to order and put in force such rate as the Commission found to be reasonable. The question as to such authority seems to have been left in some uncertainty until the noted case of *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243, opinion by Mr. Justice Brewer. After having reviewed the previous cases this learned judge sums up as follows:

"Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the Commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad company should follow the rates thus determined to have been in the past reasonable and just."

As is apparent the basis of this decision was that the powers denied the Commission were not specifically conferred by the Act of Congress (Act Feb. 4, 1887, c. 104, 24 Stat. 379). Subsequently by the amendment of 1906, known as the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584), the Commission was given further power, after finding an existing rate unreasonable, to fix a reasonable rate for the future, and to enforce observance thereof; and later by the amendment of 1910, known as the Mann act (Act June 25, 1910, c. 895, 36 Stat. 825), the power of the Commission was enlarged so as to include the suspension before going into effect of any increase in rates announced by a carrier, for certain limited periods, pending its investigation of the reasonableness of such rates.

By the act creating the Public Service Commission of this state, as originally passed, substantially all the powers conferred by Congress upon the Interstate Commerce Commission, respecting interstate carriers, except the power to suspend the operation of rates, or changes in rates, were conferred upon the relator, in respect to intrastate railroads. And by a recent amendment of section 9, of said act, by chapter 8, of the Acts of 1915, not in force at the time these proceedings were begun, the Commission was empowered, by simple protest, or by an order, to suspend pending a hearing or final decision of the matter, any proposed modification, change, or annulment of any pre-existing rate.

[3] While it is conceded, as a general proposition, that the making of railroad rates or reasonable maximum rates, for general application, primarily at least, is a legislative function, nevertheless it seems to be now established law, by state and federal decisions, that legislative control over railways and other public service corporations may, within constitutional limitations, be delegated to Public Service Commissions. 2 Wi-

loughby on the Constitution, § 778, and cases cited in notes; 4 R. C. L., pages 620, etc., paragraphs 98 to 96, inclusive; Beale & Wyman, Railroad Rate Regulation, §§ 1032 to 1035, inclusive.

The reason behind all such regulatory laws and boards or commissions is the clear distinction to be observed between the prescribing of rates generally without any complaint, controversy, or investigation, and directing the observance of a certain particular rate or schedule, after judicial or quasi-judicial investigation of its propriety. 1 Drinker on the Interstate Commerce Act, pp. 394, 395, and cases cited; Beale & Wyman on Railroad Rate Regulation, *supra*, § 1034. In *Interstate Commerce Commission v. Chi., R. I. & Pac. Ry.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946, the power of the Interstate Commerce Commission, to investigate and pronounce unreasonable and discriminatory existing or proposed new rates, and to prescribe other rates in place thereof, was distinctly decided. See, also, *Interstate Commerce Commission v. Perry*, 3 Interst. Com. R. 740, where, prior to the amendments of the federal act, power in the Commission was asserted not only to find that an existing rate was unreasonable, and forbid its continuance, but also to ascertain, order and enforce a rate that was reasonable, and where the reasons for the right to exercise such authority in special instances are dilated upon by Veazey, Commissioner.

We are of opinion, therefore, that there is no merit in the contention that the Public Service Commission is without constitutional or legislative authority to exercise the powers specifically conferred upon it by the act of the legislature creating it. In exercising those powers and functions it is not exercising powers specifically confined to the Legislature, but those quasi-legislative and quasi-judicial, and administrative in character, and such powers as we held in *United Fuel Gas Co. v. Public Service Commission*, *supra*, the Legislature has constitutional authority to delegate.

[4] The second ground urged in resistance of the writ is that the present statute, chapter 41, Acts 1907, in pursuance of the constitutional mandate, is the paramount law of the state, is still in force, and that the relator has no power to change or modify that law, or make any new or different rate for carriers of passengers. And while affirming and urging with persistency this proposition, in opposition to the authority and jurisdiction asserted by the Public Service Commission, counsel for respondent affirm with equal emphasis, the cognate proposition, that as to the railway company the statute is invalid and without binding force or authority, even *prima facie*, upon it, because, as it has attempted to determine for itself, the maximum rate fixed by the statute is unreasonable and confiscatory, and that re-

gardless of this paramount law, it may with impunity and without application to or authority granted by the Public Service Commission, or by any judicial process, promulgate and put into effect new tariffs and rates, and that the Commission is without power or jurisdiction over it in the premises, to investigate or decide whether the maximum rate prescribed by the statute is reasonable or confiscatory, or to make any order in the premises.

But for the jurisdiction conferred upon the Public Service Commission by the Act of 1913, and upon principles enunciated in *Coal & Coke Railway Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613, on showing to the satisfaction of the court that the maximum rate prescribed by the statute, as to it, is confiscatory, equity would have jurisdiction, on that ground, to enjoin, for the time being, enforcement of the statutory rate. But that decision is no authority for the proposition now advanced in this case, that before judicial inquiry injunction will lie against the public officers from enforcing the statute. True, a preliminary injunction was granted by the circuit court in that case, but the propriety of that injunction was not presented here, and the practice finds no justification in the decision of this court in that case.

[5] Since the decision of the *Coal & Coke Railway Case*, however, we have the Public Service Commission, with the powers, jurisdiction and authority conferred by statute upon it. It is not contended, but quite the contrary, that the act creating this Commission repealed chapter 41, Acts of 1907. It is conceded on both sides of this controversy, that that act is still in force, and being in force it must be construed as a part of the new system inaugurated by the act creating the Public Service Commission for the regulation and control of public service corporations, including railway companies, and that the new act must be read in *pari materia* with all previous legislation relating to the subject of rates and regulative control. *McChord v. L. & N. Ry. Co.*, 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; *Coal & Coke Railway Co. v. Conley*, *supra*, point 38 of the syllabus.

While we do not find the act relating to the Public Service Commission, in force at the time these proceedings were inaugurated, specific authority to suspend existing or new rates, we do find in section five above quoted, power to investigate all methods and practices of public service corporations, and to require them to conform to the laws of the state. It was pursuant to this authority that relator entered upon the investigation recited in the original and special supplemental orders, and summoned respondent before it, and the command of the alternative writ, sought to be made peremptory, as we have seen, commanded respondent to obey and comply with and conform to the provisions of said chap-

lar 41, of the Acts of 1907, and to prohibit it from putting into effect the proposed increased passenger rates, and from making or putting into effect any other or different passenger rates than those prescribed in said acts until the 1st day of June, 1915, unless otherwise ordered by the Commission.

[8] If it be true as contended that the statutory rate for passengers and baggage, as to respondent, operates to deprive it of a reasonable and lawful return for the services rendered, and therefore confiscatory, the proper construction of the act creating the Public Service Commission, in our opinion, requires that resort be first had to that commission as the primary forum in which to have investigated and determined those questions. That Commission being given the power and authority to investigate and to change any intrastate charge or toll which is unjust or unreasonable and to prescribe a rate that will be just and reasonable, must be construed to include the power to change the rate prescribed by the statute, if such maximum rate is in fact confiscatory and void on constitutional or other grounds. In our opinion this power must necessarily have been included in the plan and scheme of the Legislature in creating the Commission; otherwise corporations so affected would be put beyond the control of the Public Service Commission, while other corporations as to whom the rate prescribed by statute is not confiscatory would remain subject to its control. In our opinion the statute binds and controls respondent until it has been lawfully determined by the Public Service Commission, or afterwards by a court of competent jurisdiction, that the prescribed rate is confiscatory. And while the Commission may not have been empowered, at the time these proceedings were begun to suspend a rate lawfully promulgated, it has the specific power given by the provision of the statute quoted, to require respondent to conform to the law of the state, and this includes jurisdiction and power to require it to adhere to the rate prescribed by the statute, until by lawful and orderly proceedings under the statute, by application to the Public Service Commission, that rate has been lawfully suspended or changed, for until then that law must be regarded the law of the state enforceable against the railway company.

As thus construed the statute imposes no hardship upon or barrier to the speedy determination of respondent's rights in the premises. The remedy given by this statute is more summary and is calculated to lead to better and quicker results because of the peculiar powers and functions of the Commission, than resort to a court of equity in the first instance, whose powers are limited to the determination whether a specific rate is unreasonable, and it is without power or jurisdiction to determine what rate would be reasonable, and to enforce the same.

According to the original writ the Public

Service Commission had already entered upon the investigation of respondent's proposed new schedules and rates. Since the establishment of the Interstate Commerce Commission the federal courts have declined to take jurisdiction to test the validity of interstate rates pending proceedings for the same purpose before the Interstate Commerce Commission, that forum being the primary jurisdiction to which resort should be made for relief against unreasonable and confiscatory rates. *B. & O. R. Co. v. U. S. ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *McChord v. L. & N. R. Co.*, supra; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *Meeker v. Lehigh Valley R. Co.* (C. C.) 162 Fed. 354; *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, 166 Fed. 206, 92 C. C. A. 114; *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; *Robinson v. B. & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323; *Coal & Coke Ry. Co. v. Railway Co.*, 67 W. Va. 448, 68 S. E. 107, 28 L. R. A. (N. S.) 108. In our opinion the rules and principles of these decisions should be applied.

Not only is the right given to respondent to apply for relief in the first instance to the Public Service Commission, a forum having quasi-legislative and quasi-judicial powers, but if aggrieved by the entry of any final order of the Commission affecting it, it may apply to this court for suspension of such final order, and for a full hearing upon the merits of its case as prescribed by section 16 of the Public Service Commission act, and as interpreted and construed by this Court in *United Fuel Gas Co. v. Public Service Commission*, supra, or as there indicated, by original application to any other court having jurisdiction, to have determined the reasonableness of the rates as fixed and ordered to be put into effect by the Public Service Commission.

Some of the propositions advanced by counsel for the relator, supported by many federal supreme court decisions, in support of the primary jurisdiction of the Public Service Commission are: (1) That rate making is primarily a legislative function; (2) that there is no distinction between the exercise of this function directly by the legislature or mediately through a Commission; (3) that injunction does not lie against the exercise of legislative function, and (4) that injunction does not lie against the making of a rate, or against a Commission before the rate is made. We think it will be unnecessary to enter upon any other or further discussion of these propositions, and as the cases cited in support of them are so numerous, even a citation of them here would overburden this opinion.

What has now been said we deem suffi-

ciently comprehensive of all propositions relied upon by respondent in resistance of the writ, and in affirmance of those propositions relied upon by the relator, and we are of opinion that the peremptory writ prayed for should be awarded, and it will be so ordered.

(101 S. C. 239)

CLARK et al. v. SOUTHERN EXPRESS CO.
(No. 9113.)

(Supreme Court of South Carolina. May 26, 1915. On Petition for Rehearing, July 8, 1915.)

APPEAL AND ERROR ¶501—**RESERVATION OF GROUNDS—EXCEPTIONS.**

An appellate court will not consider any point raised by an exception unless it appears in the record that it was presented to or considered by the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. ¶501.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Action by Mary Etta Cathcart Clark and others against the Southern Express Company. From a judgment for plaintiffs, defendant appeals. Affirmed on condition.

Barron, McKay, Frierson & Moffatt, of Columbia, for appellant. Logan & Edmunds and C. T. Graydon, of Columbia, for respondents.

HYDRICK, J. The question presented by this appeal is foreclosed by the decision of this court in the case of Varnville Furniture Co. v. Railway, 98 S. C. 63, 79 S. E. 700.

Appellant asked leave to amend its exception by adding thereto a ground which was not taken in the courts below. If the exception had been taken in due time, this court would not have considered the additional ground upon which the constitutionality of the statute is sought to be assailed, because it is well settled by numerous decisions that this court will not consider any point raised by an exception, unless it appears in the record that it was presented to or considered by the court below.

Judgment affirmed. Let the remittitur be stayed for 30 days to enable appellant to apply for a writ of error.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

On Petition for Rehearing.

PER CURIAM. Upon consideration of the within petition, it is ordered that the judgment of this court heretofore filed affirming

the judgment of the circuit court be modified, and that the judgment of the circuit court be reversed, unless the plaintiff shall, within 20 days after notice of the filing of the remittitur herein, remit so much of the judgment as includes the penalty recovered, and, upon such remittitur being entered, that the judgment of the circuit court be affirmed.

(101 S. C. 303)

STATE v. McCALLA. (No. 9121.)
(Supreme Court of South Carolina. June 23, 1915.)

HOMICIDE ¶74—**MANSLAUGHTER—INVOLUNTARY MANSLAUGHTER.**

One guilty only of ordinary negligence in handling a pistol, which results in the death of a bystander, may be convicted of involuntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 97-101; Dec. Dig. ¶74.]

Watts, J., dissenting.

Appeal from General Sessions Circuit Court of Abbeville County; Ernest Moore, Judge.

William Henry McCalla was convicted of manslaughter, and he appeals. Dismissed.

Graydon & Graydon, of Abbeville, for appellant. R. A. Cooper, Sol., of Laurens, for the State.

GARY, C. J. This is an appeal from the sentence imposed upon the defendant, who was convicted of manslaughter. The question is whether a person is subject to conviction for involuntary manslaughter, when he is only guilty of ordinary negligence in handling a pistol which results in the killing of a bystander. The following cases show that the exceptions raising this question cannot be sustained. *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6; *State v. Tucker*, 86 S. C. 211, 68 S. E. 523; *State v. Revels*, 86 S. C. 213, 68 S. E. 523.

The appellant's attorneys upon request were granted permission to review said cases, but this court is satisfied that they embody sound propositions of law, and see no reasons for overruling the principles upon which they were decided.

Appeal dismissed.

HYDRICK, FRASER, and GAGE, JJ., concur.

WATTS, J. I dissent. The judge's charge, in my opinion, was erroneous and prejudicial to the defendant. In accidental killing only is defendant guilty when he is guilty of gross negligence or criminal carelessness, and not ordinary negligence.

(101 S. C. 304)

STATE v. ENGLISH. (No. 9122.)

(Supreme Court of South Carolina. June 30, 1915.)

1. CONSTITUTIONAL LAW §83 — HUSBAND AND WIFE §308—WIFE ABANDONMENT—IMPRISONMENT FOR "DEBT."

Cr. Code 1912, making it a misdemeanor for a husband to abandon his wife and to fail to support her without just cause, punishable by imprisonment, does not violate Const. art. 1, § 24, prohibiting imprisonment for debt, since the imprisonment is not for any "debt," but for failure to obey the statute obligations incident to the marriage contract or relation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83; Husband and Wife, Cent. Dig. § 1101; Dec. Dig. § 308.]

For other definitions, see Words and Phrases, First and Second Series, Debt.]

2. HUSBAND AND WIFE §305—WIFE ABANDONMENT—DEFENSES.

In a prosecution under Cr. Code 1912, § 697, making the abandonment of a wife and failure to support her without just cause a misdemeanor, punishable by imprisonment, it is no defense that the marriage was contracted under the proviso of section 389, permitting a seducer to escape the penalty of his wrong by marrying his victim.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1103; Dec. Dig. § 305.]

3. MARRIAGE §35—VALIDITY—MARRIAGE TO ESCAPE PUNISHMENT.

A marriage resulting under the proviso of Cr. Code 1912, § 389, penalizing seduction under promise of marriage, but permitting him to escape the penalty of his wrong by marrying his victim, is valid.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 21; Dec. Dig. § 35.]

4. HUSBAND AND WIFE §305—WIFE ABANDONMENT—DEFENSES—WIFE NOT DEPENDENT FOR SUPPORT.

It is no defense to a prosecution under Cr. Code 1912, § 697, making it a misdemeanor to abandon a wife and to fail to support her without just cause, that she was not dependent upon her husband for support, and that her parents were able to support her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1103; Dec. Dig. § 305.]

5. HUSBAND AND WIFE §314—WIFE ABANDONMENT—EXCUSE—QUESTION FOR JURY.

In a prosecution under Cr. Code 1912, § 697, making it a misdemeanor to abandon a wife and to fail to support her without just cause, punishable by imprisonment, defended on the ground that defendant had just cause or excuse, because before her marriage to him, and without his knowledge thereof until after marriage she had been guilty of gross immorality with other men, evidence held to make the just cause or excuse a question for the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1111; Dec. Dig. § 314.]

6. CRIMINAL LAW §1170—APPEAL—HARMLESS ERROR—QUESTION OF EVIDENCE.

In such prosecution the exclusion of evidence that the wife before her marriage to defendant, and without his knowledge thereof until after the marriage, had been guilty of immoral conduct with a particular man, was harmless, where other evidence of like character was received, and where her confession after marriage

that before marriage she had been guilty of incest was likewise received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.]

Appeal from General Sessions Circuit Court of Marlboro County; H. F. Rice, Judge.

Brooks English was convicted of abandonment of his wife and failure to support her without just cause, and he appeals. Affirmed.

J. K. Owens and S. S. Tison, both of Bennettsville, for appellant. Townsend & Rogers, of Bennettsville, for the State.

GAGE, J. The defendant was tried and convicted for a violation of section 697 of the Criminal Code of 1912, the law which makes it a misdemeanor for a husband to abandon his wife and to fail to support her without just cause. The appeal is from a judgment of imprisonment entered upon the verdict.

There are five exceptions; the second is split into five, and the third is split into four, alleged errors. But the appellant's counsel concedes in his argument that the case presents really only four issues, and he has stated them thus, he contends: (1) That the statute in the case is in violation of section 24, article 1 of the Constitution of 1895; (2) that the marriage was illegal because had under the provisions of section 389 of the Criminal Code of 1912; (3) that the wife was admittedly not dependent upon her husband for support and that circumstance bars the prosecution; (4) that the husband had "just cause or excuse" to abandon and fail to support his wife, because, before her marriage to him, and without his knowledge thereof until after marriage with him, she had been guilty of gross immorality with other men.

History: The prosecutrix was married to the defendant in the latter part of 1911 when she was 17 years old. The marriage resulted under the proviso of section 389 of the Criminal Code; that which permits a seducer to escape the penalty of his wrong by marrying his victim. The defendant abandoned his wife in the early months of 1912, and has admittedly done nothing since then towards her support. She gave birth to three children, one in 1911, one in 1913, and one in 1914, all now dead, and all by the defendant, so she swears. The defendant did not deny the paternity of the first child, but did, by necessary inference, deny that of the others.

It was admitted at the trial on circuit, that the prosecutrix and the defendant had been married, and that the defendant had abandoned her and failed to supply her with the necessities of life. The excuse for his conduct is that he had just cause to abandon his wife; that the marriage is of no force, because contracted under compulsion; that the statute creating the offense is against the

fundamental law; that the wife is not dependent upon him for support, because her father is able to do that for her. These defenses are but a restatement of the four exceptions. They will be considered in the order first hereinabove stated.

[1] I. It is true the Constitution of 1895, and for that matter most others, prohibit imprisonment for debt except in cases of fraud. From that fundamental it is argued: (1) That defendant made a contract of marriage with the woman; (2) that his failure to support her constituted a breach of the contract; and (3) that for such breach the Legislature cannot penalize the defendant by imprisonment. The argument is not sound; the conclusion is too general for the limited character of the premises.

It is true marriage has been termed by our courts a civil contract, but it has not been confined to that definition. Issues depend upon it, and results spring out of it which do not follow upon the performance or the breach of other contracts. A relationship is not much simplified by calling it a contract, for thereout may arise multitudinous and different rights.

Coming now to the minor premise of the argument: It is true one of the many obligations of the marriage contract is that resting on the husband to support the wife, however poorly that obligation may in fact be sometimes performed. The implied contract to support is incident to the marriage relation. But the parties to the marriage contract are not alone interested in the performance of the implied obligation to support. All those who constitute organized society have a direct interest in that event. The state has always busied itself about the domestic relations; about marriage and who may contract it, and how women may be protected from the force and stratagem of men; about children, their education, and their employment; about morality and how it shall be preserved in the family. Those forces which operate to impair the integrity of the family will finally sap the foundations of the state. Society is interested that the family shall be maintained first of all by meat and bread. The state may command that in behalf of all its members; it has commanded it by the statute under review. The penalty for the breach of the command is imprisonment. But that is not for any "debt" due by the husband to the wife; it is for the husband's failure to obey society's law, made for society's subsistence.

The case is likened to the criminal statute against bastardy. There it was held:

"A fine imposed for the violation of a statute is not a 'debt,' within the constitutional provision forbidding imprisonment for debt, * * * the term 'debt' is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of * * * (a public duty)." *State v. Brewer*, 38 S. C. 268, 269, 16 S. E. 1001, 1003, 19 L. R. A. 362, 37 Am. St. Rep. 752.

This case does not fall within the strictures of *Ex parte Hollman*, 79 S. C. 13, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

In our opinion the statute is not within the constitutional prohibition.

[2, 3] II. A sufficient answer to the second contention, that the marriage is void because contracted under duress, is that the defendant would thereby completely evade two statutes, that one now under review, and section 389 which penalizes seduction under promise of marriage. The defendant escaped imprisonment for a violation of that statute by marrying his victim, an act made permissible by the proviso to that statute; he now seeks to escape imprisonment for a violation of section 697, because, in effect, he had aforesaid violated another law. There would be some manifestation of the spirit of justice, if the defendant should now, after ignoring his marriage vows, submit himself to be punished for the first wrong he did; but he does not do that. The statute penalizing seduction under promise of marriage has not been directly assailed; but it may be sustained under like principles as the statute now under review. The second exception is therefore without merit.

[4] III. The third exception is faulty on its face. To sustain it would be to acquit those wrongdoers who may have married women with parents able to support them, and to convict those wrongdoers who may have married women whose parents are poor.

[5, 6] IV. The last exception involves a construction of those words of the statute which "excuses" the husband to abandon his wife, and the rulings and charge of the circuit court thereabout.

The court was requested by the defendant to charge, and did so charge, that "what is just cause or excuse is a question for the jury." The defendant tendered one witness to prove that the wife after her marriage told the husband that she had before marriage been guilty of incest. The testimony was received. The defendant tendered a witness (Oscar Odom) to prove that before the marriage he and the prosecutrix had been guilty of immoral conduct, unknown to the defendant before marriage. That testimony was received. A witness (Bradford Quick) was tendered to prove like conduct by the prosecutrix with him. The court ruled "if it is after marriage it is competent: if it was prior to marriage it is incompetent." The witness did not fix the time, and he did not answer. The objection therefore that Quick's testimony was rejected cannot avail, because Odom's testimony of like character was received, and so was the testimony about incest. Nor can the defendant object that the court left it to the jury to ascertain what amounted to just cause; the defendant suggested that view to the court.

The wife denied the testimony about incest and the testimony of Odom. The issue

thereabout was for the jury, and if the jury concluded that the wife swore truly, then the defendant was left without just cause or excuse for his abandonment of her.

In any view of the cause the judgment of the circuit court must be affirmed; and it is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(100 S. C. 227)

PREACHER v. SOUTHERN EXPRESS CO.
(No. 9127.)

(Supreme Court of South Carolina. July 8, 1915.)

On rehearing. Modified, and reversed conditionally.

For former opinion, see 100 S. C. 227, 84 S. E. 1008.

PER CURIAM. Upon consideration of the foregoing petition, it is ordered that the judgment of this court, affirming the judgment of the circuit court, be modified, and that the judgment of the circuit court be reversed, unless the plaintiff shall, within 20 days after notice of the filing of the remittitur herein, remit so much of the judgment as includes the penalty recovered, and, upon his entering such remittitur, that the judgment of the circuit court be affirmed.

(76 W. Va. 322)

BAILEY v. GOLLEHON.

(Supreme Court of Appeals of West Virginia. June 8, 1915.)

Dissenting opinion.

For majority opinion, see 85 S. E. 556.

WILLIAMS, J. Leaving out of consideration the direct testimony of defendant that he saw Bailey take the papers out of Harman's pocket, and later saw him open the stove door, the remaining facts, that may be regarded as clearly established facts, are not sufficient to warrant the court in saying, as matter of law, that probable cause existed for believing Bailey guilty of the crime with which he was charged. No other witness corroborates defendant in respect to what he says he saw Bailey do, and Bailey flatly contradicts him. Their credibility, as well as the credibility of every other witness, was a jury question. I do not think the evidence warrants the assertion of fact in the opinion that "Bailey was the only person in the room who was clearly and undoubtedly in a position from which the package could have been taken and put in the stove, without Harman's knowledge." Harman had the papers in his right coat pocket, and was sitting at the table. Bailey swears that Peery was standing at Harman's right side, and was nearer to him than he was. Bailey is corroborated by Peery, who says he was

standing so close to Harman that Bailey could not have taken the papers out of Harman's pocket without his (Peery's) knowing it. No witness, except defendant, says Bailey opened the stove door, and no one else present appears to have suspected that Bailey took the papers. He was proven to have a good reputation. The only material facts tending to show probable cause, not controverted, were the loss of the papers and the subsequent finding of their charred remains in the stove. It is not shown that Bailey had any motive for destroying them, and, apart from defendant's testimony, there was as much ground to suspect Peery as Bailey, and not a sufficient ground to warrant a reasonable belief that either of them was guilty. The prosecuting attorney testified that all he knew of the commission of the alleged crime, at the time he advised the prosecution of Bailey, was what defendant had told him, and that he so advised because he believed his statements to be true. If what defendant says he saw was true, it amounted to more than probable cause; it was direct evidence of guilt. But, if it was not true, there are not, in my opinion, sufficient uncontroverted facts to show probable cause; hence that question was properly submitted to the jury. The case was fairly tried upon all the evidence, and instructions, as to the law, which were even more favorable to defendant than the law warrants, and I do not think the court has any right to disturb the jury's verdict. I would affirm the judgment.

(76 W. Va. 531)

MARSHALL v. NICOLETTE LUMBER CO. et al.

(Supreme Court of Appeals of West Virginia. June 15, 1915.)

(Syllabus by the Court.)

1. EQUITY \S 446—BILL OF REVIEW—RIGHT. A bill of review lies to error of law, but not to an erroneous conclusion on evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 1079-1090; Dec. Dig. \S 446.]

2. EQUITY \S 447—BILL OF REVIEW—RIGHT—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

For a party to maintain a bill of review on after discovered evidence, it must appear that due diligence by him on the former hearing would not have brought to light the new evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 1091-1094; Dec. Dig. \S 447.]

3. EQUITY \S 447—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE—WHAT CONSTITUTES.

Additional evidence of the same kind and to the same point is cumulative and will not avail as after discovered evidence to maintain a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 1091-1094; Dec. Dig. \S 447.]

Appeal from Circuit Court, Wood County.

Bill of review by T. Marcellus Marshall against the Nicolette Lumber Company and others. From decree for defendants, plaintiff appeals. Affirmed.

Merrick & Smith, of Parkersburg, for appellant. Hall & Hall, of Sutton, and Van Winkle & Ambler, of Parkersburg, for appellees.

ROBINSON, P. The decree appealed from dismisses a bill of review. A thorough consideration of the record leads us to the conclusion that it is right. The alleged errors of law in the former decree are not found. The evidence alleged and submitted as newly discovered, by the use of reasonable diligence could have been submitted on the former hearing. Besides, it is merely cumulative to the previous evidence.

[1] If there is error in the decree sought to be opened by the bill of review, it is purely one in the determination of the facts—an erroneous finding on the evidence. We do not say that the former decree is erroneous in any particular, for we do not have it on appeal. It is before us only on bill of review. We simply say that no error was committed in entering the former decree unless it be that the court wrongly adjudged the issue of fact arising on the pleadings and evidence. On bill of review we have no province to correct such error if it exists. A bill of review lies to error of law, but not to an erroneous conclusion on evidence. *Lorentz v. Lorentz*, 32 W. Va. 556, 9 S. E. 886; *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66; *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

[2] On the score of after discovered evidence the bill of review is plainly not maintainable. That which was submitted as after discovered evidence can not be considered as such. It seems useless to go into details here. It suffices to say that it is clearly apparent from the record that, though the evidence now sought to be relied on is in a sense newly discovered, the use of the most ordinary diligence would have produced it on the former hearing. A litigant can not close his eyes to reasonable sources of evidence prior to a submission and determination of his cause, and then after the decree is entered against him become so spurred to the diligence which he should have observed in the first instance that he may obtain a re-hearing by submitting evidence obtainable on the previous hearing. An essential of the rule for a bill of review on after discovered evidence, is that the new testimony could not have been obtained with reasonable diligence on the former hearing. It must appear that the party was diligent in collecting his evidence on the former hearing and that due diligence under all the circumstances would not have brought the new evidence to light before the decree. *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953. All the cases say this.

In this case plaintiff was certainly derelict in not producing on the original hearing the evidence he now brings forward. He was seeking to prove liability on a logging contract, so that he might obtain a decree for

the amount of an order which one of the parties selling the logs had given him on those to whom they were sold. Naturally he should have looked to the parties to the contract for evidence of what was due under it. They kept the very books and were in possession of the same evidence that he would now bring up on a re-hearing. He must have known on the former hearing that the evidence he now seeks to rely on was in their possession. True, plaintiff to an extent sought this source of evidence on the former hearing, but did not deeply probe. Though the process of the court, and a full examination of the witnesses naturally available, would have produced all that he now presents, he did not on the former hearing go far toward obtaining it. That which he presents as after discovered evidence to be read in support of the bill of review, is really not the kind of after discovered evidence which can have place in overturning a decree fairly and considerably entered and foreclosed. For, reason pointed plaintiff to the same evidence on the former hearing. With only ordinary diligence it would have been forthcoming. A comparison of the evidence taken before the decree with that subsequently introduced, shows clearly that the latter by simple diligence could have been known and put in before. No such newly discovered evidence can be read in support of a bill of review.

[3] Again, it appears from the original evidence and that now asked to be read that the latter is merely cumulative to the former. It is only additional evidence of the same kind to the same point. It is not dissimilar to the previous evidence. It does not prove some distinct affirmative fact not proved, and which no evidence tended to prove on the former hearing. Additional evidence of the same kind and to the same point is cumulative and will not avail as after discovered evidence to maintain bill of review. It is the resemblance of the facts to those previously proved that makes them cumulative. *Grogan v. Railway Co.*, 39 W. Va. 415, 19 S. E. 563. The facts sought to be established by the alleged after discovered evidence relied on in this case, are precisely the same facts which were sought to be established by the evidence on the former hearing.

In the light of the foregoing observations, we must affirm the decree complained of.

LYNCH, J., absent.

(76 W. Va. 534)

MORGAN et al. v. POOL et al.

(Supreme Court of Appeals of West Virginia.
June 15, 1915.)

(Syllabus by the Court.)

CANCELLATION OF INSTRUMENTS — 27 —
RIGHT OF ACTION—FORFEITED LANDS.

A former owner who has lost title by forfeiture to the state, has no real litigable right in the land while the title is so vested. He can

maintain no suit in regard to the land while the state has the forfeited title, other than a petition to redeem filed in the special proceeding therefor provided by statute.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 39-42; Dec. Dig. § 27.]

Appeal from Circuit Court, Roane County.

Suit by Amanda J. Morgan and others against W. P. Pool and others. From decree for defendants, plaintiffs appeal. Modified and affirmed.

R. E. Bills, of Parkersburg, and J. W. Lance and Ryan & Boggess, all of Spencer, for appellants. Pendleton, Mathews & Bell, of Spencer, for appellees.

ROBINSON, P. Amanda J. Morgan and husband conveyed to Pool a small parcel of land. By this suit they seek to cancel the conveyance as having been obtained from them by deception and fraud. Having been denied relief by the circuit court, they have appealed.

By the pleadings and proof it appears that plaintiffs did not own the land when they conveyed to Pool and would not own it now if the conveyance was canceled. Long before the conveyance to Pool, plaintiffs had allowed the title to the land to become forfeited to and vested in the State. It has not been redeemed. The State has the title. Plaintiffs have no title. The most that they have is a mere grace to redeem. Of that they have not availed themselves. They lost nothing by the conveyance to Pool, and he gained nothing thereby, unless it be that the conveyance operated to transfer from the one to the other the mere privilege of redemption which the law accords. Whether it so affected the privilege of redemption, we do not decide. That question belongs to another proceeding—the one which the law has specially prescribed for praying redemption of lands. The land cannot be redeemed in this suit. It can only be redeemed in a suit pursuant to the provisions of Code 1913, ch. 105. Until the land is redeemed pursuant to law, neither plaintiffs nor Pool have the least title to it. Nor do we know that they will ever ask the privilege of redemption. Besides, the State may transfer the title so that the privilege to them will be forever gone.

All this being true, what have plaintiffs and Pool to litigate about in this cause? Assuredly nothing. Shall plaintiffs be given a remedy when they have no right? Before they can have what they pray for herein, they must show that the land is theirs, clouded by a deed obtained from them by fraud. A court of equity is not open to do a vain thing. A cancellation of the deed to Pool will not give them the land. Were we to cancel the deed, the land would still belong to the State, and plaintiffs would have nothing more than they now have. It may be said that they should

be allowed to have the conveyance canceled so as to settle that they may redeem. But the question who may exert the mere privilege of redemption which the law in its grace accords, belongs exclusively to a suit instituted by the commissioner of school lands. The privilege to redeem has been extended in no other way by the law. A reading of Code 1913, ch. 105, will disclose the policy of confining the question of redemption to the proceeding provided for therein. An independent suit might thwart that policy. Besides, why should we here cancel the deed to Pool so that plaintiffs may redeem, when we do not know that they will ever ask to do so in the manner prescribed by law or that the privilege can be accorded to them if they do ask it?

That a former owner who has lost title by forfeiture to the State has no litigable right in the land while the title is so vested, is well settled. He can maintain no suit in regard to the land while the state has the forfeited title, other than a petition to redeem filed in the special proceeding therefor provided by statute. He can not maintain ejectment, suit to remove cloud, or other proceeding based on title to the land, for he has no title. The only action which he can take about the forfeited land, is to ask of the State the grace which it may accord if it has not already given the title to one more deserving. *Lawson v. Pocahontas Thin Vein Coal Land Co.*, 73 W. Va. 296, 81 S. E. 583; *State v. Mathews*, 68 W. Va. 89, 69 S. E. 644; *Stockton v. Craig*, 56 W. Va. 464, 49 S. E. 386; *Mathews v. Glenn*, 100 Va. 352, 41 S. E. 735; *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214.

Plaintiffs have neither a legal nor an equitable right on which they may maintain this suit. The relief for which they prayed was properly denied. But the decree went further and declared "that the defendant W. P. Pool do hold the 1¼ acres of land in the bill and exhibits mentioned and described, free from the claims of the plaintiffs and all persons claiming under them." It further adjudicated that an oil lease executed by Pool, covering the land, was a good and valid lease and that Pool should take the royalties thereunder. Evidently the court entertained the suit and passed on the question of fraud, finding in favor of Pool. The record, however, shows no better title or right in Pool than in plaintiffs. Neither of them should be decreed rights in the land, so long as it appears that the title thereto is in the State. Wherein the decree goes further than to dismiss the bill, it is wrong. It will now be here modified by striking from it all adjudication other than the dismissal of plaintiffs' bill, and as so modified it will be affirmed.

LYNCH, J., absent.

(76 W. Va. 557)

R. D. JOHNSON MILLING CO. v. READ et al.(Supreme Court of Appeals of West Virginia.
June 22, 1915.)*(Syllabus by the Court.)***1. EQUITY §132—PARTIES—DESIGNATION IN PLEADING.**

Naming a person in the caption of the bill as a defendant and serving him with process are not alone sufficient to constitute such person a party to the suit so as to authorize the granting of relief against him. An averment showing his interest in, and relation to, the subject-matter of suit and a prayer for relief against him are indispensable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 312; Dec. Dig. §132.]

2. EQUITY §427—PLEADING—PRAYER—GENERAL RELIEF.

A prayer for general relief does not warrant the granting of relief against a person, in respect of whom no allegation is made and no special relief asked.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. §427.]

3. EQUITY §427—RELIEF—GENERAL PRAYER.

A judgment creditors' bill to enforce liens against a debtor's land, to which other lienors and the debtor's wife are named as defendants, and in which the only allegation respecting the wife's interest in the suit is that some of the judgments are against her and her husband jointly, and which contains a prayer for special relief against the husband only, and also a prayer for general relief, will not authorize the granting of relief against the wife.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. §427.]

4. CREDITORS' SUIT §28—INTERVENTION—SUFFICIENCY.

Her filing a so-called answer to such a bill, claiming title to some of the lands averred in the bill to be her husband's land, does not supply the lack of proper averment in the bill, or make the wife a party against whom relief can be granted.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 115, 116, 118-121, 125; Dec. Dig. §28.]

5. EQUITY §118—AMENDMENT—NEW PARTY.

Such bill is amendable, for the purpose of making the debtor's wife a party and attacking conveyances made by him to her, either voluntary or fraudulent, for the purpose of hindering, delaying, and defrauding his creditors, provided always, such amendment be made with reasonable diligence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 258, 554, 590; Dec. Dig. §118.]

6. EQUITY §118—AMENDMENT—LACHES.

Delay in making such amendment for eight years, without excuse therefor, constitutes laches, and justifies the court in rejecting it on demurrer. A court of equity responds only to conscience, good faith, and reasonable diligence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 258, 554, 590; Dec. Dig. §118.]

7. EQUITY §271—PLEADING—NEW SUBJECT-MATTER—LACHES.

The same degree of diligence is required in amending a bill so as to introduce new subject-matter, as is required in bringing an original suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 558-560; Dec. Dig. §271.]

8. EQUITY §271—AMENDMENT—STATUTE.

Section 12, c. 125, Code 1913 (Sec. 4766) does not give a plaintiff an absolute right and unlimited time, after appearance by defendant, to amend his bill. The right to amend depends on whether substantial justice will be promoted thereby, a question which must be determined by the court. The statute does not preclude the defense of laches as a bar to the right.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 558-560; Dec. Dig. §271.]

9. FRAUDULENT CONVEYANCES §300—SUFFICIENCY OF EVIDENCE—CONVEYANCE TO WIFE.

The burden is on the wife who claims lands by conveyance from her insolvent husband, against his creditors, to establish by clear and convincing proof that the land was purchased for her with her own means; and, if the testimony shows that the only means she had was money received from her mother's estate 25 or 30 years before her husband's conveyance to her, and that she turned the money over to him, taking no note or writing evidencing the transaction as a loan, and neither of them keeping an account thereof, the presumption is that she intended it as a gift to him.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. §300.]

10. DEEDS §69—REFORMATION OF INSTRUMENTS §16—VALIDITY—MISTAKE OF GRANTOR.

In the absence of fraud on the part of the grantee, or mutuality of mistake by both parties to a deed, it will not be set aside or altered on the ground that the grantor was ignorant of its contents.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 156-164; Dec. Dig. §69; Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. §16.]

11. JUSTICES OF THE PEACE §82—PROCESS—RETURN OF SERVICE—CONCLUSIVENESS.

The return of a constable on a summons issued by a justice, in a case in which he has jurisdiction of the subject-matter, stating that he executed it by delivering a copy thereof to the defendant on a certain day, is conclusive evidence of a proper service.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 262, 263; Dec. Dig. §82.]

12. JUSTICES OF THE PEACE §122—DEFAULT JUDGMENT—VALIDITY.

The omission by a justice, in rendering a default judgment, to note in his docket that he waited one hour after the time set for trial for defendant to appear does not render the judgment void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382-388; Dec. Dig. §122.]

13. JUDGMENT §822—CONCLUSIVENESS—FOREIGN JUDGMENT.

The judgment or decree of a court of a sister state, having jurisdiction of the parties and the subject-matter of suit, is *res judicata* as to all matters determined thereby. The parties are estopped by such final judgment or decree from again litigating the same matters in a court of this state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. §822.]

Appeal from Circuit Court, Randolph County.

Creditors' suit by R. D. Johnson Milling Company against William J. Read and others. Decree for the defendants, and com-

plainant appeals. Affirmed in part, reversed in part, and remanded.

James A. Bent and J. F. Strader, both of Elkins, for appellant. J. F. Harding and Arnold & Arnold, all of Elkins, Wm. MacDonald, of Keyser, Tasker G. Lowndes, of Cumberland, Md., and Cunningham & Stallings, of Elkins, for appellees.

WILLIAMS, J. [1-3] Plaintiff filed its bill at April rules, 1899, to enforce the lien of a judgment recovered against the defendant W. J. Read, and in the caption thereof named Nora S. Read, his wife, and a number of other lien creditors besides itself as defendants. The bill avers that some of the judgments, naming them, were recovered against W. J. Read and his wife jointly. No other averment shows why Nora S. Read was made a party to the suit, or that she owned any land against which the judgments were liens; and no relief was prayed for against her. It is necessary to determine whether the bill presented a suit against her, inasmuch as many of the assignments of error depend upon a decision of that question. Plaintiff itself was certainly not seeking relief against her land, because its judgment was against her husband only, and it prayed for no relief against her. Merely naming her in the caption of the bill as a party defendant and serving her with process was not enough to constitute the suit one against her. It was indispensable to aver facts showing her relation to the cause of action, her connection with the subject-matter thereof, and to pray for relief against her or her land. The only prayer of the bill is that all the real estate owned by W. J. Read, the condition of his title thereto, the liens thereon, and their priorities be ascertained, and that the cause be referred to a commissioner for that purpose, and that, upon the coming in and confirmation of the report, a decree be entered directing a sale of said land to satisfy the liens thereon. There is no averment whatever entitling plaintiff to a decree against Mrs. Read, and no prayer for a sale of her land. The bill contains nothing she is called upon to answer, and nothing in fact she could answer; and the court could not adjudicate her rights without giving her an opportunity to defend. *McCoy v. Allen*, 16 W. Va. 724; *Chapman v. P. & S. R. R. Co.*, 18 W. Va. 184; *Bank v. Wilson*, 35 W. Va. 36, 13 S. E. 58. Section 37, c. 125, Code (sec. 4971), prescribing the form of a bill in chancery, does not dispense with the necessity for proper averments and prayer for relief in respect of a party proceeded against. *Preston v. West*, 55 W. Va. 391, 47 S. E. 152. A prayer for general relief will not warrant the court to grant relief against a party, as to whom no averment is made and no special relief asked. General relief can be given against those only as to whom special relief is sought. A bill to enforce liens against a husband's land would not authorize the

court to grant relief against the wife's land, simply because it contained a prayer for general relief. It follows, from these observations respecting the rules of equity pleading, that plaintiff's bill did not present a cause of action, or suit, against Nora S. Read, and, as to her, it was not a pending suit.

[4] The bill averred that W. J. Read owned three tracts of land, an 80-acre tract known as the Mouse land, an 121½-acre tract known as the Phares land, and a 30-acre tract known as the Butcher tract. These tracts had been conveyed to W. J. Read at different times, and he conveyed the 80 acres to his wife before this suit was brought and before any of the liens had attached; and the 30 acres and about 71 acres of the Phares tract he conveyed to her after the institution of this suit. She filed her answer in February, 1905, setting up title in herself to the 80 acres, and on March 14th of the same year, by leave of court, she filed her amended and supplemental answer, claiming title to both the 80 acres and the 30 acres. These so-called answers were more in the nature of petitions; they responded to no allegation in the bill because no averment related to her. Nor did she make any one a party to those petitions, or pray for affirmative relief. Hence the filing of them did not supply the lack of averments and prayer in the bill, so as to warrant the granting of any relief against her. An amendment of the bill was essential to any kind of relief against her.

But plaintiff made no effort to amend its bill until March rules, 1913. The final decree from which this appeal was taken by plaintiff, pronounced on the 12th of June, 1913, sustained the demurrer thereto and rejected the amended bill, and this is one of appellant's assignments of error, and to it we will advert later on. The cause was then heard upon the fourth report of commissioner W. E. Baker, 15 exceptions taken thereto by W. J. Read, and 12 by Nora S. Read, and upon the petitions of certain creditors whose liens were subsequent to the date of the suit. The court sustained W. J. Read's fifteenth and overruled all his other exceptions, and overruled Mrs. Read's first, eighth, and ninth, and sustained all her other exceptions. This ruling, in some particulars, is assigned as error by appellant, and, in others, cross-assigned as error by appellees.

Prior to the date of plaintiff's judgment, W. J. Read and wife had conveyed to Helen M. Nestor 31 acres and 131 poles, and to W. L. Hicks 13½ acres, out of the 121½-acre tract known as the Phares land. Both of these deeds were recorded before plaintiff obtained its judgment. On the 10th of October, 1899, W. J. Read conveyed the remainder of that tract to his wife, and by deed dated May 9, 1901, she conveyed to Helen M. Nestor 6 acres and 100 poles more out of it, her husband joining in the deed. The two last-

mentioned conveyances were made after the suit was brought.

Prior to any of the aforementioned conveyances, to wit, on April 7, 1897, Read and wife executed to L. D. Strader, trustee, a trust deed conveying all three tracts of land, the 30 acres, 121½ acres, and the 80 acres, as additional and collateral security, to secure a note of \$8,000, payable to W. C. White, which was at that time secured by a mortgage and also by a trust deed on property in the state of Maryland. Although the 80 acres had been conveyed to Nora S. Read by her husband, in 1895, it also was included in the trust deed to Strader, trustee. But that deed provided that the Maryland property was to be primarily liable for the White debt. White assigned the debt and mortgage to De Warren H. Reynolds on the 2d of January, 1898. There was also a prior mortgage on the same property, held by one George Glick, to secure a debt to him of \$6,000. This debt and mortgage were likewise assigned to Reynolds, and thereafter, on the 16th of March, 1901, and pursuant to the power and authority conferred on the mortgagee by the terms of the Glick mortgage, he sold the property and became the purchaser himself, at the cash price of \$15,150. This sum was not enough to pay the taxes, commissions, and the two mortgages in full. The balance ascertained by the commissioner in this case to be due on that debt is \$2,782.20, and is reported as the second lien, in favor of said Reynolds as assignee of White, on all three tracts of land, the taxes due thereon being reported as the first lien. Thirty-six liens, in all, were reported, aggregating more than \$10,000. The commissioner reported plaintiff's judgment as the fifth lien on the Phares and Butcher tracts. But the court modified the report, and held that it was not a lien on the Butcher tract, and was a lien only on the remainder of the Phares tract, after deducting therefrom 31 acres and 131 poles conveyed to Helen M. Nestor and 13½ acres conveyed to W. L. Hicks. The balance of the debt due De Warren H. Reynolds, trustee and assignee of White, was decreed to be the third lien upon the same portion of the Phares tract as plaintiff's judgment, said Reynolds having released his lien as to the two parcels conveyed to Helen M. Nestor and Hicks, respectively, and also a third lien upon the 80 and the 30 acres, as the land of Nora S. Read, the court decreeing those two tracts to be her sole and separate property, and not liable to sale in this proceeding. Although the court decreed that the Helen M. Nestor parcel of 6 acres and 100 poles was liable to appellant's judgment lien, it was not sold. Only 71 acres of the Phares tract was sold. It was purchased by Semmes Read, son of W. J. and Nora S. Read, at the price of \$3,300, and the sale was confirmed. The sum realized was not enough to pay the costs of suit, the two prior liens, and the balance due De War-

ren H. Reynolds, by \$608.48. Semmes Read then filed his petition in open court, averring that he had become the owner of all the land covered by the trust deed, and prayed that he might be permitted to pay the balance due said Reynolds, into the hands of the special commissioner, and to be thereupon subrogated, without recourse, to his rights under the deed of trust. His prayer was granted, and he paid the money to the commissioner, who was directed by the decree to pay it over to Reynolds upon his delivery of the original note, the deed of trust, and assignment to said Semmes Read, or his attorney. All rights of creditors to proceed against Nora S. Read, or her lands, for the satisfaction of any debts due them from her, was expressly reserved in the decree. No part of the proceeds of sale was applicable to plaintiff's lien. It has appealed and assigns numerous errors. Cross-errors are also assigned by counsel for W. J. Read and wife, and by counsel representing other judgment creditors of W. J. and Nora S. Read.

[5] The first assignment by appellant is the rejection of its amended bill, on demurrer thereto. Plaintiff did not file its amended bill for nearly 15 years after it brought its original suit. By the amendment it is sought to charge the lands of Nora S. Read, and averred that the conveyance to her of the 80 acres from her husband was voluntary and without consideration, and that the conveyance to her of the 30 acres was made by him with intent to hinder, delay, and defraud his creditors, and that she knew of such fraudulent intent and participated therein. We do not think the amendment is subject to one of the objections made by the demurrer, that it seeks to introduce matter wholly foreign to the purpose of the original bill. There is no question of a lien creditor's right to attack a fraudulent or a voluntary conveyance, made by his debtor, in a suit brought to enforce his lien, provided he does so in time. Such is the well-settled practice in this state. *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; *Peale v. Grossman*, 70 W. Va. 1, 73 S. E. 46, Ann. Cas. 1913C, 1373; *Davis v. Halstead*, 70 W. Va. 572, 74 S. E. 725; and *Bland v. Rigby*, 73 W. Va. 61, 79 S. E. 1013. Section 2, c. 133, Code 1913 (sec. 4756) permits a creditor who has not even reduced his claim to judgment to attack a voluntary or fraudulent conveyance, and gives him a lien upon the land, if he is successful, from the time of filing his bill or petition. *Watkins v. Wortman*, 19 W. Va. 78. A lien creditor could do so regardless of that statute. The new matter of the alleged voluntary and fraudulent conveyances, which plaintiff sought to introduce by its amendment, was germane to the cause of suit averred in its original bill.

[8-8] But it presented no excuse for its great delay. It does not say how or when it

discovered the alleged fraud. It must have known that Nora S. Read claimed both the 80 and the 30 acres, from the time she filed her so-called answers, yet it made no effort to amend its bill, attacking her title thereto, until eight years thereafter. Section 12, c. 125, Code (sec. 4766), permitting a plaintiff to amend his bill after the defendant has appeared, if substantial justice will be promoted thereby, contemplates that the amendment shall be made in a reasonable time. The statute confers a right, but it must be pursued with reasonable diligence. Nor is such right absolute and unqualified. It depends upon whether substantial justice will be promoted by the amendment; and the court, in the exercise of its judicial discretion, must determine that matter. If a plaintiff has been guilty of laches, it may refuse to allow the amendment on the ground that substantial justice would not thereby be promoted. Equity requires diligence in amending as well as in bringing a suit. Nothing calls into activity a court of equity except conscience, good faith, and reasonable diligence. Plaintiff offered no explanation for its delay, no excuse. It averred that the conveyance of the 80 acres was voluntary, yet it did not attack it for 18 years after it was made and recorded. It cannot be successfully assailed for that reason only after five years. It avers that the conveyance of the 30 acres was fraudulent, and yet it does not inform the court when it discovered the fraud, or give any excuse for not attacking the deed for eight years after it knew it had been made. Delay, when there is a reasonable excuse therefor, is not laches, but unexplained delay is, and it may be taken advantage of on demurrer. *Bill v. Schilling*, 39 W. Va. 106, 19 S. E. 514; *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Jarvis v. Martin's Adm'r*, 45 W. Va. 347, 31 S. E. 967; *Jackson's Adm'r v. Hull*, 21 W. Va. 601; *Eubank v. Barnes*, 93 Va. 153, 24 S. E. 908. It was therefore not error to reject the amended bill.

[9] Appellant's next assignment is that the court erred in sustaining certain exceptions taken to the commissioner's report by Nora S. Read, numbered 1, 2, 3, 4, 5, 6, 7, 10, 11, and 12, and in sustaining the fifteenth exception thereto of W. J. Read. Most of these exceptions were taken because the commissioner had reported the judgments against W. J. Read as liens upon the 30 acres, the Butcher tract. Consequently the determination of the question whether Nora S. Read has proven herself entitled to that tract will dispose of most of the exceptions. That tract was conveyed to W. J. Read by B. L. Butcher, special commissioner, on 14th of March, 1896, and W. J. Read did not convey it to his wife until October 16, 1899, several months after the suit was brought. His insolvency is alleged and proven. Hence his wife carried the burden of establishing, by clear and convincing proof, that the land was

purchased for her with her own means. The only evidence on the question is the depositions of herself and husband. They both testified that he purchased the land for her with her money. But, when asked, on cross-examination, where she got the money, she replied that it came from her mother's estate; and yet she says her mother had died about 25 years before that time. There is no evidence that her husband kept a separate account of the money he got from her, either from that or any other source, or that he ever, at any time, executed his note to her for money borrowed from her. Neither is there any evidence of an express agreement that he was to buy that particular tract of land for her. She did not know, in 1905, when she testified, what the land had cost. Before coming to West Virginia, W. J. Read and wife lived in Maryland; and, on the 5th of November, 1897, they executed to De Warren H. Reynolds, Robert R. Henderson, and James W. Thomas, trustees, a deed of trust conveying all W. J. Read's property in Allegany county and in the city of Baltimore, and elsewhere in the state of Maryland, to secure his creditors, in the order of the legal priority of their several claims. That trust deed authorized the trustees to sell his property and apply the proceeds to the payment of his debts. It further provided that, if any surplus remained, it was to be "paid over to William J. Read, his proper representatives or assigns." There is no pretense that Mrs. Read was one of the creditors thereby secured; nor is there any evidence that the money she got from her mother's estate had ever been invested in property for her in the state of Maryland. But it does appear that W. J. Read had been in financial straits for several years prior to this suit, and was a heavy borrower. In view of these facts and circumstances, the evidence is not sufficient to overcome the presumption that the money Mrs. Read received from her mother's estate and turned over to her husband, taking no note therefor and keeping no account thereof, was intended as a gift to him. *Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175, 25 Am. St. Rep. 806; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47; *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 960. The conveyance of the 30 acres, made subsequent to this suit, was therefore void as to the creditors of W. J. Read; but not so as to the 80 acres, which is attacked only on the ground that the conveyance of it was voluntary. It was conveyed to her before plaintiff obtained his judgment, and more than five years had elapsed without any attack being made on it. The right to avoid it on the sole ground that it was voluntary was barred long before it was assailed.

[10] Nor is the evidence of Mrs. Read sufficient to overcome the effect of the conveyance of the three tracts of land to L. D. Strader, trustee, as collateral security for the White \$8,000 debt. She and her husband ex-

executed and acknowledged that trust deed, free from fraud or duress. She cannot be heard to say that she was ignorant of its contents, or did not know, when she executed it, that it embraced the 80-acre tract of land. It was her duty to know what was in the deed. It was prepared in Maryland and mailed to her at Morgantown, where she and her husband then resided, and was there signed and acknowledged and returned to Reynolds. A deed will not be set aside on the ground of a mistake by the grantor alone, when the grantee has been guilty of no wrong or inequitable conduct. *Crim v. O'Brien*, 69 W. Va. 754, 73 S. E. 271; *Smith v. Board of Education of Parkersburg District*, 85 S. E. 513; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221; and *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807. Inasmuch as the suit was not a proceeding to sell Nora S. Read's land, even to pay the liens admittedly existing on it, it was not error to omit a sale of the 80 acres. The rights of Nora S. Read's creditors to proceed against her land were expressly reserved by the decree. Moreover, the trust deed lien upon her 80 acres was fully satisfied by her son Semmes Read, the purchaser at the judicial sale, who assumed the payment of the balance due on it, and paid it into court. The 30 acres being liable for the judgments against W. J. Read, it follows that the exceptions taken to the commissioner's report by Nora S. Read, because it reported that tract liable for such judgments, were not well founded, and should have been overruled. Her tenth exception was taken because a judgment in favor of M. H. Harvey, recovered on the 8th day of October, 1904, against her and her husband, amounting to \$172.69, was reported as a lien upon her land. The judgment itself was attacked on the ground that it had been rendered without personal service of summons upon her. We decline to pass upon the validity of the judgment, on the ground that this is not a proceeding to sell her land. Whether it is a lien on her land or not cannot properly be determined in this suit, and that is sufficient to sustain the exception. Her eleventh and twelfth exceptions are likewise sustainable on the same ground.

Appellant's third assignment is that the court erred in striking the cause from the docket, without directing a sale of the 6 acres and 100 poles conveyed to Helen M. Nestor on the 9th of May, 1901, and the 13½ acres conveyed to H. L. Hicks. The commissioner's report states that the conveyance to Hicks was on February 9, 1899, but the court, by its decree, finds the correct date to be February 9, 1898. We do not find the Hicks deed in the record, but the correctness of the date found by the court is shown by a release of lien, as to the Hicks parcel, executed and acknowledged by De Warren H. Reynolds on the 10th of February, 1898.

That release recites that the deed to Hicks bears date February 9, 1898. Plaintiff's judgment was therefore not a lien upon the Hicks 13½ acres. As to the 6 acres and 100 poles, Helen M. Nestor was a pendente lite purchaser; and we perceive no reason why that parcel should not have been sold to satisfy plaintiff's judgment. The decree provided for a sale of it, in the event enough money to discharge the liens thereon was not realized from the sale of the 71 acres of the Phares land then owned by W. J. Read. It is highly probable that the commissioners appointed to make sale are responsible for the mistake. After having decreed it was liable, the court would hardly have ordered the cause stricken from the docket without its being sold, the necessity therefor appearing, if the court's attention had been called to the matter.

[11] Numerous cross-assignments of error are made in briefs of counsel representing various appellees. The first assignment by counsel for W. J. Read is that the court erred in not holding appellant's judgment void for want of service of summons upon said Read. Read averred in his answer that he was not served with summons, and did not appear before the justice who rendered the judgment. The transcript from the justice's docket shows the judgment was rendered in default of defendant's appearance, after hearing the evidence. But it recites that summons was returned executed. A copy of the summons, with the return indorsed thereon by E. E. Taylor, Constable, is also made a part of the record. The return states that it was served by delivering a copy of the summons to W. J. Read on March 19, 1898. Mr. Read swears positively he was not served, and says he remembers distinctly that he left his home on that day, early in the morning, to appear as attorney for his wife and son to defend a suit against them, before a justice in another part of the county, and did not return until late that afternoon. As to what he did on that day, he is corroborated by the testimony of both his wife and son. If the constable's return were not conclusive of the fact of service, we would have to say the evidence is sufficient to overcome it. But the return of process by a sworn officer whose duty it is to serve it, showing a proper service, must be accepted as a verity. That is the settled law of this state. *McClung v. McWhorter*, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785; *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *Stewart v. Stewart*, 27 W. Va. 167; and *Bowyer v. Knapp & Martin*, 15 W. Va. 277, opinion page 291. That the service of process in the case at bar was by a constable, whereas in the cases above cited it was by a sheriff, does not distinguish this case from those. There is no reason for applying to it a different rule. The same reasons for holding a sheriff's return conclusive evidence of the manner of service apply equally to the return of a constable. It is a

necessary rule in order to give certainty and stability to judicial proceedings. Both sheriff and constable take the same kind of an oath of office, both are required to give bond, and it is as much the legal duty of a constable to execute writs issuing from a justice's court as it is of a sheriff to execute writs issuing from a court of general jurisdiction. That a justice has only a limited jurisdiction does not affect the rule, or prevent its proper application to a case of which he has jurisdiction. That the application of the rule may, in some cases, operate harshly is more than offset by the great inconvenience that would arise from the uncertainty of judicial judgments and decrees if a different rule obtained. That it does not work a hardship in the present case is apparent. The judgment was rendered in an action on a note, and W. J. Read makes no pretense to a defense thereto.

[12] The judgment is also challenged on the further ground that the justice's docket does not show that he waited one hour after the time set for trial, for defendant to appear, before entering judgment. Section 65, c. 50, Code (sec. 2619), entitles each party to one hour after the time stated in the summons or order of continuance, if there has been a continuance, in which to appear. But section 179 (sec. 2733), prescribing what particulars shall be noted by the justice in his docket, does not expressly require him to state that fact; and it has been held that his omission to do so does not invalidate the judgment. *Fishburne v. Baldwin*, 46 W. Va. 19, 32 S. E. 1007. Appellant's judgment was founded on a proper summons, appearing by the officer's return to have been duly served upon the defendant, and must, in this proceeding, be taken to be a valid judgment. *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

[13] Counsel for W. J. Read insist there is nothing due De Warren H. Reynolds as assignee of the White mortgage. He was also the assignee of the Glick mortgage. Both mortgages were upon a business house and lot in Cumberland, Md., owned solely by Robert C. Read, brother of W. J. Read, subject to the life estate therein of their mother. She died about the year 1900, and Robert C. Read died on the 17th of January, 1903, leaving W. J. Read his sole heir at law. The property was sold, however, by Reynolds, under the grant of power contained in the Glick mortgage, nearly two years before Robert C. Read's death. It also appears that the trustees in the Maryland deed of trust had also sold and collected the proceeds from all of W. J. Read's Maryland property. Counsel for Reynolds contend that, after full and complete disbursement of all the proceeds from the sale of the Maryland property, there yet remains due him, as assignee of the White mortgage, the sum found by the commissioner in this cause. Before a complete

application was made of the proceeds of the Maryland property, W. J. Read instituted a suit in the circuit court of Allegany county, Md., against said Reynolds, the purpose of which was to avoid the sale of the Baltimore street property and to have an accounting. Reynolds answered his bill, and the cause went to the Court of Appeals of that state, resulting in a dismissal of plaintiff's bill. Reynolds filed his special replication to Read's answer in the present suit vouching the record in the Maryland suit and relying upon it as an adjudication of the matters averred in his answer in this suit. The Maryland court had jurisdiction of both the subject-matter and the parties, and its final decree is certainly *res judicata* of all the matters therein involved. No authorities need be cited to sustain this proposition. The cause was there submitted upon bill, answer, and exhibits, and the rule of practice obtaining in that state is that when a case is thus submitted —

"all the averments of the answer, whether responsive to the allegations of the bill or in avoidance of it, are to be taken as true." *Royston v. Horner*, 75 Md. 557, 24 Atl. 25.

It was determined by that suit that the Glick mortgage was not given to secure a debt created for the benefit of W. J. Read, and that therefore it was not a debt to be paid out of the trust property conveyed to Reynolds, Henderson, and Thomas, trustees. It also determined that Reynolds, as assignee of the Glick mortgage, had a right to purchase the mortgaged property, and that his purchase thereof was valid; that he has properly accounted for the rents, issues, and profits derived therefrom before the sale took place; that by the terms of the Glick mortgage, he was entitled to a commission of \$1,212 for making the sale; that in respect of the mortgaged property Reynolds was not a trustee for W. J. Read, and that the Glick mortgage was not upon his property, nor did the subsequent deed of trust executed by W. J. Read and wife embrace the Glick note as a debt to be paid by the trustees out of the trust fund; that sale under the Glick mortgage had been confirmed, and under the law of Maryland could not thereafter be impeached on the sole ground that the mortgagee had become the purchaser. Article 66, § 14, General Laws of Maryland. *Chilton v. Brooks*, 71 Md. 445, 18 Atl. 868; *Dircks v. Logsdon*, 59 Md. 173. It also determined that, after payment of the Glick mortgage, the commissions and taxes on the Robert C. Read property, there remained in the hands of said Reynolds the sum of \$5,901.68 to be applied on the White mortgage; and that, of the trust funds derived from the sale of W. J. Read's property, there remained in the hands of the trustees the sum of \$2,624.71, which was likewise applicable to that mortgage. W. J. Read is now estopped to controvert any of those matters in this suit. He can-

not go behind that decree. The opinion and final order in that case was pronounced by the appellate court on the 17th of September, 1904. This suit was then pending in Randolph county. There were two judgment liens upon the Baltimore street property, subsequent to the White mortgage. Those judgments were against Robert C. and W. J. Read, one in favor of M. R. Welch and Ida F. Welch for \$2,078.63, rendered by the circuit court of Allegany county, Maryland, on the 12th of April, 1897, and the other rendered by the same court on the 13th of December, 1897, in favor of R. D. Johnson for \$2,506. These liens were set up in plaintiff's bill, and admitted by respondent's answer in the Maryland suit. In respect of the Welch judgment, plaintiff averred that Robert C. Read was principal and himself only surety. Both judgments, however, were admittedly liens on the Baltimore street property. As an excuse for not having applied the funds then admitted to be in his hands, respondent averred that before an audit had been made and ratified in the mortgage sale proceeding, petitions had been filed by Johnson and the Welch heirs, asking to have the assets marshaled, and that an order of court had been made and served upon him, which prevented his applying the balance in hand to the White mortgage. This averment was not controverted, and it explains why, at the time the final decree was made, there was yet in respondent's hands the sum of \$5,901.68, derived from the sale of the mortgaged property. As shown by a subsequent audit, that sum, together with the sum of \$2,624.71 derived from the trust funds, was applied on the White mortgage, leaving the balance due thereon found by the commissioner in this case. That balance was secured by the trust deed on the West Virginia lands.

Numerous other cross-assignments are made by other appellees. They all relate to questions raised by the exceptions of W. J. Read and wife to the commissioner's report, and are practically disposed of in the foregoing opinion.

In so far as the decrees of June 12, 1913, and March 6, 1914, appealed from decide that the judgments against W. J. Read are not liens on the Butcher tract of 80 acres, and that the judgments docketed against him before the 6 acres and 100 poles was conveyed to Helen M. Nestor are not liens on said 6 acres and 100 poles, they will be reversed; and the cause will be reinstated on the docket and remanded to the circuit court for the sale of those tracts, and for the application of the proceeds in the manner and according to the priorities ascertained by the decree of June 12, 1913. In all other respects the decrees will be affirmed, with costs to appellant against W. J. Read.

LYNCH, J., absent.

(76 W. Va. 519)

STATE ex rel. MEEKS v. MORRIS, Judge.
(Supreme Court of Appeals of West Virginia.
June 15, 1915.)

(Syllabus by the Court.)

INSANE PERSONS — §32 — APPOINTMENT OF COMMITTEE — CONCURRENT JURISDICTION — VALIDITY OF STATUTE.

Section 34, c. 58, Code (1913), serial section 3359, is a constitutional statute, has not been repealed, and vests in the circuit courts concurrent jurisdiction with the county courts in the matter of appointing committees for persons determined by said circuit courts to be insane.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 47; Dec. Dig. § 32.]

Mandamus by the State, on the relation of M. A. Meeks, against P. D. Morris, Judge. Writ awarded.

J. M. Foster, of Weston, for petitioner. Jackson V. Blair and A. F. McCue, both of West Union, for respondent.

WILLIAMS, J. Relator's petition to the circuit court of Doddridge county, praying for the appointment of a committee for his father, Hezekiah Meeks, alleged to be insane, having been dismissed on the sole ground, as shown by the order of dismissal, that the circuit court did not have original jurisdiction in the matter, he has applied to this court for a writ of mandamus to compel the Honorable P. D. Morris, judge of said court, to entertain his petition and proceed to final judgment thereon. Due notice of the filing of the petition had been given.

A motion to quash the alternative writ presents the question whether circuit courts have concurrent jurisdiction with county courts in the matter of appointing committees for insane persons. Relator relies on section 34, c. 58, Code 1913 (sec. 3359), as conferring such jurisdiction. That it was the legislative purpose, by the enactment of that statute, to confer such jurisdiction on circuit courts, is clear. But counsel for respondent contends: (1) That the statute is unconstitutional; and (2), whether constitutional or not, that it has been repealed. He insists that section 24, art. 8, of the Constitution, prescribing the jurisdiction of county courts, is exclusive and confines all original jurisdiction, in the matter of probate of wills, appointment of administrators, committees, etc., to that court. The particular language of that section relied on is as follows:

"They (county courts) shall have jurisdiction in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, curators, and the settlement of their accounts, and in all matters relating to apprentices."

He emphasizes the words, "jurisdiction in all matters." But those words do not necessarily mean "exclusive" jurisdiction in all matters; and, considering them in connection with other provisions of the Constitu-

tion, we do not think they can properly be so construed. The county courts may have jurisdiction in all matters enumerated, and yet other courts have concurrent jurisdiction in the same matters. Concurrent and original jurisdiction in the circuit courts is not incompatible or inconsistent with jurisdiction in the county courts. "Jurisdiction in all matters" does not mean all jurisdiction, or exclusive jurisdiction, in such matters. That section of the Constitution does not confine the jurisdiction to the county courts, nor limit the power of the Legislature to confer original jurisdiction in the same matters upon the circuit courts. That the framers of the Constitution did not so intend is further shown by the last clause of section 12, art. 8, defining the jurisdiction of the circuit courts. The concluding clause of that section is as follows:

"They (circuit courts) shall also have such other jurisdiction, whether supervisory, original, appellate, or concurrent, as is or may be prescribed by law."

Here is express constitutional authority, even if such were necessary, to the Legislature to vest jurisdiction in the circuit courts in such other matters, not enumerated in the Constitution, or expressly limited by it to some other tribunal. Appellate jurisdiction of circuit courts is not incompatible with their original jurisdiction in the same matter. There being no constitutional inhibition upon the Legislature forbidding its vesting jurisdiction in such matters in the circuit courts, it has the power, either to confer exclusive jurisdiction to appoint committees for insane persons upon the county courts, or to vest both county and circuit courts with concurrent jurisdiction in that respect; and in its wisdom it has seen fit to confer concurrent jurisdiction on both courts.

The case of *Stone v. Simmons*, 56 W. Va. 89, 48 S. E. 841, is cited in support of the contention that the statute (section 34, c. 58) is unconstitutional. We do not so interpret that decision. That case involved the question of the jurisdiction of the circuit court to enjoin proceedings, instituted in the county court to revoke letters of administration which had been previously granted by the last-named court to another, and to permit the petitioner, who was the executor named in the will, to qualify as such. Judge McWhorter's opinion does not discuss the constitutional question, but deals exclusively with the statute law on the subject, and holds that chapter 136, Acts of 1872-73, conferring on the circuit courts concurrent jurisdiction with the county courts, "in all matters of probate of wills, the appointment and qualification of personal representatives, guardians, committees and curators and the settlement of their accounts," was repealed by chapters 68 and 84 of the Acts of 1882, amending chapters 87 and 77 of the Code.

No reference is made to section 34, c. 58, Code, on which relator relies. That section is an old statute, adopted from the Code of Virginia. See Code of Virginia 1860, c. 85, §§ 51, 52, and 53. It appears in the Code of West Virginia (1868) as section 38, c. 58; and has continued ever since to be published as a statute of this state, without modification, except as to the notice now provided, which was incorporated into it in 1882, when it, together with certain other sections of chapter 58, was amended and re-enacted. See Acts 1882, c. 67. Although the opinion in *Stone v. Simmons*, supra, decides that the enactment of chapters 68 and 84, Acts 1882, amending chapters 87 and 77 of the Code, repealed chapter 136, Acts 1872-73, it did not decide that section 34, c. 58, Code, was thereby repealed. Nor does that result necessarily follow; because at the same session of the Legislature at which chapters 87 and 77 of the Code were so amended as to repeal chapter 136, Acts 1872-73, another act was passed, amending and re-enacting section 38, c. 58, which is now section 34 of that chapter. See Acts 1882, c. 67. But even though it may have been repealed by the same legislation that repealed chapter 136, Acts 1872-73—a question we do not decide—it was again re-enacted in 1889 by chapter 19, Acts 1889, amending and re-enacting the whole of chapter 58 of the Code; and it is not claimed that there has been any legislation since that time which has effected a repeal of it.

Our conclusion, therefore, is that section 34, c. 58, Code 1913, is a constitutional statute and has not been repealed. The writ is awarded.

(76 W. Va. 537)

STATE v. HEROLD et al.

(Supreme Court of Appeals of West Virginia.
June 18, 1915.)

(Syllabus by the Court.)

1. EVIDENCE ⇨460—PAROL EVIDENCE—DESCRIPTION IN DEED.

For ascertainment of the intent of the parties to a deed, in which the description of the subject-matter is inconsistent, contradictory, and ambiguous, extrinsic evidence is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. ⇨460.]

2. BOUNDARIES ⇨7—DESCRIPTION—MISTAKE.

A beginning corner of a survey, inconsistent with other portions of the description of the subject-matter of the deed, and shown by the situation and purposes of the parties and all the surrounding circumstances to have been selected by mistake, may be rejected and the subject-matter ascertained and determined by the parts of the description that harmonize with the obvious intention of the parties.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 58-65; Dec. Dig. ⇨7.]

3. BOUNDARIES ⇨5—DESCRIPTION—INTENT.

A call in a description for a tree or other object as being on one of the exterior lines of the grantor's lands, which is shown by extrinsic evidence only not to be on such line, is latently ambiguous; and if it appears from the situation and purposes of the parties and the

surrounding circumstances that adoption of such line, as the true monument, and rejection of the tree, will make the conveyance conform to their real intention, and that the adoption of the tree, as the monument, would defeat it, the former interpretation must prevail.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 44-46; Dec. Dig. ¶5.]

4. BOUNDARIES ¶3—RELATIVE WEIGHT—MONUMENT.

Ordinarily the call for the tree or other object will prevail, under such circumstances; but, if the adoption thereof would make the deed include land the grantor did not own, and omit land owned by him which would pass under the other interpretation, the case falls within an exception to the general rule, by force of a strong presumption against intent on the part of either party to include in the deed land to which the grantor had no title.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. ¶3.]

5. BOUNDARIES ¶5—DESCRIPTION—REFERENCE TO OTHER CONVEYANCE—DATE.

A deed is to be interpreted and construed as of its date, and a call in the descriptive portion thereof for an adjoining tract of land, as a monument, is a call for the true location of such adjoining tract at the date of the deed; and the location of the adjoining tract, though not involved in the litigation, may be ascertained for the purposes of the interpretation of the deed calling for it.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 44-46; Dec. Dig. ¶5.]

Robinson, P., and Williams, J., dissenting.

Appeal from Circuit Court, Nicholas County.

Suit by the State against A. C. Herold and John B. Emery and others, to forfeit lands for nonentry for taxation. From a decree adjudicating forfeiture and allowing defendant Herold to redeem, defendants Emery and others appeal. Affirmed in part, reversed in part, and remanded.

G. G. Duff, of Summersville, and Price, Smith, Spliman & Clay, of Charleston, for appellants. W. C. Reddy, of Summersville, A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

POFFENBARGER, J. The alleged right of A. C. Herold to redeem portions of a certain tract of land in a suit instituted by the state for sale thereof, on the ground of forfeiture for nonentry for taxation and nonpayment of taxes thereon, accorded to him by the decree appealed from, is contested by John B. Emery and others, who deny forfeiture of the title and claim the land mediately from A. C. Herold himself and payment of taxes thereon by themselves and those under whom they hold.

By a deed dated July 9, 1866, Wm. H. Edwards conveyed to Herold a tract of land, in form an irregular parallelogram, supposedly containing 600 acres. Out of this Herold sold a tract of 100 acres to Wm. R. Wilson and a tract of 125 acres to Ephraim Sargent. These two tracts purported to come out of the center of the 600-acre piece; the Wilson

parcel extending clear across it and the Sargent tract only partially across it. Later he sold the east and west ends of the original tract to Benj. W. Byrne. No doubt Wilson and Sargent were in possession of their purchases for considerable periods of time before deeds were executed, conveying them, for the deed made to Byrne calls for their boundaries, but bears an earlier date than their deeds. The Wilson deed bears date May 22, 1877, the Sargent deed October 22, 1877, and the Byrne deed September 28, 1874.

The Wilson deed describes the beginning corner of the Wilson tract as being a large chestnut, "on a line of said Herold's 600 acres"; the first line as running irregularly northeast to "a small sugar on a rich hillside," the second line as following the course of the north line of the original tract to "a large sugar on a rich hillside," the third as being generally parallel to the first and ending at a "red oak near Cherry run on the east side and on a line of the whole tract," and the last as following the course of the south line of the original tract to the place of beginning. The beginning point in the description in the Sargent deed is identical with that of the Wilson tract; the last line but one is described as ending at pointers "on a line of the original survey;" and the last line is described as running "with the same (line of the original tract) to the beginning." The chestnut and red oak called for in the Wilson deed, as being on the south line of the original tract, are shown by extrinsic evidence to be about 40 poles north of that line and within the original tract. Run from them, the east and west lines of the Wilson tract will carry it about 40 poles beyond the north line and into land he did not own and leave out, at the south, land he did own.

The two ends of the original tract were conveyed to Byrne by a single deed; the east end as containing 400 acres and the west as containing 150 acres. In the description of the former, the beginning corner is described as "a sugar on a rich hillside and corner to said Wilson's 100 acres"; the first line as running with Wilson to "a red oak on Cherry run" (Wilson's southeast corner), and the second as running south 56 east 230 poles to "two chestnut oaks on a divide between the waters of Buffalo and Strange creeks." Thought not so described in the Byrne deed, this is the southeast corner of the original tract, and the course of the line to it is the course of the south line of the original tract. The course of the third line is admittedly erroneous, and the course of the last is the course of the north line of the original tract. The timber called for in the Edwards deed, as the northwest and southwest corners of the original tract, is called for in the deed to Byrne, as corners of his 150-acre tract, but is not described as being such corners, and the courses to and from those corners are the

same as those of the north and south lines of the original tract. On the other side, the description connects this tract with the Wilson and Sargent tracts and is inconsistent with the western corners and courses to and from them, if the Sargent and Wilson tracts are to be located 40 poles north of the original south line. Otherwise it is not.

Herold claims his deed omitted a strip 40 rods wide along the southern line of the 600-acre tract. If so, it has been forfeited, and he has the right to redeem it; he not having paid any taxes on it, since the dates of his conveyances. All taxes on such lands as are covered by the Byrne deed have been paid, and that land is now owned by John B. Emery and others. They say the Byrne deed properly construed carried their 400-acre tract and their 150-acre tract to the south line of the original tract. No adverse claim to so much of the 40-rod strip as lies immediately south of the Wilson and Sargent tracts is made.

[1-3] Within the terms of the deeds, extrinsic evidence may be considered upon the inquiry as to what was really intended. Such evidence develops latent ambiguities in the Wilson and Sargent deeds. Both call for the south line of the original 600-acre tract conveyed to Herold by Edwards. They also call for certain timber at the point of intersection with that line. Locating the timber on the line at the same point, when in fact it is about 40 poles from the line in each instance, these calls are necessarily ambiguous, and latently so, because the discrepancies do not appear on the face of the deeds and are revealed only by extrinsic evidence. If we say the parties intended, in the case of the Wilson deed, to commence on that line and return to it, and, in the case of the Sargent deed, to run to that line, we do not go outside of the terms of the deeds, because that southern line is called for in the deeds as much and as clearly as the timber is called for in them. We do no more than ascertain, from the subject-matter of the instruments and the situation and purposes of the parties, which objects they really intended to make the monuments, the trees or the line. One is as much within the deed as the other, in each case. In view of the extraneous evidence disclosing dominant intent, the phraseology of the calls is unimportant, as will be shown later. In locating these tracts first, we do no more than Herold did in his conveyances. He located the Byrne tracts by the Wilson and Sargent tracts. His description of the 400-acre Byrne tract begins with the northwest corner of the Wilson tract, but erroneously describes it as being a sugar on a rich hillside. Wilson's deed, properly construed, puts that corner in the northern line of the original tract. In describing the Byrne 150-acre tract, he made the Sargent tract a monument and boundary, and that tract runs down to the southern line of the original tract. Moreover, the Byrne deed

manifests clear intent not to go beyond the lines of the original tract. One of the corners of that tract is made a corner of the Byrne 400-acre tract, namely, the southeast corner. The distance from that call on another line is the exact distance called for in the eastern line of the original tract, and to reach that corner, the description calls for the course of the southern line of the original tract. Two of the corners of the 150-acre Byrne tract are corners of the original tract, the northwestern and southwestern. It reaches the former by running the same course as that called for in the old deed from Edwards and leaves the latter by that course. In these facts it found overwhelming evidence of purpose to stay within the lines of the original tract, in the conveyances of the Byrne tracts, and it is shown in the very terms of the deeds.

[4, 5] The Wilson and Sargent deeds may be read and considered upon this inquiry, because the tracts of land they convey are monuments called for in the descriptions of the Byrne tracts. They are as clearly monuments as the trees called for as corners, and, being tied to the southern line in express terms and limited to the northern by the distances, areas, and intent necessarily arising out of the subject-matter and situation and purposes of the parties, they carry the Byrne conveyances to the southern line, on the one hand, and limit them to the northern line, on the other.

That the Wilson and Sargent lands are not involved in this litigation, and that those lands have been claimed and held in accordance with an erroneous interpretation, do not preclude correct locations of their boundaries for the purpose of determining the true location of the Byrne tracts. The date of the Byrne deed is the time with reference to which the intention of the parties is to be ascertained. The contemporaneous or subsequent conduct of Wilson, induced by an error as to the relation of the trees to the line, is wholly immaterial. Every contract is construed as of the time at which it was made. *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185; *Titchenell v. Jackson*, 26 W. Va. 496; *Crislip v. Cain*, 19 W. Va. 483. Wilson may have precluded himself, by his subsequent conduct, from insisting upon the true construction of his deed, but that would not affect claimants under the Byrne deed, who have the right to go back to the date thereof for its true construction, unless they too are precluded from doing so by acquiescence or estoppel in some form. Of that there is no evidence. For the proposition here stated, namely, that a tract of land called for as a monument, in the description of another tract, is to be located in accordance with the true interpretation of its boundaries as of the time at which its description was written, the date of the deed, even though written under a misapprehension as to the location of the line and

calling for the line and a tangible object not on it, as this one was, and erroneously treating them as identical, as this one does, authority is abundant and the reason, logic, and justice of the rule overwhelming. *Pennington v. Bordley*, 4 Har. & J. (Md.) 450.

"When A. conveys land to B., 'bounded on land of T.' the true line of T.'s land is the boundary of the land conveyed, although A. and T. had previously agreed, by parol, on a different line, and had set up stakes to mark such line, and had afterwards held possession of their respective lands according to such linea." *Cornell v. Jackson*, 9 Metc. (Mass.) 150.

Chief Justice Shaw so instructed the jury in that case, and, on appeal, the instruction was sustained. *Wilde, J.*, who delivered the opinion of the court, observed:

"It has been argued that it must be presumed that the grantor intended to convey the premises in conformity with the conventional lines, because he supposed, at the time of the conveyance, that those were the true lines; and this may well be. But he also must be presumed not to have intended to convey any part of the adjoining lots, to which he had no valid title."

On an issue as to the location of an adjoining tract, deeds for that tract, subsequent in date to the deed calling for it as a boundary, are not admissible. *Cutter v. Caruthers*, 48 Cal. 178. To the same general effect, see *Umbarger v. Chaboya*, 49 Cal. 525. A deed adopting the corner of a certain tract as the beginning point, in terms, conveyed a specified quantity of land on the west side of a line running to that corner, which the grantor did not own, and was interpreted as having conveyed a like quantity on the east side of the line, which he did own. *Parkinson v. McQuaid*, 54 Wis. 473, 11 N. W. 682. A deed ambiguous as to a corner was limited to the land the grantor owned, in *Crosby v. Parker*, 4 Mass. 110.

Any plainly erroneous call may be rejected as a means of effectuating the obvious intention of the parties to a deed. Though the beginning point is presumed to have been ascertained and fixed with more care than any of the others called for, and therefore ordinarily prevails in cases of inconsistency and conflict, the rule is not invariable; and, if consideration of the entire instrument and the surrounding circumstances shows it to have been erroneously selected, it yields to the other calls and is rejected. *Walsh v. Hill*, 88 Cal. 481; *Jones v. Andrews*, 62 Tex. 652; *Davis v. Smith*, 61 Tex. 18; *Zuhl v. Woods*, cited in *Jones v. Andrews*, 62 Tex. 652, as not having been reported. To hold otherwise would be the adoption of the absurd view that no mistake in the selection of the starting point could ever occur, and that, in this one instance, the parties to deeds are always infallible.

Under this settled rule, the calls in the Byrne deed for the southeast corner of the old tract and the course of the old line to that corner and for the northwest and southwest corners of the old tract and the courses of the lines thereof to those corners, taken in

connection with the fact that these calls, if given controlling influence, will confine the conveyances to land owned by the grantor, avoid conflict with the rights of adjacent owners and effectuate the clear purpose of the parties, ought to be allowed to control, and the inconsistent calls should be rejected as having been inserted by mistake. These calls, evidence of intent found in the terms of the deed, not outside of it, read in the light of the surrounding circumstances, plainly show it to have been Herold's purpose to convey, and Byrne's purpose to buy, what remained of the 600-acre tract after conveyances of parts thereof to Sargent and Wilson. What other purpose could they have had in calling for the old corners and old courses? Upon these calls alone, aided by admissible extrinsic evidence, and without the aid of the calls for the Wilson and Sargent tracts, lines, and corners, the authorities warrant the limitation of the Byrne conveyances to land within the 600-acre tract and carry them to the extent of the unsold areas of that tract. Since the calls in the Byrne deed for the Wilson and Sargent tracts, their corners and lines cannot be reconciled with the calls for the corners and courses of the old tracts, nor with the manifest intention of the parties as disclosed by extraneous evidence; they may be rejected and ignored as having been inserted by mistake.

Properly analyzed and understood, the decisions in cases involving questions of the character of the one here under consideration are not in conflict. The apparent lack of harmony among them is due to the presence of determining factors in some of them that are not found in others. One of these is the important fact upon which rests the presumption against intent on the part of the grantor to sell, and on the part of the grantee to buy, what the former did not own. That fact is present here and was in *Mylius v. Raine-Andrew Lumber Co.*, 69 W. Va. 346, 71 S. E. 404. It was not present in *Robinson v. Braidon*, 44 W. Va. 183, 28 S. E. 798. There the grantor owned and made good title to all the land his deed covered. The grantee simply wanted more of the grantor's land than had been laid off and conveyed to him or wanted it in a different place. As to whether there was a mistake, the evidence was conflicting, and no circumstance conclusive of the question of intent was disclosed. It was lacking in *Matheny v. Allen*, 63 W. Va. 443, 60 S. E. 407, 129 Am. St. Rep. 984, also. In the opinion in that case, lack of any extrinsic evidence, reflecting light on the terms used in the deed, is distinctly asserted at page 446 of 63 W. Va., 60 S. E. 407, 129 Am. St. Rep. 984. That the deed did not call for the Preston line in terms nor describe the trees designated as being on that line was also noted as a potent fact. A controlling fact in *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va. 449, 78 S. E. 384, extended

lines beyond the trees called for to the lines on which they were described as standing, and that as matter of law. The terms used to designate corners in the partition deeds involved in that case were very similar to those used in the Wilson and Sargent deeds. They called for certain trees, describing them as being on the Moore and Beckly patent line. It was urged that the calls were for the trees, not for the line, as I say here; but the court instructed the jury that the call was for the line, and that instruction this court sustained. Why? Because the whole record showed the purpose of the partition proceeding was to divide and dispose of the entire Moore and Beckly tract of land and not leave a small strip of it undisposed of. We said, in that case, as I say here, discovery of the fact that the trees were not on the line disclosed a latent ambiguity, letting in extraneous evidence for the determination of the true intent of the parties by the terms of the deeds aided by such evidence. Does not an equally strong presumption arise from the fact that extension of a line beyond another line to trees erroneously described as being on it will make the deed include land not owned by the grantor? Authorities already cited answer in the affirmative. *Cornell v. Jackson*, 9 Metc. (Mass.) 150; *Parkinson v. McQuaid*, 54 Wis. 473, 11 N. W. 682; *Crosby v. Parker*, 4 Mass. 110; *Pennington v. Bordley*, 4 Har. & J. (Md.) 450.

"But he * * * must be presumed not to have intended to convey any part of the adjoining lots, to which he had no valid title." *Wilde, J., Cornell v. Jackson*.

"There was no intention to include in the survey made any lands not owned by the plaintiff." *Taylor, J., Parkinson v. McQuaid*.

"But, upon settled rules of construction, the call for the lands of Antonio Chaboya must be understood as a call for lands to which Antonio had title." *Wallace, C. J., Umbarger v. Chaboya*.

"It is obvious that the vendor did not intend to sell, nor the vendee to buy, the latter, because the former did not own it, and the purchaser did already own it." *Mylius v. Raine-Andrew Lumber Co.*, 69 W. Va. 346, 71 S. E. 404.

These and many other authorities affirm the proposition that rules designed for ascertainment of the true intention of the parties to deeds and other contracts are not to be perverted from their purposes and made to defeat such intention by adherence to them under circumstances making them inapplicable. All rules have their limitations and exceptions. They are so framed as to answer the requirements of usual and ordinary conditions only, and, if an unusual or anomalous state of the evidence makes the application of any of them defeat the end or purpose of its existence, effectuation of the true intent of the parties, the courts uniformly refuse to apply it and adopt a different means or method of solution of the problem. Ordinarily the tree or other object called for is the monument, and the other words used in connection with it are held to be mere mat-

ters of description. *Robinson v. Braiden* fell under this general rule. But the facts in the cases above cited, and no doubt many others, in point of reason and justice, denied its application and put them under an exception to it. Likewise the general rule by which courses and distances are subordinated to monuments does not apply when, upon the whole case, the monument called for clearly appears to have been selected and marked by mistake. Such a monument controls nothing. It is totally rejected under another rule of equal dignity. Other exceptions from general rules, resting upon strong natural presumptions, may be found. Though a survey has been so made as to leave a narrow strip between the land conveyed and low water mark of a river and stakes actually driven along such survey and called for in the deed, the conveyance takes the land to low water mark, upon the presumption against unreasonable intent to retain a useless narrow strip along the water's edge. *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42, 29 Am. St. Rep. 793. A line run for the purpose of leaving a 16-foot road, with an angle in it, but so described in the deed as to be straight and to leave in portions thereof more than 16 feet and in others less or nothing, was so construed and applied as to make it angular and to leave just 16 feet for the road throughout its entire length, in *Clayton v. County Court*, 58 W. Va. 253, 52 S. E. 103, 2 L. R. A. (N. S.) 598. And it was so construed to effectuate the manifest purpose of the parties to the deed, though the operation involved departure from stakes driven and called for in the deed as well as specified courses.

"Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines." *Western M. & M. Co. v. Cannel Coal Co.*, 8 W. Va. 408.

Of course, such deviations or departures are not possible under the rules of construction, in the absence of ambiguity or uncertainty in the terms of the description. If the terms are certain, definite, and consistent, they are to be applied as written, however absurd the result or variant from intent deducible from the circumstances, for, in such case, the facts and circumstances showing intention different from that expressed are not admissible at all.

"Although parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances such as the actual condition and situation of the land, buildings, passages, water courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description." Chief Justice Shaw, in *Salisbury v. Andrews*, 19 Pick. (Mass.) 250.

"But where any part of the description is inconsistent with the rest, and thus shown to be erroneous, it may be rejected; and, when the description given is uncertain and ambiguous,

parol evidence will be admitted to show to what it truly applies." *Bond v. Fay*, 12 Allen (Mass.) 86: Dev. Deeds, § 1042.

Under the latitude thus given, in cases of inconsistent, contradictory, and ambiguous descriptions, I would extend the east and west lines of the Wilson survey, for the purposes of this case, through the trees called for as being on the southern line of the Herold tract, to that line, and stop them at the northern line of that tract, and the east and west lines of the Sargent tract to the southern line of the Herold tract. This puts the trees in the lines and so gives effect to the call for them, but it also gives effect to the calls for that southern line. These tracts being so located, the descriptions of the Byrne tracts, calling for them as boundaries, will be consistent throughout and take all of the 600 acres, except what is included in the Sargent and Wilson tracts, leaving nothing south of them for forfeiture. But there is enough in the description of the Byrne tracts, taken in connection with admissible parol evidence, to justify rejection of the erroneous calls for trees as corners of the Sargent and Wilson deeds, and thus locate them within the 600-acre tract. As to them, the same result may be accomplished in either of these two ways.

The stress I have laid upon the presumption against intent on the part of Herold to grant any land north of the 600-acre tract is justified by the terms of his petition, which admits the land he conveyed to Sargent, Wilson, and Byrne were all parts of the 600-acre tract, and does not even intimate that he owned or claimed any land north of it or elsewhere in that country. Edwards conveyed to him the 600-acre tract out of a boundary of 10,000 acres. A witness says Brockerhoff owned the land on the north. That Herold did not own it is at least a concession in the case.

In so far as the decree allows redemption of the portions of the tract of land to which Emery and others are entitled by virtue of the deed to Benj. W. Byrne and subsequent conveyances of said Byrne title, adjudicates forfeiture of the title to said portions, orders sale thereof, in default of redemption, and fixes the amounts of the taxes, interest, and commissions necessary to be paid by Herold in redemption, the decree is erroneous and will be reversed. In other respects, it will be affirmed, and the cause remanded for ascertainment of the land to which said Emery and others are entitled as aforesaid, in accordance with the principles, conclusions, and findings herein made, and also of the amount necessary to redeem the residue of the land in controversy, and with direction to dismiss the bill as to the portions thereof to which said Emery and others are so entitled, after ascertainment thereof.

ROBINSON, P. (dissenting). Deeming the opinion of the majority to be at variance

with well settled important principles, I dissent, and present the following as my view of the case.

Herold, owning a survey of land estimated to contain 600 acres, conveyed therefrom a tract to Wilson, a tract to Sargent, and two tracts to Byrne. All this was back in the 70's. The original survey was a parallelogram in shape. All agree upon its location. Its corners are established. Near the middle of the parallelogram the Wilson tract of 100 acres was surveyed out. Adjoining the Wilson tract on the west the Sargent tract of 125 acres was laid off. A portion of the original survey was thus left to the east of the Wilson tract and another portion to the west of both the Wilson and Sargent tracts. That to the east of the Wilson tract embraced 400 acres; that to the west of the Wilson and Sargent tracts embraced 150 acres. These remaining tracts were conveyed to Byrne by a single deed. In 1910 the commissioner of school lands instituted this suit to sell for the benefit of the school fund a strip extending from one end of the parallelogram to the other, lying along the southern line thereof, as having been forfeited in the name of Herold for nonentry. The theory of the suit is that the deeds to Wilson, Sargent, and Byrne did not embrace this strip, that title thereto remained in Herold, and that by reason of his failure to keep the same entered for taxation, it became forfeited to the State, though taxes were always paid on the Wilson, Sargent, and Byrne tracts. A decree in the cause finds the strip forfeited and directs that the same be sold unless Herold redeems it. The decree is based on a survey which finds the strip to contain 159½ acres. Emery and others, successors to Byrne in title, contested the right of the State to sell this strip as forfeited or the right of Herold to redeem it. They insisted that the Wilson, Sargent, and Byrne tracts which were surveyed out of the parallelogram all bordered on its southern boundary line and were so shaped as exactly to cover the original survey of six hundred acres. In other words, they claimed that the deeds to Wilson, Sargent, and Byrne left in Herold no title to any part of the original survey. But, as we have seen, these contentions were overruled by the decree. Emery and others have, therefore, appealed.

It seems clear from the Wilson and Sargent deeds, viewed with the Duffy map upon which the decree is based, that the draftsman of those deeds believed he was making the southern line of the original survey to be the southern boundary of the tracts conveyed to Wilson and Sargent. The Wilson deed defines the southern boundary line of the tract conveyed thereby as running from "a large chestnut on top of the divide between Buffalo and Strange Creek and corner to E. Sargent's land, on a line of said Herold's 600 acres" to "a red oak near Cherry

Run on the east side and on a line of whole tract." The Sargent deed defines the southern boundary line of the tract conveyed by it as running from "pointers on a line of the original survey and with the same" to "a large chestnut on said ridge." This chestnut is plainly the same that is mentioned in the Wilson deed. It is a corner between the two tracts of land. So the southern boundary of these two tracts was supposed to border on the southern line of the original survey. The timber called for as fixed monuments is described in the deeds as being on that line. Doubtless the draftsman believed it was. But the survey made in this case, and testimony in relation to the actual location of the chestnut and red oak, show these trees to be about forty rods north of the southern boundary line of the original survey. The chestnut and the red oak have been proved to be at the footsteps of the surveyor. These two trees, out in the middle of the southern part of the original survey, have been made the guiding points in clipping off from the original parallelogram the long strip extending from end to end, about 40 rods wide, which has been decreed to be forfeited as the property of Herold. Not a word has been introduced by way of evidence to show that the witnesses were mistaken about the trees designated on the map being the ones meant by the deeds. If a chestnut and a red oak answering the description in the deeds can be found on the southern line of the original survey, it has not been made to appear.

The case is presented and argued as though we were called upon to say whether the whole of the strip was omitted in the three conveyances to Wilson, Sargent, and Byrne—whether title to all of it remained in Herold. But so far as portions of the strip may or may not be parts of the Wilson and Sargent lands, we are not called to decide. No parties as claimants of the Wilson and Sargent tracts have been brought into this suit or have appeared therein. Emery and others, successors to Byrne in title, have no interest in any part of the strip which would be in the Wilson and Sargent tracts, if the southern line of the original survey is their true southern line. So delineation of the Wilson and Sargent corners is only necessary because it is submitted that the description in the Byrne deed may be corrected or controlled by them. It is the Byrne tracts that belong to appellants and about which they may litigate in the cause. They were the only litigants below as against the State and Herold. They plainly have no right to litigate any question about that which does not belong to them. They claim no interest through the Wilson and Sargent titles. Only as far as any of the tracts conveyed to Byrne has been affected by the decree, may they appeal. Whether in the Wilson and Sargent deeds the true southern boundary is the line indicated by the trees called for therein, or is the southern

line of the original survey mentioned therein, may not be decided in the absence of those in interest.

Appellants say that it is evident that Herold, by the deeds to Wilson, Sargent, and Byrne, intended so to lay off and convey the tracts that they would exactly fit each other, and all taken together be simply the original parallelogram. If that was the intention, Herold failed to express it by the deeds. The particular tract should be located by the description in the deed conveying it. The intention of the grantor must be gathered from the language of his deed, not by outside speculation or surmises arising years after the date of the deed. It is true that if we could ignore all of the established monuments called for in the deeds but those which conform to the original parallelogram, and except as to the latter be governed by the degree courses, we could make the three tracts exactly fit into and consume the original parallelogram. In other words, if we could ignore some of the fixed monuments established by evidence as ones called for in the deeds, and depend in their stead on degree courses leading from other fixed monuments called for and not ignored, we could make the Wilson, Sargent, and Byrne tracts to be exactly the original parallelogram. Yet we cannot do this, if for the intention of the parties we look to specifically mentioned monuments the location of which are known. From presumption and other things outside of the deeds it might be said that Herold did not intend to leave a part of the original survey unconveyed or to run over in his conveyance on land outside of it and not owned by him. But the descriptions in the deeds do not show that—construed as they must be by that in them which is most certain in preference to anything in them less certain—construed by the settled rule that course and distance must give way to fixed monuments. The Wilson deed, even if it fixes the tract to the southern line of the original survey, carries the tract at the other end to monuments located beyond the bounds of the original survey. The Sargent deed omits land to the south, unless we ignore a fixed monument, and give more force to the call which mistakenly designates that monument to be on the southern line of the original survey. The Byrne deed, in describing the 400 acres, ties the tract by fixed monuments so that a triangular piece of the original survey is left unconveyed at the south, and a similar piece outside the original survey is taken in at the north. The Byrne deed, in describing by fixed monuments the other tract of 150 acres, takes in at the north land outside the original survey, and may omit some therein at the south.

The Byrne deed embracing the two tracts speaks for itself. Its specific calls for monuments do not conflict with calls for any line of the original survey. It does not say that the Byrne tracts must evenly fit the original

parallelogram. For, nowhere does it call for a line of the original survey. Unless we change its calls for monuments, we must take it as expressing the intention of the parties to lay out the land to border on those monuments. The deed as it is, plainly expresses intention to convey the land by the monuments mentioned. If a mistake was made in so describing the land to be conveyed, the deed does not tell us so. Where does the deed locate the land? That is the only question before us. This is not a suit to reform a deed for mistake. "Under cover of construction a court cannot reform a written contract to make it express the real intention of the parties, which by mistake is not expressed in the words thereof." 2 Page on Contracts, sec. 1130. We have no right to say that the parties did not intend that which the deed without doubt says they did intend. There is no ambiguity in the calls for particular monuments. We are not dealing with a description of land so conflicting or inconsistent in itself that we find a mistaken call. "If there is anything equivocal in the language of the grant, the courts declare its interpretation. But if the parties have used plain and explicit language—if they have fixed a boundary which no man can mistake—courts have nothing to say about it; construction in that case has no office to perform, and the law makes no intendment." Tyler on Boundaries, 127.

Now, the Byrne deed, in describing the 400 acres, calls for a beginning at "a sugar on a rich hill side and corner to said Wilson's 100 acres." This sugar is proved to be there. True, it is outside of the original survey, 40 rods to the north, but from the evidence it is nevertheless the sugar intended. Right here it is said that Wilson's tract does not extend that far north. But by his deed it does. By Wilson's deed the sugar was a corner to his 100 acres, as the Byrne deed says it is. A call in Wilson's deed is for this same sugar, without reference to its being on the northern line of the original survey. If we were construing the Wilson deed, and were to extend it to the southern line of the original survey, since it calls for monuments to be there though they are not, we could not make it conform to the northern line of the original survey, which it does not mention. Can we say that Herold did not intend that the Byrne 400 acres should not begin at the sugar on a rich hill side? He plainly says that the survey of the tract begins there. Nothing in the deed says the contrary. By what rule can we say otherwise? Shall we say otherwise, simply because Herold may not have owned the land on which the tree stood? If so, then where shall we begin? Down at the northern line of the original survey? If so, at what point? The deed says nothing about any such a beginning.

Then, from the beginning corner of the Byrne 400 acres, the sugar on a rich hill side, the call is for a red oak on Cherry Run, on

a line of Wilson. As the proof in the case stands, this is the red oak on the southern boundary of the Wilson tract, about 40 rods north of the southern line of the original survey. The Wilson deed says that the red oak should be on the southern line of the original survey, but the Byrne deed does not describe it as being on that line. The latter deed simply calls for a red oak on Cherry Run, which is proved to be located about 40 rods north of the southern line of the original survey. It is argued that, since the Wilson deed locates the red oak on the southern line of the original survey, we should, as to the Wilson deed, make that line prevail over the red oak; and then, having found the Wilson deed to be mistaken as to the red oak being on the southern line of the original survey, take notice of the same mistake being in the Byrne deed. It is said that we should do this in preserving the claimed general scheme to convey away all of the parallelogram by the Wilson, Sargent, and Byrne deeds. The descriptions in these deeds do not vouch such a scheme. They are not even contemporaneous, or parts of the same transaction. The Byrne deed, in describing the 400 acres, does not put the red oak on the southern line of the original survey, and we know of no rule whereby we can read the Wilson deed for the Byrne deed in this particular, even if we were to change the description in the Wilson deed by eliminating the call for the red oak as a mistaken one. The red oak as called for by the Byrne deed, has been located by the proof at a particular place. Witnesses prove it to be at the place called for by the deed. This tree is a fixed monument. Nothing in the Byrne deed proves it to be a mistaken call. Nothing in that deed shows intention to locate it on the southern line of the original survey. We must give the red oak the recognition that its certainty deserves. Course and distance and other calls less certain than this marked tree must give way to it. "Marked trees upon the land remain invariable, according to which neighbors hold their distinct lands. On this ground, our juries have uniformly, and wisely, never suffered such lines, when proved, to be departed from, because they do not agree exactly with descriptions in conveyances." *Herbert v. Wise*, 3 Call, 239. We cannot leave the red oak and adopt a point on the southern line of the original survey about 40 rods south of it, for that would do plain violence to the specific description given in the deed. We cannot change that which the parties to the deed most specifically expressed in it. True, it looks like they should have followed the southern line of the original survey, but it is apparent they did not, if the red oak has been truly found and properly mapped. Not what they should have done in shaping the land—not even what they may have intended to do, yet wholly failed to do—but what they actually did by the express terms of the de-

scription, should be our guide in the present instance. The red oak called for by the Byrne deed in describing the 400 acres, has been established about 40 rods north of the southern line of the survey, and we have no basis on which to hold that it is elsewhere or that it was mistakenly adopted in the deed.

The record is, however, not so consistent in establishing the next point of the description in the deed as to this Byrne tract. "Two chestnut oaks on the divide between the waters of Buffalo and Strange Creeks" are called for as the terminus of the line leaving the red oak. These monuments are found and established, yet instead of proceeding to them, giving them the merit given to the red oak, the surveyor whose map has been adopted as the basis of the decree, follows the course and distance to a new point and establishes a stake, thereby making a corner not called for in the deed, more than 40 rods to the north of the one called for therein. The "two chestnut oaks on the divide between the waters of Buffalo and Strange Creeks" are unquestionably monuments of the original survey, though the Byrne deed does not name them as such. When a line is run to these two chestnut oaks directly from the red oak as the deed calls, a long, triangular piece of ground is left south of the Byrne 400 acres and north of the southern line of the original survey. This triangle the Byrne deed does not convey from the original survey. On the map it will appear by lines from K to A, from A to N, and from N to K. The surveyor seems to have been bent on preserving equal width for a strip omitted by the Wilson, Sargent and Byrne deeds from the original survey. But to do this he had to establish a corner that the Byrne deed itself did not establish, and to ignore a monument it called for—one not only findable but actually found. His persistency in clinging to the red oak and in not clinging to the two chestnut oaks is inconsistent, but no doubt unwittingly so. Therein was violated the elementary rule that course and distance must yield to fixed and established monuments the location of which are known and found. *Matheny v. Allen*, 63 W. Va. 443, 60 S. E. 407, 129 Am. St. Rep. 984; 2 Enc. Dig. Va. & W. Va. 582.

Again the same elementary rule was violated by the surveyor as to the description of the 150 acres conveyed by the Byrne deed. He confesses that he did not survey all this tract. But he established a corner at a stake marked O by elongation on paper so as to reach another stake at P, not called for in the deed, and thus he preserved south of P the 40 rods strip out in this territory also. To do this he ignored monuments called for in the deed, which witnesses testify are actually on the ground, at C and B. From the evidence there seems to be no reason why he should not have followed the fixed and

established monuments called for in the deed, particularly why the line from C to B cannot be laid on the ground just as the deed points it out. Then from B the call is for a post, corner to Sargent's land. The evidence does not establish the location of that post. If it is at R, as a view of the proper laying out of the Sargent tract by the known monuments called for by the deed would indicate, no land of the original survey was omitted from the Byrne deed in describing the 150 acres. If the post is somewhere to the north of R, then the line from the proved corner of the Byrne 150 acres at B to the post will leave a small triangular parcel omitted from the original survey. Further surveying and further evidence are necessary here.

It is clear that Duffy did not make surveys of the Byrne tracts conformable to the descriptions in the deed. The commissioner to whom the cause was referred, adopted this erroneous survey, and the court over exception carried it into the decree. Therefore, the decree ought to be reversed, and the cause remanded for a surveying of the land according to established law and for proceedings which should necessarily follow. The conclusion of the majority that the Byrne deed conveys all of the remainder of the original parallelogram can stand upon no intention expressed by that deed. The majority virtually say that the parties to the deed did not intend the fixed monuments—the beginning sugar and the red oak—to figure in the description at all. Then, why were they resorted to? Only by guessing at intention contrary to that which the deed expresses, can such a conclusion as has been reached in this case by the majority be brought about.

WILLIAMS, J. I dissent from the majority opinion and concur in the foregoing opinion of Judge ROBINSON.

(143 Ga. 547)

HENDERSON v. FIELDS. (No. 380.)

(Supreme Court of Georgia. June 19, 1915.)

(Syllabus by the Court.)

VENDOR AND PURCHASER — 334—DEFECTIVE TITLE—RECOVERY OF MONEY PAID.

A purchaser of land, who is in undisturbed possession under his vendor's bond to make or cause to be made good and sufficient title on the payment of the purchase money, cannot recover from the vendor partial payments made on the purchase price solely on the ground of a defect in the vendor's title. Such relief is dependent upon the vendee's equitable right of rescission or cancellation, which does not exist unless he allege that the vendor is insolvent or a nonresident, or some other fact which would make it inequitable for the vendor to hold the purchase money already paid and to collect the balance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. — 334.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by E. M. Henderson against E. A. Fields. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. S. Cargill and W. H. Boyd, both of Savannah, for plaintiff in error. F. P. McIntire, of Savannah, for defendant in error.

EVANS, P. J. The action is to recover certain payments made on a contract for the purchase of land on the ground that the vendor's title is imperfect. The petition was dismissed on demurrer. In substance it was alleged that the plaintiff purchased a lot of land from the defendant, who executed to him a bond conditioned to make or cause to be made good and sufficient title upon payment of the stipulated purchase money. The plaintiff paid \$50 of the purchase money at the time of the execution of the bond, and has since paid purchase-money notes aggregating \$105 and \$8 taxes assessed against the land. The plaintiff was let into immediate possession of the land upon the execution of the bond for title, and that possession has never been disturbed. The defendant pressed the plaintiff for the payment of the balance of the purchase-money notes, and the plaintiff had arranged to provide the money to make such payment, but before paying it she employed counsel for the purpose of having the title to the property examined. The result of the examination of the title disclosed that one of its muniments is a deed from a grantor who describes himself as trustee, and the record discloses no power authorizing the execution of the deed by a trustee. Another muniment of title is a deed from a person describing herself as the sole heir at law of a grantee in the chain of title, and upon investigation it was discovered that such person was not the sole heir at law, but there was at least one other heir in life at the time of the bringing of the suit. The prayer of the petition was for cancellation of the unpaid purchase-money notes, for an injunction against the defendant's transferring or negotiating the same, and for recovery of the payments, including the taxes.

Unless the plaintiff is entitled to a rescission of the contract, she is not entitled to the relief sought. Her right to recover the purchase money which she has paid on the land necessarily depends upon her right to have a restoration of the status. The rule is well established that:

"A purchaser of land who is in possession under a bond for titles cannot have relief in equity against his contract to pay, on the mere ground of a defect in title, unless he allege that the vendor is insolvent, or a nonresident, or some other fact which would make it inequitable for the vendor to enforce the payment of the purchase money." *Mallard v. Allred*, 106 Ga. 503, 32 S. E. 588; *McGehee v. Jones*, 10 Ga. 127; *Black v. Walker*, 98 Ga. 31, 26 S. E. 477.

A distinction between a purchaser in possession under an executed deed and one in

possession under a bond to make title has been attempted. Where a vendee takes the precaution to secure himself by a bond covenanting to convey by good and sufficient title, though we may consider the covenant to convey as an executory contract, there can be no difference between the purchaser who enters under a deed and the one who enters under a bond for title. In the latter case the vendee has his remedy upon the covenants in the bond, and would be subject to the general rule unless there be fraud or eviction. *Coleman v. Rowe*, 5 How. (N. S.) 460, 37 Am. Dec. 184. In *McGehee v. Jones*, supra, Nisbet, J., said that when a purchaser—"goes in under a deed, with covenants of warranty, and apprehends a failure of title, and wishes relief before eviction, he must resort to his covenants; and, if under a bond for titles, he must resort to his bond."

The principle that a purchaser of land who is in undisturbed possession under a title bond cannot have relief in equity against the payment of the purchase money, solely on the ground of a defect of title, was strongly asserted by Chancellor Kent, in *Abbott v. Allen*, 2 John. Ch. (N. Y.) 519, 7 Am. Dec. 552, 554. In the argument supporting the proposition he said:

"It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts, or takes any measures to assert, a hostile claim, can be permitted, on suggestion of a defect or failure of title, and on the principle of quia timet, to stop the payment of the purchase money, and of all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim, in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will to assert or renounce a title which he never asserted, and, perhaps, never thought of?"

The plaintiff's possession has never been disturbed, nor is it alleged that the holder of any paramount title has any intention of disputing her title or possession. Nor is any equitable ground alleged to bring her case without the operation of the general rule. It follows that the judgment on demurrer was proper.

Judgment affirmed. All the Justices concur.

(143 Ga. 497)

HARRIS et al. v. BLACK et al. (No. 362.)
(Supreme Court of Georgia. June 17, 1915.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES §168—ACTION ON OFFICIAL BOND—PLEADING—WRONGFUL LEVY.

In a suit on a sheriff's official bond, allegations that an execution showed on its face that the judgment on which it was based was dormant, and that this was known to the sheriff, but he nevertheless levied the execution on land of the plaintiffs, sold it, and ejected them from possession, set out a cause of action.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 398-404; Dec. Dig. §168.]

2. SHERIFFS AND CONSTABLES ⇨168—ACTION ON SHERIFF'S BOND—WRONGFUL LEVY—PARTIES—PLEADING.

Where it was alleged that the administrator of the estate of an intestate died, and no other administrator was appointed, that there was no necessity for any further administration, and no debt against the estate, that the heirs were all sui juris, and had taken possession of the real estate, and that the sheriff knowingly made a void levy on the land under an execution based on a dormant judgment, sold the property, and evicted the heirs therefrom, this showed a right of action by the heirs, and under Civ. Code 1910, § 12, such heirs could bring the suit in their own names on the official bond of the sheriff.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 398-404; Dec. Dig. ⇨168.]

3. SHERIFFS AND CONSTABLES ⇨161—ACTION ON SHERIFF'S BOND—WRONGFUL LEVY—AMOUNT OF RECOVERY—LOSS OF TITLE.

If a sheriff made a void sale of land in the possession of heirs of a decedent whose estate was unrepresented and as to which no representation was necessary, and evicted them, and delivered possession to the purchaser, but the heirs negligently allowed the purchaser to remain in adverse, peaceable possession until he obtained a title by prescription, in a suit by them on the sheriff's bond they could not recover the value of the land, with mesne profits, on the ground that they had lost the title.

(a) The allegations showed no good reason for the failure to sue for the land until prescription had ripened.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 383-387; Dec. Dig. ⇨161.]

4. SHERIFFS AND CONSTABLES ⇨171—ACTION ON OFFICIAL BOND—DISMISSAL—WRONGFUL LEVY.

Where suit was brought on the official bond of a sheriff on account of a wrongful levy and sale, and an eviction under the void sale, and where the allegations were sufficient to authorize a submission to the jury of the good or bad faith of the sheriff, under Civ. Code 1910, § 299, it was erroneous to dismiss the action as a whole, although the special damages sought to be recovered might not be recoverable.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 414-422; Dec. Dig. ⇨171.]

5. LIMITATION OF ACTIONS ⇨22—ACTION ON OFFICIAL BOND.

Under the statutes of this state and the former decisions of this court, a suit for a breach of the official bond of a sheriff, if brought within 20 years from the breach, will not be barred because an action sounding in tort or contract on account of his breach of duty, against the sheriff alone, not on the bond, might be barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 100-111; Dec. Dig. ⇨22.]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by J. M. Harris and others against L. E. Black and another. Judgment for defendants, and plaintiffs bring error. Reversed in part and affirmed in part.

On March 15, 1913, J. M. Harris and others brought suit against L. E. Black, former sheriff of Early county, and the Fidelity & Deposit Company of Maryland, as surety on

his official bond. The petition as amended alleged, in substance, as follows: The plaintiffs are the sole heirs at law of J. M. Harris, deceased. At the date of his death he was in possession of a described tract of land containing about 250 acres. The administrator appointed on his estate died, and there is now no administrator, nor is there any necessity for an administrator, the plaintiffs being sui juris, and there being no debts against the estate. At an election held in 1898 Black was elected sheriff for a term of two years from January 1, 1899, and gave a bond with the Fidelity & Deposit Company of Maryland as surety. On March 4, 1899, during his term of office, he levied upon the land by virtue of an execution which had issued from the superior court on November 2, 1881, based upon a judgment rendered at the October term, 1881, of the court, in favor of one Robinson against the administrator of Harris. Upon this execution no entry was made from its date until April 8, 1890. The property was exposed for sale and knocked off to certain purchasers. A deed was made by the sheriff on September 12, 1900, and he placed the purchasers in possession on that date, having ejected the plaintiffs therefrom. The execution was dormant, and not legally enforceable against the estate of Harris; and this appeared on the face of the execution, and was known to the sheriff when he made the levy and sold the property. The land cannot now be recovered by the plaintiffs, for the reason that the purchasers at the sale and those claiming under them have acquired a good title thereto by prescription. The plaintiffs did not ascertain that the execution was dormant, and that the levy, sale, and deed made by virtue thereof were void, until on or about January 1, 1913, too late to bring a suit against the purchasers of the land, or those claiming under them, for the purpose of recovering it. By reason of the wrongful conduct of the sheriff in making the levy and sale the official bond given by him was breached. The property was of the value of \$10,000, and the rents, issues, and profits since the sale have been of the yearly value of \$300. The defendants demurred to the petition on several grounds, one of them being that it appeared on the face thereof that the action was barred by the statute of limitations. They also objected to the allegation to the effect that the plaintiffs did not ascertain that the execution was dormant, and that the levy, sale, and deed made by the sheriff were void, until on or about January 1, 1913, too late to bring an action to recover the land from the holders of it. The court sustained this objection and the demurrer, and dismissed the action. The plaintiffs excepted.

Rambo & Wright, of Blakely, for plaintiffs in error. Little, Powell, Hooper & Goldstein, of Atlanta, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. After a judgment has become dormant, the execution based on it is not enforceable by levy, and a sale thereunder is void. *Welch v. Butler*, 24 Ga. 445; *Davis v. Comer*, 108 Ga. 117, 33 S. E. 852, 75 Am. St. Rep. 33; *Conley v. Redwine*, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398. In *McDougald v. Dougherty*, 12 Ga. 613, it was held that the levy of an execution against one person upon property in the possession of another, and not subject thereto, was a trespass. In *Hall v. Lyon*, 37 Ga. 636, where a clerk had erroneously issued executions for cost, but they were apparently regular on their face, it was held that the sheriff was not a trespasser because of levying them. In the opinion Chief Justice Warner said:

"It may be stated, as a general legal proposition in regard to the liability of officers executing process, that when the process is void upon the face of it, it will never afford protection to the officer executing it, but he is liable to an action as well as the party obtaining it; but when the process is apparently good and regular on the face of it, and can be avoided only by some extrinsic matter, then the officer is excusable, and the party only liable, for the officer can judge only from what is apparent on the face of the process."

In *Boyd v. Merriam*, 53 Ga. 561, *Trippe, J.*, after citing the case of *McDougald v. Dougherty*, *supra*, said:

"If the levy itself did not constitute a trespass, the sale and delivery of possession by the sheriff to the purchaser would complete it."

The petition alleged that the execution showed on its face that the judgment was dormant, that this was known to the sheriff when he made the levy and sold the property, and that he ejected the plaintiffs and put the purchaser in possession. This showed a case of trespass and a breach of the sheriff's official bond.

[2] 2. The plaintiffs alleged that they were the heirs of the former owner of the lot, whose administrator was the defendant in execution; that the administrator was dead, and there was no further administration on the estate and no necessity therefor, there being no debts, and all the heirs being *sui juris*; and that they were evicted by the sheriff, who placed the purchaser at the void sale in possession. Upon the death of the owner of the real estate the title vests immediately in his heirs at law, subject to administration. Civil Code 1910, § 3929. While an administrator continues as such, the right to recover possession of the estate from third persons is solely in him; but if there be no administrator, the heirs at law may take possession of the lands, or may sue therefor in their own right. Civil Code 1910, § 3933. Under the allegations of the petition, the plaintiffs were in lawful possession of the property, and an unlawful interference with their possession gave them a right of action. Civil Code 1910, § 12, provides that a suit on an official bond may be brought in his own name by any person aggrieved by the

official misconduct of the officer. By section 291 it is provided that the principal and sureties on an official bond are bound, among other things—

"for the use and benefit of every person who is injured, as well by any wrongful act committed under color of his [the principal's] office as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law."

There can be no doubt that the levy, sale, and placing of the purchaser in possession were done under color of the office of sheriff. *Luther v. Banks*, 111 Ga. 374, 36 S. E. 826.

[3] 3. The sale and deed were made in 1900. Suit was brought on the bond in 1913. The plaintiffs sought to recover the value of the property and the rents, issues, and profits thereof during that time, alleging that a prescriptive title had ripened against them, and that they had thus lost the property. Prescriptive title involves something more than a levy, sale, and placing of the purchaser in possession. It includes the holding of exclusive, adverse possession for the statutory period, peaceably, accompanied by a claim of right, and not originating in fraud. Civil Code 1910, § 4164. It involves a failure on the part of the holder of the superior title to properly assert it within the time limited. The holding of possession adversely and peaceably by the purchaser, and the failure of persons claiming to have a superior title to assert it within the statutory period, cannot be held to be the proximate results of the sheriff's making a void sale. The owners of the title could not sit by and allow their right to recover the property to become barred by lapse of time and recover against the sheriff for having done so. There is no sufficient allegation to show that they were misled by the sheriff or prevented from recovering their property. The averment in the amendment that they did not know that the judgment was dormant and the sale void until about January 1, 1913, was not sufficient to relieve them of the results of their own delay. They alleged that the execution showed on its face that the judgment was dormant, and that they were dispossessed under the sale, yet for about 13 years they did not ascertain what was patent on the face of the papers.

[4] 4. The general rule is that if a petition shows the breach of a contract, although the special damages claimed may not be recoverable, yet the entire petition will not be dismissed, because the plaintiff has the right to prosecute his action in order to vindicate his right. Civil Code 1910, § 4397; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Graham & Ward v. Macon, etc., R. Co.*, 120 Ga. 757, 49 S. E. 75. In actions founded on tort, if the injury be small, nominal damages may be awarded. Civil Code 1910, § 4502. With reference to official bonds Civil Code 1910, § 299, declares that the meas-

ure of damages for misconduct of the officer, "unless otherwise specially enacted," shall be the amount of injury actually sustained, including the reasonable expenses of the suit to the plaintiff, besides the costs of the court, but that in all cases where little or no damage is actually sustained, and the officer has not acted in good faith, the jury may find for the plaintiff an amount, as smart money, which, taking all the circumstances together, shall not be excessive nor oppressive. It was alleged that the sheriff levied the execution after the judgment became dormant, sold the property, and evicted the plaintiffs, and that he acted with knowledge of the facts. These allegations were sufficient to authorize the submission to the jury of the question of good faith on the part of the sheriff. Although the special damages alleged may not have been recoverable, this did not authorize the dismissal of the action as a whole.

[5] 5. The last question for consideration is whether the petition showed on its face that the action was barred by the statute of limitations. Civil Code 1910, § 4359, declares that:

"Actions upon bonds or other instruments under seal shall be brought within twenty years after the right of action accrues."

In several of the states the courts have held that an action on an official bond cannot be maintained where the statute of limitations would bar an action against the officer not brought on the bond. The general theory on which these rulings is based is that the bond does not of itself create a liability, but is in the nature of a collateral security or obligation, and that where an action is barred against the principal debt or cause of action, it is likewise barred against the security. In some of these decisions the statute of limitations is referred to as if it operated upon the cause of action, rather than upon the remedy; and in some of the jurisdictions where a decision of that kind has been rendered there was a statute expressly limiting suits against officers. Thus in the early and leading case of *State v. Conway*, 18 Ohio, 234, it appears that there was a statute in that state which declared that actions against officers for nonfeasance and misfeasance in office should be brought within one year; and in the later case of *State of Ohio v. Blake*, 2 Ohio St. 147, emphasis was laid on the fact that the Legislature had in terms limited all actions against the officer for malfeasance or nonfeasance in office to one year, and that it was not the legislative purpose to leave open the question of his liability in another form, for the same causes, for 15 years. In some other cases, however, the same rule has been applied, although there was no statute expressly limiting actions against public officers. In one or more of these decisions the case has been analogized to that of a debt secured by a mortgage, where the mortgage

creates a lien, but does not convey the fee; and it has been said that when the principal debt is barred, no action can be maintained upon the mortgage itself, which is a collateral security for the debt. In one or two jurisdictions it has been held that the same reasoning applies to an action on an administrator's bond as to one based on the bond of a public officer. In this state the exact point as to an official bond has not been passed upon. But the condition prescribed by the statutes for the official bond of a sheriff and that of an administrator or guardian is similar. Civil Code 1910, §§ 4906, 3972, 3047. The duties of a sheriff are, of course, different from those of a guardian or an administrator. But this cannot make a difference as to the point now under consideration, if there is a breach of the bond. As early as 1850 it was held, in *Elkins v. Edwards*, 8 Ga. 325, that when a creditor takes a mortgage to secure the payment of a promissory note, and the remedy on the latter is barred by the statute of limitations, his remedy on the mortgage is not necessarily barred, the debt being unpaid, but the creditor may avail himself of the statutory remedy to foreclose his mortgage, in satisfaction of the debt. In the opinion Warner, J., said that the creditor stipulated, by contract, for two remedies against his debtor, to enforce the collection of his demand, one by suit upon the note, in which he might obtain a general judgment against the defendant, and the other by foreclosure of the mortgage; that the creditor might pursue both at the same time until he had obtained satisfaction; that the remedy on the note might be barred, but the debt be not extinguished; and that, because the remedy on the note might be barred by the statute in six years, it did not follow that the creditor's remedy on the mortgage, being a sealed instrument, was also barred. In *Shipp v. Davis*, 78 Ga. 201, 2 S. E. 549, a debtor upon open account gave to the creditor a promissory note as a security for the payment, in part, of the account (this being the effect of the transaction, as declared by this court [78 Ga. page 208, 2 S. E. 549]). In a suit on the note it was pleaded that the account was barred, and that the note could not be collected. It was held that the barring of the remedy by suit on the account by lapse of time simply caused the loss of one of the plaintiff's rights of action; that the debt survived, though that remedy for its recovery had perished; and that the suit on the note was not barred. In *Reid v. Flippen*, 47 Ga. 273, it was held that mere delay by a creditor to sue the principal debtor until the bar of the statute of limitations has attached as between them does not discharge the surety, if he has been sued in time, and that the surety is not damaged by the delay, since, if he has to pay the debt, he can recover from the principal on the implied contract to hold him harmless, and the right to sue on

this implied contract does not exist until the money is in fact paid by the surety. The decision in 8 Ga. 325, and that just cited, have been codified in Civil Code 1910, § 3268, which declares:

"That the note or other evidence of debt is barred does not prevent the creditor thereafter availing himself of the mortgage or other security."

A distinction has been drawn between a mortgage made to secure a certain debt, and referring to it and thereby acknowledging it under seal, and an absolute deed, containing no reference to the debt, where it was sought to foreclose the latter as a mortgage after the debt was barred. *Duke v. Story*, 116 Ga. 388, 42 S. E. 722; *Pusser v. Thompson*, 132 Ga. 280, 286, 64 S. E. 75, 22 L. R. A. (N. S.) 571. But it was not held that the bar of the statute would operate to revest title. Perhaps a distinction might also be drawn between a mortgage to secure a particular debt and a bond for the general performance of duty, though the language of the code section above cited is not confined to a mortgage. It does, however, refer to "the creditor." However that may be, it does not appear that any clear distinction, as to the running of the statute of limitations, can be drawn between a suit on a guardian's bond and on that of a sheriff, the conditions in the two being similar, as already noted. In *Ragland v. Justices of the Inferior Court*, 10 Ga. 65 (7), a suit was brought on the bond given by a deceased guardian, against his legal representative, to recover the estate of his ward. The sureties were not sued, but the action was against the administrator of the guardian alone. The statute of limitations of four years was pleaded, and evidence was offered to show that the plaintiff became 21 years of age more than 4 years before the death of the guardian; and it was contended that the suit would therefore be barred. The evidence was rejected. In the opinion (10 Ga. page 74) it was said:

"This being a suit at law on the bond, no limitation term is applicable to it, but that which our statute prescribes for sealed instruments. The exception taken, therefore, on the ruling of the court, repelling the evidence offered to support the plea of the statute of limitations for four years, cannot be sustained."

As above mentioned, that was a suit against the administrator of the guardian alone on the bond; and yet it was held that the statute in relation to bonds and other sealed instruments was the one which applied, and not the statute prescribing a shorter period. This is in principle conclusive of the present case, and applies the doctrine of contracting for an additional method of procedure to a bond given for the faithful discharge of duty. The same ruling was announced, without discussion, in *Monroe v. Simmons*, 86 Ga. 344, 347, 12 S. E. 643. These rulings are binding upon us unless they should be reconsidered and reversed in the statutory method.

Whatever may be the ruling in other states,

based on other statutes, if this is a suit on a bond, by the express words of our statute (Civil Code 1910, § 4359), and by previous decisions, the plaintiff has 20 years to bring suit after the right of action accrues. If it is not a suit on a bond, what is it? In *Burnett v. Smith*, 60 Ga. 314, it was held that a suit on a sheriff's bond was a suit on a contract. If so, and the contract is under seal, why does not the statute of limitations applicable to suits on bonds and contracts under seal apply to such a case? If the statute works any hardship, the Legislature can change it; the courts cannot do so. While this decision may not be in accord with those in some other states, it is not without basis in reason, under our statutes. Sheriffs are required to give bond conditioned for the faithful performance of their duties as sheriffs, by themselves, their deputies, and their jailers, and upon the terms required by law. Civil Code 1910, § 4906. It is declared:

"Every official bond executed under this Code is obligatory on the principal and sureties thereon—1. For any breach of the condition during the time the officer continues in office or discharges any of the duties thereof. * * * 4. For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law." Civil Code 1910, § 291.

Suit may be brought by any person aggrieved by the official misconduct of the officer, in his own name, in any court having jurisdiction thereof, without any order for that purpose. Section 12. No preliminary recovery against the sheriff for the wrong is requisite to entitle the injured party to sue on the bond. *Jefferson v. Hartley*, 81 Ga. 716, 9 S. E. 174; *McCain v. Bonner*, 122 Ga. 842 (3), 844, 51 S. E. 36. These statutes and decisions recognize that the bond, a sealed instrument, obligates the principal and surety to answer for the misconduct of the officer, and that suit may be brought on this contractual obligation by any person aggrieved, without any preliminary recovery against the officer. There is in this state no statute specifying a limitation upon suits against public officers by name, not on their bonds; but, under the general law, which might render them liable in an action of tort or assumpsit, the limitation applicable to the particular action brought would apply. There is a statute fixing a limit of 10 years as to suing executors, administrators, guardians, or trustees, except on their bonds. Civil Code 1910, § 4366. There is no such statute as to a sheriff. If it should be held that an action against a sheriff for a breach of a statutory duty fell within the provision of the statute in regard to the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law—which I do not think is the case (*Bigby v. Douglas*, 123 Ga. 635 (3), 636, 51 S. E. 606)—the statutory period would still be 20 years.

Civil Code 1910, § 4360. If the action were in the form of implied assumpsit, to recover money not paid over, the period would be four years. Section 4362. Actions for trespass upon or damages to realty must be brought in four years. Section 4495. And a similar period is applicable to actions for injuries to personality. Section 4496. Actions for injuries done to the person must be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year. Section 4497. At present the period of limitations applicable to several different actions is four years, but there is no certainty that the Legislature will retain the same limitation. Thus if the action is brought against the officer individually, and not upon his bond, different periods of limitation may apply according to whether the action sounds in tort or in contract; and if the former, the limitation is dependent upon the particular character of the tort. Section 4359 requires suits on bonds and other instruments under seal to be brought within 20 years after the right of action accrues. So that if suit is brought upon an official bond under seal, for a breach thereof, either this general statute applies or else the principal and sureties may defend by setting up whatever one of several statutes of limitation might apply to a suit for the particular kind of wrong done, as if no bond had been given. See, in this connection, *Bantley v. Baker*, 61 Neb. 92, 84 N. W. 603; *Schwarman v. Com.*, 99 Ky. 296, 38 S. W. 146. If the bond were not under seal, it might be good (Civil Code 1910, § 4, par. 7), but a different statute of limitations might possibly apply.

There was no error in sustaining the demurrer to the ninth paragraph of the original petition, on the ground that it did not appear therefrom how or in what manner the alleged levy and sale of the property under a dormant execution caused the plaintiffs to lose their property, or how they were damaged thereby, and because the allegations in respect thereto were too indefinite and uncertain; nor was there error in sustaining the objection to the paragraph of the amendment which sought to set up that the plaintiffs did not ascertain that the execution was dormant, and that the levy, sale, and sheriff's deed were void, until about January 1, 1913. The facts now before us do not call for a consideration of the law of indemnity insurance.

Judgment reversed in part, and affirmed in part. All the Justices concur.

ATKINSON, J. The levy of the execution being unlawful, because the judgment upon which the execution issued was dormant, the unauthorized levy was a tort based on an act of misfeasance. The tort was alleged to have been committed by the sheriff under

color of his office. The bond was the official bond of the sheriff, as required by Civil Code, § 4906. The liability of the sheriff and his sureties on the bond included liability to "every person who is injured * * * by any wrongful act committed under color of his office." Civil Code, § 291. Applying these sections to the allegations of the petition, considered in connection with the recitals in the bond, the liability of the sheriff and his sureties to the plaintiff for the tort complained of was for breach of contract evidenced by the bond, notwithstanding the tort was based on an act of misfeasance by the sheriff. The statutory bond executed by the sheriff and his sureties was under seal, and is to be dealt with as if the provisions of Civil Code, § 291, were expressly written therein. So treated, the period of statutory limitations (20 years) as provided in the Civil Code, § 4359, is applicable. Not all that is said in the fifth division of the opinion meets with my approval, but, for the foregoing reasons, I concur in the result.

(143 Ga. 538)

EXPOSITION COTTON MILLS v. SANDERS. (No. 402.)

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

MASTER AND SERVANT — §302 — TORTS OF SERVANT—LIABILITY OF MASTER.

Where a manufacturing corporation employs a watchman, and prescribes, amongst his duties, that he shall look after the property of the employer and police the premises and tenant houses in which the employes live, and keep order on said premises, and arrest persons violating the law or injuring any property of the employer or creating any disorder about the mill, the servant necessarily must be the judge of acts which will amount to acts of disorder; and, if the servant arrest and, in pursuance of his duties as servant, beats an intoxicated person sitting on the steps of one of the employer's tenant houses, but not creating a disturbance, the master is liable for the servant's tort. This is true although the servant may also be a special policeman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. §302.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by D. M. Sanders against the Exposition Cotton Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

D. N. Sanders brought suit against the Exposition Cotton Mills to recover damages on account of an alleged unlawful assault upon him by a servant of the defendant, acting within the scope of his duties. The petition alleged, in substance, that the plaintiff was working for the defendant at its factory, and was boarding with a Mr. Queen at 109 Main street, near the mills. The house occupied by Queen belonged to the defendant, and Queen was its tenant. On the afternoon of the day named in the petition the plaintiff

"had been to town and had taken several drinks, and was to some extent intoxicated." After returning home he sat on the steps of his boarding house, and "was not creating any disturbance, and was not in any wise molesting any one," when one Lawson came to him, took hold of him, and told him he was going to place him under arrest. Plaintiff inquired the cause of his arrest, when Lawson jerked him off the doorsteps and began beating him over the head with a heavy club. Lawson then took him "up the street for the purpose of calling a police patrol, and while waiting he again assaulted petitioner, beating petitioner over the head with said heavy club." It was alleged that:

"Lawson was employed by said defendant as gatekeeper and watchman. It was a part of the duties of said Lawson, under the employment of said defendant, to look after the property of defendant and to police the premises and tenant-houses in which defendant's employes lived, and to keep order on said premises, and to arrest persons violating the law or injuring the property of defendant or creating any disorder about the mill property. Said Lawson acted as a policeman about the mill and mill property, and this was done as a part of the duties of the employment by the defendant."

It was further alleged that Lawson was acting within the scope of his employment by the defendant in his efforts to arrest the plaintiff. The court overruled a general demurrer, and exception was taken to this judgment.

Payne & Jones, of Atlanta, for plaintiff in error. Moore & Branch, of Atlanta, for defendant in error.

EVANS, P. J. (after stating the facts as above). The petition is not clear that the servant of the defendant was also an officer of the law. He is referred to as a policeman, and also as having taken the plaintiff up the street to be delivered to a police patrol. We think it is fairly inferable from these allegations that the defendant's servant was also a special officer of the law, detailed for service upon the defendant's premises. A servant may also be a special officer of the law, and the latter fact does not relieve the master from liability for his acts within the scope of his authority as servant. If he commits a tort in the discharge of duties owing to the master, the latter will be liable for his servant's tort. If the servant commits a tort as a police officer, the master will not be liable, unless it was done at his direction. *Pounds v. Central of Georgia Railway Co.*, 142 Ga. 415, 83 S. E. 96. The petition alleges that it was a part of the duties of the servant to look after the defendant's property, and "to police the premises and tenant houses in which the defendant's employes lived, and to keep order on said premises, and to arrest persons violating the law or injuring any property of defendant or creating any disorder about the mill prop-

erty." This allegation contains a specific charge that the servant was authorized by the master to arrest persons violating the law, injuring the master's property, or creating any disorder upon the property. Under the terms of an employment of this kind the servant necessarily must be the judge as to whether any person was creating disorder about the mill. The plaintiff was in an intoxicated condition, and, although he disclaims that he was creating any disturbance, if the servant mistakenly interpreted his intoxicated condition while sitting on the steps of the defendant's tenant house as a violation of law, or as an act of disorder, and arrested him in pursuance of his general duties as servant of the defendant, the latter will be liable. *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440. The rule is clear that a master is liable for torts committed by his servants in the prosecution and within the scope of his business, whether the same be by negligence or voluntary. Civil Code 1910, § 4413. We think the allegation sufficiently charges that the servant, in arresting the intoxicated plaintiff on the premises of his employer, was in the performance of his duties, as alleged in the petition. It does not appear from the petition that any authority, state or municipal, exercised control over the acts of the servant; and, in view of the positive allegation that it was his duty under his employment to exercise the power of arrest, and that such was within the scope of his employment, we think that it was not improper to overrule the general demurrer. Judgment affirmed. All the Justices concur.

(142 Ga. 641)

COCHRAN v. WEAVER. (No. 291.)

(Supreme Court of Georgia. April 16, 1915.)

(Syllabus by the Court.)

1. DISCRETION OF COURT—MOTION FOR NEW TRIAL.

The trial judge did not abuse his discretion in refusing to grant the movant additional time in which to perfect an amendment to the motion for new trial.

2. VERDICT—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, Gilmer County: H. L. Patterson, Judge.

Action between W. M. Cochran and Henry Weaver. Judgment for the latter, and the former brings error. Affirmed.

Geo. D. Anderson, of Marietta, and A. N. Edwards, of Ellijay, for plaintiff in error. A. H. Burtz, of Ellijay, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 530)

**SOUTH GEORGIA MERCANTILE CO. v.
LANCE.**

LANCE v. SOUTH GEORGIA MERCANTILE CO. (No. 374.)

(Supreme Court of Georgia. June 18, 1915.)

(Syllabus by the Court.)

1. STATUTES ~~6~~76—SPECIAL LAW—INTEREST
—INSTALLMENT LOANS.

The act of 1912 (Acts 1912, p. 144), regulating the rate of interest allowed on loans to be repaid in monthly installments, is not violative of article 1, § 4, par. 1. of the Constitution of Georgia (Civ. Code 1910, § 8391), on the ground that it is a special law for which provision has been made by an existing general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. ~~6~~76.]

2. STATUTES 116—TITLE AND SUBJECT—MATTER—INTEREST—INSTALLMENT LOANS.

Nor is the above act violative of article 3, § 7, par. 8, of the Constitution of Georgia (Civ. Code 1910, § 6437), on the ground that the act contains matter different from that expressed in the title, and that the title is too indefinite to indicate the matters contained in the body of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 152-154; Dec. Dig. 116.]

8. CONSTITUTIONAL LAW — 207 — INTEREST — 29 — INSTALLMENT LOANS — NONRESIDENTS — CONSTITUTIONAL LAW.

Nor is the act of 1912 violative of article 4, § 2, par. 1, of the Constitution of the United States, on the ground that it denies to citizens of other states the right to lend money in this state to be paid back in monthly installments, where interest is charged at the rate of 6 per cent. per annum, or less, for the entire period of the loan, and the principal and interest for the entire period of the loan is aggregated and divided into monthly installments.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. 207; Interest, Cent. Dig. § 60; Dec. Dig. 29.]

**4. ACTION ↔ 61—INTEREST ↔ 36—CONTRACT
—CONSTRUCTION—RIGHTS OF LENDER.**

Under the terms of the contract which is set out in the questions of the Court of Appeals, on failure of the debtor to pay three installments after they became due, the lender was not confined to the right to sue for such past installments, but was authorized to bring suit for the amount of the loan, with interest thereon.

(a) It elected to pursue this remedy, and thereby abandoned any other possible remedy which it might have had in regard to bringing suit.

(b) When the lender elected to pursue this remedy under the contract, it could not establish a basis involving the collection of interest at the rate of 12 per cent., which was unlawful, but it could only sue for the amount, with legal interest thereon from the date of the loan, crediting any payment made under the ordinary rule of partial payments.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 708-717; Dec. Dig. ☞61; Interest, Cent. Dig. § 76; Dec. Dig. ☞36.]

(Additional Syllabus by Editorial Staff.)

5. STATUTES 116 — TITLE AND SUBJECT-MATTER — "INSTALLMENT PLAN" — "MONTHLY INSTALLMENTS."

The phrase "installment plan," as used in the title of Acts 1912, p. 144, reading, "An

act to authorize any person lending money to be repaid on the installment plan to aggregate the principal and interest, * * * "embraces the words "monthly installments" as used in the body of such act; and hence the title is sufficiently comprehensive to cover that portion of the act which authorizes the lender to aggregate the principal and interest for the entire period of the loan and to divide the loan into monthly installments (citing Words and Phrases, Second Series, Installments).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 152-154; Dec. Dig. ¶ 116.]

Certified Questions from Court of Appeals.

Action between the South Georgia Mercantile Company and J. B. Lance. From the judgment, both parties brought error to the Court of Appeals, which certifies certain questions to the Supreme Court. Questions answered in opinion.

The Court of Appeals certified to this court the following questions:

"1. Is the act of the General Assembly of Georgia, entitled 'An act to authorize any person lending money to be repaid on the installment plan to aggregate the principal and interest for the entire period of the loan at not exceeding six per cent. per annum for the entire time, and to take security therefor by mortgage, or title, or both, and to make such security valid, and such contracts not usurious, and for other purposes,' approved August 16, 1912 (Acts 1912, p. 144) unconstitutional and void for any of the following reasons named, to wit:

"(a) Is the said act violative of article 1, § 4, par. 1, of the Constitution of Georgia (Civil Code, § 8391), on the ground that it is a special law for which provision had been made by an existing general law, in that it applies only to persons, natural or artificial, in this state, lending money to be paid back in monthly installments, and allows such persons to charge a rate of interest greater than 8 per cent., whereas at the time it was enacted, general laws of Georgia (Civil Code, §§ 3426, 3427, and 3436) provided as follows:

"Sec. 3426. The legal rate of interest shall remain seven per centum per annum, where the rate per cent. is not named in the contract, and any higher rate must be specified in writing, but in no event to exceed eight per cent. per annum.

"Sec. 3427. Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest."

" 'Sec. 3436. It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever.' "

"(b) Is the said act violative of article 3, § 7, par. 8, of the Constitution of Georgia (Civil Code, § 6437), on the ground that the act contains matter different from that expressed in the title, and the title is too indefinite to indicate the matters contained in the body of the act, in that the act authorizes any persons, natural or artificial, in this state, lending money to be paid back in monthly installments, to charge interest thereon at 6 per cent. per annum, or less, for the entire period of the loan, and divide the same into monthly installments, whereas the title of the act does not indicate that the said persons are to be allowed to aggregate the principal and interest for the en-

time period of the loan and divide the same into monthly installments?

"(c) Does the language of section 1 of the said act, which declares that 'any persons, natural or artificial in this state, lending money,' etc., mean that the rights and privileges granted by this act are confined to persons, 'natural or artificial in this state,' or that the rights and privileges thereby granted may be enjoyed by any persons, natural or artificial, who may lend money in this state, whether or not resident or domiciled in this state? If these rights and privileges are confined to persons resident or domiciled in this state, is the said act violative of article 4, § 2, par. 1, of the Constitution of the United States, on the ground that it denies to citizens of other states the right to lend money in this state to be paid back in monthly installments, where interest is charged at the rate of 6 per cent. per annum, or less, for the entire period of the loan, and the principal and interest for the entire period of said loan is aggregated and divided into monthly installments?

"2. In the event the Supreme Court shall answer, in response to the preceding question, that the act therein referred to is not unconstitutional and void for any of the reasons suggested, is the following contract nonusurious, legal, and enforceable, or is it usurious to the extent that it stipulates for interest in excess of 8 per cent. per annum?

"State of Georgia, County of Chatham. Know all men by these presents that John B. Lance, of the county and state aforesaid, acknowledged himself held and firmly bound unto the South Georgia Mercantile Company, a corporation of Savannah, Georgia, its successors and assigns, in the just and full sum of two thousand (\$2,000.00) dollars, for which payment, well and truly to be made, he binds himself, his heirs, executors, and administrators, firmly by these presents. The condition of the above obligation is such that whereas the said obligor has obtained a loan of one thousand (\$1,000.00) dollars from the said company, now know ye that if the above-named obligor or any one for him shall well and truly pay or cause to be paid to said company, at its place of business in Savannah, Georgia, on or before the last business day in each and every month, until sixty (60) monthly payments have fallen due and been paid, the sum of twenty-one and 66/100 (\$21.66), dollars (which is made up of the sum of sixteen and 66/100 (\$16.66) dollars as installments of principal and five (\$5.00) dollars as installments of interest upon said loan, then this obligation to be void, else to remain in full force and virtue. It is further stipulated and agreed that the said loan may be repaid at any annual period from date hereof, written notice of an intention so to repay being given to the home office ninety days before such annual period; and upon any such settlement before maturity the basis of the settlement shall be computed as follows: The principal debt with interest thereon at the rate of twelve per cent. per annum, and allowing credit for all payments of installments or principal and interest upon loan, with interest thereon at the rate of twelve per cent. per annum from date of payment to said company, computed in accordance with the laws of the state of Georgia. And it is further stipulated and agreed that in the event the installments of principal and interest upon the loan are not paid promptly at the time stipulated in this obligation, in the final settlement at maturity the basis shall be the principal debt with interest thereon at the rate of twelve per cent. per annum from date of payment of same to said company, computed in accordance with the laws of the state of Georgia. It is further stipulated and agreed that the nonpayment of three installments of principal or interest after the same shall fall due shall authorize the company to

enforce the payment of the loan together with the interest due thereon, the amount due to be ascertained as follows: The principal debt with interest thereon at the rate of twelve per cent. per annum, and allowing credit for all payments of installments of principal and interest upon loan, with interest thereon at the rate of twelve per cent. per annum from date of payment to said company, computed in accordance with the laws of the state of Georgia. Ten per cent. upon the amount of the indebtedness to be recoverable as attorney's fees in the event of suit hereon. This contract and the deed of trust securing the same are to be governed and construed by the laws of the State of Georgia.

"Witness his signature this 12th day of May, A. D. 1913.

"[Signed] John B. Lance.
"Executed in presence of: J. F. Buckner, S. Branch La Far, N. P., C. C., Ga. [Seal.]

"3. Under the provisions of the foregoing contract, was the plaintiff authorized to sue only for monthly installments which were past due, for the reason that the act upon which the contract was based does not expressly provide that upon the nonpayment of any three or more of the installments the loan shall mature, or was the plaintiff authorized to sue for the entire amount of the loan upon default in the payment of three installments, principal or interest; and, in the latter event, would the lender be collecting straight interest at a rate greater than eight per cent. per annum?

"4. If the following stipulation and agreement is valid and enforceable: 'that said petitioner is at this time entitled to enforce the payment of said loan under a stipulation and agreement contained in said bond and reading as follows: "It is further stipulated and agreed that the nonpayment of three installments of principal or interest after the same fall due shall authorize the company to enforce the payment of the loan, together with the interest due thereon, the amount due to be ascertained as follows: The principal debt with interest thereon at the rate of twelve per cent. per annum, allowing credit for all payments of installments of principal and interest upon loan, with interest thereon at the rate of twelve per cent. per annum from date of payment to said company, computed in accordance with the laws of the State of Georgia"—was the plaintiff authorized to sue for \$1,028.35 principal, together with interest thereon at the rate of twelve per cent. per annum from the date the petition was alleged to be filed, to wit, October 15, 1913, and does the following statement indicate the proper method for estimating the amount due in accordance with the terms of the contract, at the time the suit was instituted?

"Savannah, Ga., October 15, 1913.

John B. Lance, to South Georgia Mercantile Co.
May 12, 1913, to loan..... \$1,000 00
Interest on loan from May 12 to October 15 51 00

\$1,051 00

Credit by installments May 31st.... \$21 66
Interest on \$21.66 from May 31st to
October 15, 1913, at 12 per cent.
per annum 99

\$1,028 35

"Or, on the other hand, was the plaintiff entitled to sue only for the sum of \$1,000, with interest thereon at the rate of 12 per cent. per annum to the date of judgment, less the sum of \$21.66, with interest from May 31, 1913, to the date of judgment?

"5. Did the judge of the city court of Savannah err in sustaining the first, second, fifth, and sixth grounds of the demurrer interposed by the defendant, in so far as they raised the question that the plaintiff could not sue for the principal and interest set forth in the first para-

graph of its petition, to wit, for \$1,028.35 principal, together with interest thereon at the rate of 12 per cent. per annum from the date when it is therein alleged the petition was filed, to wit, October 15, 1913; and did the judge correctly overrule the fourth ground of the demurrer, which was as follows: That the plaintiff is authorized to sue for only the monthly installments which are past due, as the act upon which the contract is based does not provide that upon the nonpayment of any one or more installments the loan shall mature?"

John G. Kennedy, of Savannah, for plaintiff in error. Hitch & Dennark, of Savannah, for defendant in error.

HILL, J. [1] 1. (a) The act of 1912 (Acts 1912, p. 144) is not unconstitutional as being a special law on the ground that provision had been made on the subject covered by the act by reason of an existing general law. Section 1 of the act provides:

"That any persons, natural or artificial in this state, lending money to be paid back in monthly installments may charge interest thereon at six per cent. per annum or less, for the entire period of the loan, aggregating the principal and interest for the entire period of the loan, and dividing the same into monthly installments, and may take security therefor by mortgage with waiver of exemption, or title, or both, upon and to real estate or personal property or both, and the same shall be valid for the amount of the principal and interest charged and such contracts shall not be held usurious."

We hold that the act of 1912 is not a special law. From its terms it is plain that the Legislature meant that it should apply to all persons, natural and artificial, and to all territory that the old interest laws passed prior to 1912 covered. It does not apply solely to special persons or places, but is as general in its operation as the old law on the subject of interest. In the Dottenheim Case, 107 Ga. 606, 34 S. E. 217, a law somewhat similar to the act of 1912, and which limited its operations to corporations of a certain class, was held by a majority of this court to be constitutional. It was held in that case that the Legislature had the right to classify building and loan associations and savings associations, and that the law was a general, rather than a special, one, for the reason that it had uniform operation throughout the state and affected all persons coming within the terms of the act. The instant case is stronger in its facts than the Dottenheim Case. Here—

"any persons, natural or artificial, in this state, lending money to be paid back in monthly installments, may charge interest thereon at six per cent. per annum or less," etc.

This language is broad enough to embrace all persons lending money in this state and who comply with the terms of the act. It is therefore not repugnant to that clause of the Constitution which declares that:

"Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law." Civil Code, § 6391.

[2, 5] (b) The title to the act of 1912 (Acts 1912, p. 144) is as follows:

"An act to authorize any person lending money to be repaid on the installment plan to aggregate the principal and interest for the entire period of the loan at not exceeding six per cent. per annum for the entire time, and to take security therefor by mortgage, or title, or both, and to make such security valid, and such contracts not usurious, and for other purposes."

This title is sufficiently comprehensive to include and cover that portion of the act which authorizes the lender to aggregate the principal and interest for the entire period of the loan, and to divide the loan into monthly installments. The words "installment" and "installment plan" have a definite meaning. It is true the caption of the act uses the words "installment plan," and the body of the act employs the phrase "monthly installments," but "installment plan" embraces the words "monthly installments." See Bouvier's Law Dict. (3d Revision) Installments; 2 Words and Phrases (2d Series), 1106, Installment. The act under review is not violative of article 3, § 7, par. 8, of the Constitution of Georgia (Civil Code, § 6437), on the ground that it contains matter different from that expressed in the title, and that the title is too indefinite to indicate the matters contained in the body of the act.

[3] (c) The act of 1912 (Acts 1912, p. 144), properly construed, is applicable to all persons, whether resident in this state or not, and is not unconstitutional as being obnoxious to article 4, § 2, par. 1, of the Constitution of the United States, on the ground that it denies to citizens of other states the right to lend money in this state, to be paid back in monthly installments, where interest is charged at the rate of 6 per cent. per annum or less, for the entire period of the loan, and where the principal and interest for the entire period of the loan is aggregated and divided into monthly installments.

[4] 2. The remaining questions, as propounded by the Court of Appeals, need not be taken up and discussed and answered seriatim. Underlying these propositions is the question of whether or not, upon the defendant's failure to make three successive payments of installments, the plaintiff could sue for the recovery of the principal of the loan, with interest thereon, or whether it was confined to suing for past installments. We hold that under the terms of the contract, upon the failure to make the three successive payments, the plaintiff was authorized to sue for the recovery of the principal of the loan, with interest thereon. In addition to this proposition, two of the questions of the Court of Appeals present alternative methods of calculation, and inquire whether the plaintiff could proceed upon one or the other bases thus set out, at the same time that he could proceed to recover his principal and interest. We need not take up these questions separately and discuss them, because neither

one of them sets out a correct basis on which the plaintiff could recover. Each of them involves an allowance of 12 per cent. interest, which is unlawful, and which the plaintiff could not recover; and neither one of them presents a correct method of calculating the amount which the plaintiff could sue for and recover. What it could sue for was the amount of the loan, to wit, \$1,000 with the legal interest thereon from the date of the loan, crediting the payment made as a partial payment as of the date when it was made. This substantially answers all of the questions put.

The plaintiff elected to proceed for the principal and interest upon the loan as provided by the contract. It is immaterial whether it could have sued for past unpaid installments or not or could have waited until the end of the 60 months and then brought suit. It was not obliged to sue for past-due installments alone; it had the option under the contract to sue for the principal of the loan, with interest thereon. It elected to pursue that remedy. In doing so, it of course abandoned any other possible remedies it might have had; and it is useless for us to discuss whether or not it might have proceeded in some other manner. It could proceed, and elected to proceed, for the recovery of the loan and interest thereon; and, although in attempting to exercise this remedy it sought to make the calculation on a 12 per cent. basis, which was unlawful, this did not prevent it from proceeding for the principal of the loan, with legal interest thereon from the time that it was made, and allowing credit as a partial payment for the amount which was paid.

The court did not err in sustaining the first, second, fifth, and sixth grounds of the demurrer in so far as they raise the question that the plaintiff could not sue for the principal and interest set forth in the first paragraph of the petition, stating such principal as \$1,028.35, together with interest thereon at the rate of 12 per cent. per annum from the date when it is therein alleged that the petition was filed. The correct basis of the suit has been indicated above. It is evident that the first paragraph of the petition was based on a calculation involving a 12 per cent. basis, and, as already held, this was not a proper basis. This is made more clear because the principal sum is thus fixed at a greater amount than the original loan, and the principal was thus increased by reason of the erroneous basis used in the calculation. The court allowed an opportunity to amend so as to correct the erroneous amounts thus sued for; and there was no error in sustaining these grounds of demurrer with the privilege of amendment.

Also, the court correctly overruled the fourth ground of the demurrer, which was to the effect that the plaintiff was authorized

to sue only for the monthly installments which were past due, as the act upon which the contract was based does not provide that upon the nonpayment of one or more installments the loan shall mature. We have seen that the contract provided that it should be satisfied if the borrower paid certain installments. In case three of these installments should not be paid after the same became due, it authorized the lender to proceed, not upon the basis of this installment plan at all, but to abandon it altogether and simply proceed to recover the amount of the loan, with interest thereon. No notes appear to have been given for the installments, but the contract simply provided two methods of operation. The lender was not confined to the installment basis, but, upon the failure to pay three of the installments, it had the privilege to disregard that basis altogether and proceed on the basis of a straight loan, with interest thereon, and with a proper credit for what might have been paid; and we have seen that it exercised this option.

This substantially answers all the questions propounded by the Court of Appeals. All the Justices concur.

(143 Ga. 600)

DAVIS v. BOYD CO. (No. 411.)

(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

AUCTIONS AND AUCTIONEERS \S 10—RECOVERY OF FEE—OCCUPATION TAX.

An auctioneer may sue and recover his fee for auctioning property, although he may not have paid the occupation tax and registered, as provided in Civ. Code 1910, \S 923, 978.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. \S 44-47; Dec. Dig. \S 10.]

Error from Superior Court, Calhoun County; E. E. Cox, Judge.

Action by L. H. Davis against the Boyd Company. Judgment for defendant, and plaintiff brings error. Reversed.

B. W. Fortson, of Arlington, for plaintiff in error. Yeomans & Wilkinson, of Dawson, for defendant in error.

EVANS, P. J. The plaintiff contracted with the general manager of the defendant corporation to auction the sale of certain property belonging to the defendant, at an agreed price; and the action is to recover the amount alleged to be due under this contract. On the trial the plaintiff testified that he was employed by the general manager of the defendant corporation, by virtue of a resolution of the directors and stockholders authorizing the general manager to make such contract; that he performed the service agreeably to the contract; and that the defendant had refused to pay for the same. He admitted that he had never been licensed as an auctioneer or registered as such. Up-

on the conclusion of his testimony, the court granted a nonsuit on the ground that:

"Notwithstanding the evidence showed a contract on the part of the plaintiff with the defendant to perform the services, and that the defendant had refused payment according to the terms of its contract, yet the act of the plaintiff in crying off the property of the defendant, as a matter of law, constituted the business of an auctioneer, and that the evidence showed that he had not registered his name or the business in which he was engaged with the ordinary, as required by law, and therefore his contract was null and void and unenforceable in law."

The plaintiff sued out a writ of error to the judgment of nonsuit.

In the general tax act for the raising of revenue, a specific occupation tax is levied—"upon every person, firm, or corporation carrying on the business of an auctioneer, twenty-five dollars in each county in which they may auction the sale of property or carry on such business: Provided, that this section shall not be construed to apply to any administrator, executor, or guardian disposing by auction of the property of the estate or wards they represent, or to Confederate soldiers." Civil Code 1910, § 923.

It is further provided that before any person shall be authorized to carry on any business upon which a special tax is laid—

"they shall go before the ordinary of the county in which they propose to do business and register their names, the business they propose to engage in, the place where it is to be conducted, and they shall then proceed to pay their tax to the collector. * * * Any person failing to register with the ordinary, or, having registered, fails to pay the special tax * * * required, shall be guilty of a misdemeanor," etc. Section 978.

From the recital in the bill of exceptions, the trial court held that the contract was void because of noncompliance with these sections. In this our learned brother on the trial bench was in error. The statute was passed for the purpose of raising revenue, and the failure to pay the tax or register will not invalidate a contract for services rendered in auctioning property. The matter has very recently been considered in the case of a real estate agent, and the reasoning applicable to such agent applies with equal force to auctioneers. *Toole v. Wiregrass Development Co.*, 142 Ga. 57, 82 S. E. 514.

Judgment reversed. All the Justices concur.

(143 Ga. 599)

SCOGGINS v. KNOX.

(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR 588—NEW TRIAL 132—PRESENTATION FOR REVIEW—ASSIGNMENTS OF ERROR—BRIEF OF EVIDENCE.

In this case the bill of exceptions recites that the judge refused to approve the brief of evidence tendered to him, passing the following order with respect thereto: "At Chambers, June 26, 1914. This paper was this day presented to me for approval, as a brief of the evidence; and counsel for respondent insisting that this does not contain a correct brief of the evidence

of the witnesses named therein, and, further, that the evidence of witnesses is left out and not named in this brief, it being presented for my approval 16 months after the trial, and by reason of the lapse of time I cannot remember their evidence or the evidence of any witness, and cannot approve this as correct, and I hereby disapprove this as a correct brief. This brief of evidence was accompanied by the affidavits attached of H. P. Lumpkin and P. D. Wright." The court then passed a further order reciting that: "The movant not having an approved brief of evidence, on motion this motion for new trial is dismissed." Two assignments of error are "that the court erred in refusing to approve the brief of evidence presented under the circumstances in this case, as shown by the affidavits attached to the brief of evidence," and that the court "erred in refusing to allow time to get the stenographer's report, as requested by movant's counsel, as shown by the affidavit of Paul D. Wright, attached to brief of evidence tendered in this case." The brief of evidence and the affidavits referred to were specified as a part of the record and brought to this court as such. *Held*: (a) The brief of evidence not having been approved and filed as a part of the record, neither it nor the affidavits accompanying it could legally be brought to this court as part of record, and the assignments of error quoted above cannot be considered. (b) There being no approved brief of evidence before the court, the court did not err in sustaining the motion to dismiss the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610; Dec. Dig. 588; New Trial, Cent. Dig. §§ 273-275; Dec. Dig. 132.]

Error from Superior Court, Walker County; Jas. E. Rosser, Judge.

Action between D. T. Scoggins, executor, and Alex. Knox. From the judgment, the executor brings error. Affirmed.

Paul D. Wright and H. P. Lumpkin, both of La Fayette, for plaintiff in error. W. M. Henry, of Rome, and R. M. W. Glenn, of La Fayette, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 572)

THORNTON v. OVERSTREET et al.

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

EXECUTION 328—DISTRIBUTION OF PROCEEDS.

Where A. brings a rule against a sheriff to require him to pay over money realized by the levy and sale of certain property as the property of B. under a *fi. fa.* in favor of the movant, placed in his hands, and the record in the case shows that the fund in controversy was thus produced, it is error to award it to a contesting creditor holding a *fi. fa.* against neither the plaintiff nor defendant in the *fi. fa.* first mentioned, but against a third party, notwithstanding evidence be produced which would warrant a finding that the property sold really belonged to such third party.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 951-998; Dec. Dig. 328.]

Error from Superior Court, Pike County; Robt. T. Daniel, Judge.

Proceedings between Mrs. E. J. Thornton and A. Overstreet and others. From the judgment, Thornton brings error. Reversed.

E. C. Armistead, of Barnesville, for plaintiff in error. E. F. Dupree, of Zebulon, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(143 Ga 568)

MILLER et al. v. BUTLER.

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

1. JUDGMENT \S 457—ACTION TO SET ASIDE—NECESSARY PARTIES.

A creditor and the settlor of a trust estate had mutual actions pending against each other, and they were all tried under an equity case, in which a decree was rendered, fixing the title of the land involved, and also giving to the creditor a personal decree against the settlor of the trust estate for a large amount of money. In a suit to set aside this judgment, by the beneficiaries of the trust estate, the settlor or his legal representative is a necessary party. See *Miller v. Butler*, 137 Ga. 90, 72 S. E. 913.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 867-869; Dec. Dig. \S 457.]

2. JUDGMENT \S 457—EQUITABLE RELIEF—NECESSARY PARTIES—REPRESENTATIVE OF INSOLVENT DECEDENT.

The present case, except as to the question of proper parties, in no wise differs from the former (just cited), other than that it alleged that the settlor's estate is insolvent. This does not relieve the plaintiffs from the necessity of making his personal representative a party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 867-869; Dec. Dig. \S 457.]

3. JUDGMENT \S 457—EQUITABLE RELIEF—NECESSARY PARTIES—HEIRS.

The court passed an order requiring the plaintiffs to make the administrator of the settlor a party within four months. Instead of complying with the order, the plaintiffs offered to amend by making as parties, in lieu of the representative of the estate of the deceased, certain remote heirs of the decedent. If the decree were to be vacated, the creditor would be entitled to be restored to his former status, so that in his suit he could obtain a judgment against the estate of the settlor of the trust. Many of the heirs proposed to be made parties were heirs twice removed from the deceased settlor, with intervening estates, and the creditor would not be in a position to take any judgment against the heirs, as the facts alleged are not sufficient to entitle him to a judgment against them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 867-869; Dec. Dig. \S 457.]

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by F. M. Miller and others against H. C. Butler. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. H. Terrell, of Atlanta, for plaintiffs in error. F. M. Longley, of La Grange, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 557)

STRINGFIELD v. STRINGFIELD.

(No. 384.)

(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

TRIAL \S 143—DIRECTING VERDICT.

It was error to direct a verdict on conflicting evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. \S 143.]

Error from Superior Court, Taylor County; H. A. Matthews, Judge.

Action by J. L. Stringfield, administrator of J. R. Stringfield, against Seymore Stringfield. Judgment for plaintiff, and defendant brings error. Reversed.

C. W. Foy, of Butler, for plaintiff in error. W. E. Steed, of Butler, for defendant in error.

EVANS, P. J. J. L. Stringfield, as administrator of J. R. Stringfield, brought his action against Seymore Stringfield, alleging that his intestate was the owner of a certain described tract of land in the possession of the defendant, and that the defendant is one of the heirs at law of his intestate, but that it is necessary to recover the land for the purpose of paying the debts and making distribution among the heirs at law of his intestate. The defendant denied the plaintiff's title, and set up title in himself by adverse possession. The case proceeded to trial, and the plaintiff put in evidence perfect paper title to the land in his intestate. The deed in the chain of title to the plaintiff's intestate purported to have been executed in 1894 and recorded July 1, 1912.

The plaintiff introduced testimony of the necessity for the recovery of the land for the purposes of administration; that it was worth for rent \$75 per year; that the defendant had been living for a long time on the place with his father and the other children; and that after the death of the plaintiff's intestate the defendant had offered the heirs a certain amount for their interest in the land. A witness testified to a statement by the defendant that he desired to cut down a hickory tree near the house, but desisted because the plaintiff's intestate objected. The tax digests of the county, showing that the land was returned for taxes in the name of the plaintiff's intestate from the year 1900 to 1911, inclusive, were received in evidence.

The defendant testified: That his father went into possession of the land in 1869, and in 1886 contracted to give him the land in consideration of his taking care of him during his life. That he complied with this contract with his father, who had since died. That after the death of the plaintiff's intestate he learned that his brothers and sisters were claiming the land as heirs, and he offered them a compromise rather than to have a lawsuit, which offer they declined. That

he never rented the land from plaintiff's intestate nor from any one else, but always claimed it as his own after the trade with his father in 1886, and since then he has been in the open, notorious, uninterrupted, and peaceable possession of the land and paid the taxes on it. He denied that he had made the statement about desiring to cut the hickory tree, and the objection made by his brother (plaintiff's intestate) to his cutting it.

Upon the conclusion of the testimony the court directed a verdict for the plaintiff for the premises in dispute and for \$50 mesne profits. A motion for new trial was overruled, and the defendant excepted.

The various grounds of the motion raise the point that the evidence was conflicting and that the court should not have directed a verdict. We think it clear that the court should have submitted to the jury the conflicting issue of title. The suit was brought in 1912, a few months after the record of the deed to the plaintiff's intestate, and the testimony was sufficient to raise the issue of the defendant's adverse possession under a claim of right for a period of more than 20 years. The Code declares that actual adverse possession of land by itself for 20 years shall give good title by prescription against every one except the state or persons laboring under disabilities. Civil Code 1910, § 4168. It was error to withdraw the issue of title from the jury.

Judgment reversed. All the Justices concur.

(143 Ga. 596)

TARVIN v. ROME COOPERAGE CO.
(No. 403.)

(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. NEGLIGENCE — PETITION — INVITATION TO PLAINTIFF.

Paul Tarvin, by next friend, instituted an action for damages against the Rome Cooperage Company, a corporation. In the fifth and sixth paragraphs of the petition it was alleged that the plaintiff "was an employé of the Southern Co-operative Foundry Company; that he was ordered by his boss Charlie Moore, to go to the Rome Cooperage Company and carry a message in regard to some lumber for the Rome Cooperage Company; that the said Paul Tarvin was rightfully in the plant of the said defendant, attending to business for his said superior, in the interest of his said superior, and in the interest of the defendant; that the said Paul Tarvin, on entering the plant of the defendant, found it necessary, in attending to said business, to pass through and under the shaftings, beltings, pulleys, and machinery of the said defendant," and was injured on account of alleged acts of negligence in regard to keeping in a safe condition the pulleys and other machinery. By amendment it was alleged that the plaintiff "was invited in and upon said premises and into said plant of the defendant by the defendant, and by its agent and employé, Tim Corey, who had authority to do so, and, with the full knowledge and consent of the said defendant, plaintiff did enter in and upon the said premises and go into the plant of the defendant upon the errand and business as heretofore set forth." On the trial the plaintiff testified: "He [Mr. Moore] sent

me there to tell Mr. Corey [the foreman of the defendant's cooperage plant] to come up there first, and I went down there and told him what he said, and he came up there to the foundry where we were at work. I found Mr. Corey in the cooperage plant. I went through the plant into the cooperage where he was. I went to see him the second time, and also went the third time. The third time I went I got hurt. I went in there and told Mr. Corey that Mr. Moore said, if he was going to come on, to do so, and, if he was not coming, to send him the gun. Mr. Corey said to me, 'Wait a minute, and I will see if I can get it.' I don't know where Mr. Corey went. He went out of the cooperage. While I was waiting I got hurt. The machine fell on me." *Held*, by the allegations contained in the petition, the plaintiff projected his case, in so far as it related to a duty by the defendant to him, on the sole theory that he was on the defendant's premises by invitation on account of a matter of business in which the defendant was interested.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 177, 178; Dec. Dig. —110.]

2. NEGLIGENCE — VARIANCE — INVITATION.

The evidence on this point did not support the case alleged; but, from the plaintiff's testimony explanatory of his presence on the defendant's premises, it appears that plaintiff was a trespasser, or, at most, a mere licensee.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. —134.]

3. TRIAL — NONSUIT — VARIANCE.

The plaintiff having failed to prove his case as alleged, it was not erroneous to grant a nonsuit at the conclusion of his evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 359-367; Dec. Dig. —159.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by J. A. Tarvin, as next friend of Paul Tarvin, against the Rome Cooperage Company. Judgment for defendant on nonsuit, and plaintiff brings error. Affirmed.

Hamilton & Hamilton and Hutchens & Hutchens, all of Rome, for plaintiff in error. Lipscomb & Willingham and Nathan Harris, all of Rome, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(143 Ga. 599)

CITY OF TALLAPOOSA v. BROCK.

(No. 410.)

(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — DECISIONS REVIEWABLE — FINALITY.

"Save as to cases specially provided for by law [such as exception to the grant * * * of an injunction, or the appointment of or refusal to appoint a receiver], no case can be brought to this court by bill of exceptions, so long as the same is pending in the court below, unless the decision complained of would have been a final disposition of the case, had it been rendered as the excepting party claims that it should have been." *Baldwin v. Lowe*, 129 Ga. 711, 59 S. E. 772; Civ. Code 1910, § 6138.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. —78.]

2. APPEAL AND ERROR §78—DECISIONS REVIEWABLE—FINALITY—RULINGS ON PLEA.

Where to a suit for damages the defendant filed several pleas in bar and abatement, only two of which—one of res judicata, and one based upon the ground that the present action was a renewal of one that had been withdrawn by plaintiff without having paid the costs or making a pauper affidavit of her inability so to do (Civ. Code 1910, § 5625)—were passed upon by the trial judge, to whom, by agreement, the issues thus raised were submitted without the intervention of a jury, who found against the pleas, such judgment is not a final judgment that can be reviewed by direct bill of exceptions to this court. *Johnson v. Battle*, 120 Ga. 649, 48 S. E. 128; *Baldwin v. Lowe*, supra; *Johnson v. Merchants' & Farmers' Bank*, 141 Ga. 721, 81 S. E. 873.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. §78.]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by Jennette Brock against the City of Tallapoosa. Judgment against defendant on its plea in bar and abatement, and defendant brings error. Writ of error dismissed.

Lloyd Thomas and M. J. Head, both of Tallapoosa, for plaintiff in error.

HILL, J. Writ of error dismissed. All the Justices concur.

(143 Ga. 569)

REEVES v. DANIEL.

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

1. GAMING §12 — GAMBLING CONTRACT — SALE FOR FUTURE DELIVERY.

In view of the recitals contained in the contract, and of the former ruling of this court, the following charge was not error: "Now, gentlemen, there is a certain written contract which has been introduced in this case. I charge you, gentlemen, that this is not a wagering contract on its face; that it is a legal contract on its face." *Daniel v. Reeves*, 139 Ga. 646, 77 S. E. 1067.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. §12.]

2. CONTRACTS §170 — CONSTRUCTION — INTENTION OF PARTIES.

Nor was the following charge error: "I charge you, gentlemen, that the intention of the parties may differ among themselves; in such cases the meaning placed on the contract by one party and known to be thus understood by the other party shall be held as the true meaning."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. §170.]

3. APPEAL AND ERROR §97—REVIEW—REFUSAL TO DIRECT VERDICT.

The refusal to direct a verdict is not cause for a reversal. *Cunningham v. Waters*, 142 Ga. 115, 82 S. E. 518.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.]

4. GAMING §49 — GAMBLING CONTRACT — EVIDENCE—SUBSEQUENT ACTIONS.

Certain evidence of the plaintiff was allowed to go to the jury, over objection, to the effect that the plaintiff had resold the cotton to another person after making the contract with the defendant, and that the plaintiff delivered 50

of the 150 bales so sold to the purchaser; also the evidence of the person to whom the plaintiff sold, to the same effect. For the reasons given in the case of *Richter v. Kilpatrick*, 143 Ga. —, 85 S. E. 319, we think the court erred in admitting this evidence over objection of the defendant. These were but self-serving declarations, made subsequently to the making of the contract, the validity of which could not be attacked by proof of independent collateral action of one of the parties thereto.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 100-102; Dec. Dig. §49.]

Error from Superior Court, Upson County; Robt. T. Daniel, Judge.

Action by P. G. Daniel against T. J. Reeves. Judgment for plaintiff, and defendant brings error. Reversed.

P. G. Daniel brought suit against T. J. Reeves, alleging substantially the following: On June 19, 1909, petitioner and defendant entered into a written contract by the terms of which Reeves agreed to sell and deliver to Daniel 50 bales of lint cotton in square merchantable bales at Thomaston, Ga., between the 1st and 30th of October. The cotton was to average 500 pounds per bale, and to be of any grade between strict ordinary and fair, inclusive. Daniel was to pay 10.27 cents per pound for Inman, Akers & Inman's 4's, the grade being good middling, American standard classification, with deductions and additions for other grades according to Inman, Akers & Inman's differences in effect on the day of delivery. The 50 bales of cotton, averaging 500 pounds per bale, would weigh in the aggregate 25,000 pounds, and at the price agreed on in the contract would amount to \$2,567.50. On the 30th day of October, 1909, in the city of Thomaston, Ga., Daniel tendered to Reeves, the defendant, \$2,567.50 for the 50 bales of cotton at the contract price, and stood ready to comply with the terms of the contract, and then and there demanded the 50 bales of cotton of the defendant. The cotton of the classification referred to in the contract was worth and bringing on the market on October 30, 1909, 14½ cents per pound, and the difference between that and the contract price on the 50 bales amounts to \$1,088.75. Reeves failed and refused to deliver the cotton as demanded, whereby he breached the contract and became indebted to and has injured petitioner in the sum last stated, with interest at 8 per cent. from October 30, 1909, for which petitioner prays judgment. It was further alleged that under the contract the defendant sold to the petitioner 50 bales of cotton to be raised by himself on his lands; that the defendant was a farmer and planted and raised cotton, and it was understood at the time of making the contract that the 50 bales of cotton were to be raised on his own lands and were to be delivered, but, in the event the defendant should fail for any cause to deliver the same, he had the right to settle the contract by paying any difference in the value of the cotton when delivered and the

price agreed on in money; that such was the understanding at the time, and the contract was made in good faith to secure the delivery of the cotton, and not for speculative or gambling purposes. Plaintiff amended his petition by alleging, in effect, that it was the intention of the parties to the contract that the cotton so agreed to be sold was to be actually delivered by Reeves; that the plaintiff had sold cotton to other parties, including manufacturing companies to whom it was to be actually delivered for manufacturing purposes, and at the time of making the contract in question the plaintiff was buying this and other cotton to meet his own contracts for the sale of cotton which was actually to be delivered, and in making contracts for the purchase of cotton, as in the present instance, it was his intention to secure the actual delivery of the cotton, and such was likewise the intention of the defendant; that Reeves represented, and it is a fact, that he was a farmer and raised cotton, and that the 50 bales then agreed to be sold and delivered would be raised on his own farm, and it was the intention of the defendant to deliver cotton actually raised by himself; that it was agreed and understood that if Reeves should fail, for any reason, to actually deliver the cotton as contemplated and intended by the parties at the time it should be delivered, then the parties could settle the difference between them arising from this breach of the contract.

The contract was as follows:

"Jany. 19, 1900. I hereby agree to sell to P. G. Daniel 50 bales of cotton delivered at Thomaston between the 1st and 30th days of October next. The delivery to be made at such time, at seller's option, in lots of not less than 50 bales. Cotton to average 500 pounds per bale. If cotton does not average 500 pounds per bale, I will deliver a sufficient number of bales to bring up the average to 500 pounds per bale. The cotton to be of any grade between strict ordinary and fair, inclusive, at the price of 10.27 cents per pound for Inman, Akers & Inman 4's. Said grade being good middling, American standard qualification, with deduction and addition for other grades according to Inman, Akers & Inman's difference in effect on the day of delivery. It is fully understood and expressly agreed by the parties to this contract that same can be settled by payment of money upon failure of delivery of the actual cotton in square merchantable bales weighing an average of 500 pounds as aforesaid. [Signed] T. J. Reeves. We accept the above contract with its conditions and obligations. [Signed] P. G. Daniel."

The defendant denied the material allegations of the petition, and, answering specially, denied making or entering into the alleged contract in manner and form sued on, and averred that he did not authorize any one to do so for him, and has never ratified any such contract. He says that the terms and agreements of the alleged contract set forth are not full, true, and correct, and are not the agreements of any contract ever made and entered into with the plaintiff. The jury returned a verdict for the plaintiff. A

motion for a new trial was overruled, and the defendant excepted.

J. Y. Allen and M. H. Sandwich, both of Thomaston, for plaintiff in error. W. Y. Allen, of Thomaston, and R. L. Berner, of Macon, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(143 Ga. 526)

HAYES v. CARROLLTON BANK.

(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

There being no error of law complained of, and the evidence being sufficient to support the verdict, the judgment refusing a new trial is affirmed.

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action between J. N. Hayes and the Carrollton Bank. From the judgment, Hayes brings error. Affirmed.

See, also, 85 S. E. 699.

I. N. Cheney, of Bremen, and Griffith & Matthews, all of Buchanan, for plaintiff in error. Jas. Beall and B. F. Boykin, both of Carrollton, for defendant in error.

ATKINSON, J. Affirmed. All the Justices concur.

(143 Ga. 550)

HOWARD v. ALLGOOD. (No. 377.)

(Supreme Court of Georgia. June 19, 1915.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF §38—PLEADING §212—DEMURRER—SOLVENCY OF GUARANTORS—PETITION.

In an action for damages the petition alleged, among other things, as follows: A corporation agreed to sell stock to the plaintiff, with a covenant to resell it at a stated price, if at the expiration of one year the purchaser should be dissatisfied and desired to have it resold. "As a guaranty" of this contract, certain officers and directors of the corporation, in writing undertook to "sell or take up" the shares in question at the specified price, and assumed the payment of such amount, as a means of inducing the plaintiff to take the stock from the company. The persons negotiating the trade represented to the plaintiff that these officers and directors were solvent and in good financial and commercial standing, one of them being worth \$100,000, another \$50,000, and a third from \$5,000 to \$10,000, which representations were false and fraudulent, and, with knowledge of their falseness, were made for the purpose of deceiving the plaintiff and inducing him to take the stock, and did so induce him. The company having failed and gone into bankruptcy, the plaintiff endeavored to communicate with these officers, but they could not be located; and he then found that the representations above mentioned were false, and he thereby lost the amount which he had paid for the stock. Held, that such petition was not subject to general demurrer.

(a) Civil Code 1910, § 4411, dealing with representations to obtain credit for another, does not apply to a transaction like that here involved.

(b) A special demurrer was interposed as to certain allegations of a petition. An amendment was made, striking some of them and altering others, so as to materially change the paragraph to which the special demurrer was directed. Demurrer was again interposed, but the second demurrer did not include a special demurrer, or again raise the question involved in the former special demurrer, but only relied on the general grounds; and the special ground of the first demurrer will be treated as abandoned.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 60; Dec. Dig. ¶ 38; Pleading, Cent. Dig. §§ 521-524; Dec. Dig. ¶ 212.]

2. OVERRULING OF DEMURRER.

There was no error in overruling the demurrer.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Action by H. C. Allgood against H. W. Howard. Judgment for plaintiff, and defendant brings error. Affirmed.

Neel & Neel, of Cartersville, for plaintiff in error. Mundy & Mundy, of Rockmart, and Patterson & Copeland, of Valdosta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 551)

CULBRETH v. ALLGOOD. (No. 387.)
(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

MISREPRESENTATIONS—ACTIONS.

This case is controlled by the decision in the case of *Howard v. Allgood*, 85 S. E. 757.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Action by H. C. Allgood against Love Culbreth. Judgment for plaintiff, and defendant brings error. Affirmed.

E. K. Wilcox, of Valdosta, for plaintiff in error. Mundy & Mundy, of Rockmart, and Patterson & Copeland, of Valdosta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(143 Ga. 598)

McFARLAND v. McFARLAND. (No. 407.)
(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. DEPOSITIONS ¶ 5—PROBATE OF WILL—TESTIMONY OF SUBSCRIBING WITNESS—NON-RESIDENT WITNESS.

Where in a proceeding to probate a will in solemn form it appears that one of the requisite number of witnesses necessary to prove the will is inaccessible to the court, on account of non-residence in the state, proof of his handwriting may be resorted to, or his testimony taken by commission as in other cases. *Wells v. Thompson*, 140 Ga. 119, 78 S. E. 823, 47 L. R. A. (N. S.) 722, Ann. Cas. 1914C, 898; Civ. Code 1910, § 3861.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 24; Dec. Dig. ¶ 5.]

2. JUDGMENT ¶ 219 — VALIDITY — RECITAL — EVIDENCE.

In the absence of a statute requiring it, judgments of courts of general jurisdiction of the subject-matter and the parties need not have set forth therein the evidence upon which they are based. 11 Enc. Pl. & Pr. 957.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 397-399; Dec. Dig. ¶ 219.]

3. WILLS ¶ 355 — PROBATE — VALIDITY OF JUDGMENT — TESTIMONY OF SUBSCRIBING WITNESS.

A motion to set aside a judgment of a court of ordinary probating a will in solemn form, filed by an heir at law of the testator, on account of defects appearing upon the face of the judgment, the grounds of the motion being that "upon the hearing of said case, as shown by said order and judgment of probate, * * * the evidence of [one of the witnesses to the will] was not taken or heard by the court, and no effort was made to take his evidence, although he was in life and a resident of Chattanooga, Tenn., and his evidence could have been taken without difficulty," and "the said judgment and order shows no evidence before the court as to the signature of the" nonresident witness, is, in the absence of the pleadings or record before the court, upon the application of the foregoing principles, subject to demurrer.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 811-819; Dec. Dig. ¶ 355.]

4. PROBATE—JUDGMENT—MOTION TO VACATE — DEMURRER.

The superior court, to which the case was appealed by agreement, did not err in sustaining a demurrer to the motion to set aside the judgment.

Error from Superior Court, Walker County; Moses Wright, Judge.

Proceedings in solemn form by T. F. McFarland, executor, for the probate of the will. From an order denying his motion to set aside the probate, J. A. McFarland brings error. Affirmed.

J. E. Rosser, of La Fayette, and W. M. Henry, of Rome, for plaintiff in error. Sizer, Chambliss & Chambliss, of Chattanooga, Tenn., R. M. W. Glenn, of La Fayette, and W. H. Payne, of Chattanooga, Tenn., for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 590)

CALVERT MORTGAGE CO. v. FLYNT.
(No. 401.)

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

MORTGAGES ¶ 504—RESTRAINING FORECLOSURE.

Where a petition alleged sufficient facts to show that a deed had been procured from a plaintiff by fraud, that the grantee had procured a loan from a mortgage company, that the latter had taken a deed to secure such indebtedness, and that it did so "with full knowledge of petitioner's rights," the petition was not subject to general demurrer.

(a) The special demurrer did not raise the question of the sufficiency of the facts alleged to charge the company with notice or put it

upon inquiry; and one ground of the special demurrer was not referred to in the briefs.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1470, 1490–1500, Dec. Dig. ☞ 504.]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Suit by Mrs. Mary M. Colley against the Calvert Mortgage Company. Judgment for plaintiff, and defendant brings error, and plaintiff dying, R. D. Flynt, administrator, was made a party. Affirmed.

On December 22, 1913, Mrs. Mary M. Colley filed her equitable petition against the Calvert Mortgage Company, a nonresident corporation, and the sheriff of the city court of Dublin, Laurens county, alleging substantially as follows: On June 6, 1888, she purchased a described tract of land and went into possession of it, and she has so continuously remained since. About November 16, 1912, her husband died, leaving her without children of her own, and with no one to counsel and advise her, and no one to whom she could look for maintenance and support. Soon after his death, being left with no one to live in the house with her, she requested the son and daughter-in-law of her deceased husband to move their family into the house located upon the property and to occupy it as a home in connection with her, for the purpose of protecting and taking care of her in her old age—

“it being the purpose of petitioner, and so understood by said parties [for them] to live in the said house with petitioner, and not to relinquish her rights thereto, or to give the possession thereof, other than temporary, permissive possession for the purpose aforesaid, and at the pleasure of petitioner.”

Under this arrangement the son of the petitioner's deceased husband and the wife of such son moved their family into the house on the premises. Soon after this occurred, the son of the plaintiff's deceased husband fraudulently induced her to make a deed to the premises to the wife of such son, representing that, for the purpose of saving her the trouble and annoyance of looking after business affairs, it would be best for her to execute to him a power of attorney, authorizing him to transact such business for her. Relying on his representation, she signed a paper which she thought was only a power of attorney, but which she subsequently discovered was a conveyance to the wife of the person committing the fraud. The plaintiff is 70 years old, ignorant and unaccustomed to business affairs, and easily persuaded and imposed upon by any one in whom she has confidence. On account of her age and defective eyesight, she is unable to read or write, and can only sign her name by making a mark. The paper which she signed was not read over to her or explained to her, other than in the statement above mentioned, to the effect that it was a power of attorney. On February 12, 1913, the grantee in this

deed obtained from the Calvert Mortgage Company, a loan of \$1,000, secured by a deed to the property. Of this the plaintiff had no knowledge, and the plaintiff charges that the deed which was procured from her is void on account of fraud, and also for the want of consideration. It recited a consideration of \$5, and the love and affection which she had for her stepdaughter-in-law. No money was paid to her, and she received nothing as a consideration for the deed. She is now seeking, by equitable petition, to set aside the conveyance made by her. At the time of the making of the loan by it, the Calvert Mortgage Company knew, or could by reasonable inquiry have known, that the plaintiff was in possession of the premises at the time, and that the possession thereof by the grantee from her was only temporary and permissive; and the company knew, or by reasonable inquiry should and could have known, that no consideration whatever was paid to the plaintiff for the deed executed by her, and also that the expressed consideration of \$5 was grossly inadequate for the property, which the plaintiff alleges was worth at least \$2,000, and was known to the company to be worth that amount. It was also averred that the consideration, expressed in the deed, of love and affection for the grantor's stepdaughter-in-law, was no sufficient consideration in law—

“all of which was sufficient to put said Calvert Mortgage Company on notice of all of petitioner's rights in the premises, and which therefore precluded them from being an innocent party in said transaction.”

The grantee in the deed from the plaintiff, after obtaining the loan from the mortgage company, failed to pay the monthly installments due upon it, so that, by the terms of the deed given as security for the loan, the entire debt, principal, interest, and attorney's fees, became due. The plaintiff charges that this default was intentionally made for the purpose of accelerating the maturity of the loan, in order that the debt might be reduced to judgment and the property sold to an innocent purchaser and placed beyond the power of the plaintiff to recover. After the default, the mortgage company brought suit against the debtor and obtained a judgment in the city court of Dublin, which declared a special lien upon the property. An execution was issued, and a levy made. The deed made to the mortgage company is a cloud upon the title, and—

“it was taken by said mortgage company with full knowledge of petitioner's rights, and is null and void.”

The judgment which was rendered in the city court is void, because it was founded on a conditional contract in writing, and no verdict of a jury was taken, but the judgment was rendered by the court. The prayer was for an injunction against the enforcement of the judgment, that the judgment be declared void in so far as it sought to create

a lien upon the property, and for other relief and process. The Calvert Mortgage Company demurred to the petition, on the grounds that no cause of action was set out, and that it was not affected by the allegations of fraud. The demurrer was overruled, and it excepted. While the case was pending in this court, the defendant in error having died, her administrator was made a party.

West & Dasher, of Macon, and Jas. A. Thomas, of Dublin, for plaintiff in error. Davis & New and Ira S. Chappell, all of Dublin, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The petition alleged that a deed to certain land was fraudulently procured from the plaintiff, that the grantee obtained a loan from a mortgage company, and made a deed to secure the debt, and that such deed was taken by the company "with full knowledge of petitioner's rights." Whether or not certain allegations in regard to notice arising from the grantor's remaining on the land with the grantee, and from recitals of the consideration in the deed attacked, were subject to demurrer need not be considered. This question was not distinctly raised by a demurrer to such allegations, though argued in the brief of counsel for plaintiff in error. In addition to them, there was the direct allegation of knowledge above quoted; and a general demurrer to the entire petition was properly overruled.

There was a demurrer to the paragraph of the petition which contained allegations on the subject of such notice, but the only point raised by the demurrer as to that paragraph was that the mortgage company was a non-resident corporation which could only act through its officers and agents, and that the paragraph of the petition mentioned should disclose what officer or agent of the company had the notice as charged. The allegation was of notice to the company, and this objection was not well taken, whether or not other objections might have been made.

Another ground of the demurrer was aimed at the allegation that the judgment of the city court of Dublin was void; but it was not argued or even mentioned in the brief of counsel for plaintiff in error, and the exception to the overruling of that ground will be treated as abandoned.

Judgment affirmed. All the Justices concur.

(143 Ga. 572)

SEAGRAVES v. W. E. POWELL CO.
(No. 394.)

(Supreme Court of Georgia. June 23, 1915.)

(Syllabus by the Court.)

1. CERTIORARI \S 40—APPLICATION—TIME FOR FILING.

Application to the judge of the superior court for the sanction of a petition for certi-

orari to an inferior judicatory must be made within 30 days from the date of the judgment complained of. Civ. Code 1910, \S 5183. By section 4365 it is provided that all writs of certiorari shall be allowed within three months from the date of the judgment of which complaint is made. Accordingly, where an application for a writ of certiorari, complaining of a judgment of the court of ordinary dated November 19, 1913, was presented to the judge of the superior court within 30 days, and duly sanctioned by him on November 29th, and was filed on January 2, 1914, in the office of the clerk of the superior court to which the writ was made returnable, there was no error in refusing to dismiss the petition on the ground that it was not filed within the time allowed by law.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. \S 58; Dec. Dig. \S 40.]

2. CERTIORARI \S 17, 60—RIGHT TO REMEDY—CORRECTION OF JUDGMENT—OBJECTIONS—MOTION TO DISMISS.

Where an administrator was discharged by the court of ordinary, and subsequently an application was made to set aside the judgment of discharge on the ground that it was obtained by fraud, and the ordinary sustained a demurrer to such application, a writ of certiorari would lie to correct such judgment.

(a) A motion to dismiss a writ of certiorari taken to correct an alleged error in the judgment of the court of ordinary, based on the ground that appeal, not certiorari, was the proper remedy, did not raise a question as to whether the applicant for certiorari had filed written exceptions in the court of ordinary, which had been overruled, before he applied for the writ.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. \S 22, 153-167; Dec. Dig. \S 17, 60.]

3. EXECUTORS AND ADMINISTRATORS \S 516—DISCHARGE OF ADMINISTRATOR—RIGHT TO ATTACK—FRAUD—JUDGMENT CREDITOR—GARNISHMENT.

A certain corporation obtained a judgment against one S. E. Seagraves and Mrs. J. P. Seagraves. The former was the administrator on the estate of J. P. Seagraves, deceased. The judgment creditor garnished the administrator, who answered, and his answer was traversed. While the case was pending, the administrator obtained a discharge from the court of ordinary. The judgment creditor which had caused the garnishment to be served upon the administrator thereupon made a motion to set aside the discharge, on the ground that it was fraudulently procured. Held, that the corporation which held the judgment, and which had garnished the administrator as such, thereby proceeding against the estate to subject the amount which might be due to the judgment debtors, had such an interest as authorized it to make a motion to set aside the discharge on the ground that such discharge was procured by fraud.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 2199-2207, 2220-2232; Dec. Dig. \S 516.]

4. EXECUTORS AND ADMINISTRATORS \S 516—DISCHARGE OF ADMINISTRATOR—PETITION BY JUDGMENT CREDITOR—SUFFICIENCY AGAINST DEMURRER.

If a judgment creditor of two named persons caused a garnishment, based on the judgment, to be served on the administrator of a decedent, and if pending such garnishment proceedings, on a traverse to the answer of the garnishee, the administrator procured a discharge from the court of ordinary by falsely and fraudulently representing to that court that he had fully administered the estate of the decedent, when in fact he had not done so, and as the administrator was indebted to the judgment

debtors, or one of them, a petition by the judgment creditor to set aside the judgment of discharge on the ground that it was thus procured by fraud and without his knowledge was not subject to general demurrer.

(a) There was no special demurrer to such allegations of the petition, and they were good as against a general demurrer.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199–2207, 2220–2232; Dec. Dig. § 516.]

Error from Superior Court, Pike County; Robt. T. Daniel, Judge.

Petition by the W. E. Powell Company to set aside a discharge granted to S. E. Seagraves, administrator. The sustaining of a demurrer to the petition was held erroneous on certiorari and the case remanded for trial on the merits, and the administrator brings error. Affirmed.

E. O. Armistead, of Barnesville, for plaintiff in error. Cleveland & Goodrich, of Griffin, for defendant in error.

LUMPKIN, J. An application was made to the court of ordinary to set aside a discharge granted to an administrator, which it was alleged had been obtained by falsely and fraudulently representing to the ordinary that the administrator had fully discharged all of his duties as such. The ordinary sustained a demurrer to the petition, and the petitioner obtained a writ of certiorari. A motion was made to dismiss the certiorari proceedings. It was overruled, and the presiding judge held that it was error to sustain the demurrer to the petition to set aside the judgment of discharge, and remanded the case for a trial on the facts. The defendant in certiorari excepted.

[1] 1. One ground of the motion to dismiss the certiorari proceedings was because the application for certiorari was not filed in the clerk's office within the time allowed by law. The judgment sustaining the demurrer was rendered by the ordinary on November 19, 1913. The application for certiorari was sanctioned on November 29th. There is no entry of filing in the record; but the writ of certiorari was dated January 2, 1914, showing that the papers were in the hands of the clerk by that date. The contention of counsel for the plaintiff in error was that it was necessary for the application to be filed in the clerk's office within 30 days from the date of the judgment complained of. This contention involves a glance at the legislation and decisions bearing on the point raised. In the judiciary act of 1799, it was provided that if a party should take exception to any proceedings in a cause in an inferior court, and they should be overruled, it should be lawful for the dissatisfied party, "on giving twenty days' notice to the opposite party or his attorney, to apply to one of the judges of the superior court, and if such judge shall deem the said exceptions to be sufficient, he shall forthwith issue a writ of certiorari."

Cobb's Digest, p. 523. By the act of December 29, 1838, it was declared that it should not be lawful for any judge to sanction or grant a writ of certiorari, "unless such writ of certiorari shall be applied for within the term of six months next after the case has been determined in the court below." Cobb's Digest, p. 528. The act of February 21, 1850, contained the first express reference to filing. It provided that it should be lawful for either party in a justice's court, who might be dissatisfied with the judgment, "to apply for and obtain a certiorari on complying with the requisitions heretofore prescribed by law; * * * and on being filed in the office of the clerk of the superior court, it shall be his duty to issue the writ," which should be returnable to the next term of court, sitting 20 days after the issuing thereof. Cobb's Dig. 529. On March 6, 1856, a general law in regard to the limitations of actions was passed. By the sixteenth section it was declared that "all writs of certiorari shall be allowed and brought within six months from the time [the] judgment sought to be reversed was rendered." Acts 1855–6, pp. 233, 234. By the act of December 11, 1858, the act of December 29, 1838 (Acts 1838, p. 54), was so amended as to require parties desiring writs of certiorari "to apply for the same" within three months after the final determination of the case in the justice's court. Acts 1858, p. 88. The sixteenth section of the act of 1856 appeared in the first Code (which took effect on January 1, 1863) as section 2861. Here the words are shall "be allowed and brought within three months." Several acts on the subject of writs of certiorari and the manner of applying for and issuing them, serving notice, etc., were codified in section 3958 et seq. Section 3965 states that all writs of certiorari shall be applied for within three months after the final termination of the case, and shall be made returnable to the next superior court sitting not less than 20 days after the issuing of the writ. It will be seen that the section last cited was derived from several acts in reference to the practice in regard to writs of certiorari, and the provision of that section on the subject of time was codified from the act of 1838 as amended by the act of 1858, without reference to the limitation act of 1856, while the section first cited was taken from that act. The Code containing both of these sections was adopted, and they were carried forward in later Codes, appearing in the Codes of 1873 and 1882, as section 2920 and section 4057. On November 12, 1889, an act was approved which amended section 4057 of the Code of 1882, by changing the words shall be applied for "in three months" after the termination of the case, so as to read "in thirty days." Laws 1889, p. 84. No reference was made to the other section taken from the act of 1856, which declared that the writ must be "allowed and

brought" within three months. In the Code of 1895, for some reason, the words "and brought," appearing in section 2920 of the Code of 1882, were omitted, and the corresponding section of the Code of 1895 (section 3771) declares that the writ shall be "allowed within three months," and the same is true of the Code of 1910, § 4385. The other provisions still stood in the Code of 1895 as section 4642, and in the Code of 1910 as section 5188. It will thus be seen that two provisions have long coexisted, one requiring that the writ shall be "applied for" in 30 days, the other that it shall be "allowed and brought" (or "allowed" in the last two Codes) in three months.

Let us now look at some of the decisions on the subject. Jones v. Smith, 28 Ga. 41, was decided in 1859, while the act of 1856, employing the words "allowed and brought," and the act of 1858, amending the act of 1838, and using the words "applied for," both stood, but had not been codified. It was held that where a trial took place in a justice's court on November 27, 1857, and the petition for certiorari was filed on May 28, 1858, it was not applied for within six months of the former date. There was no discussion as to the meaning of the words "applied for," but only as to the mode of computing a limitation of six months. Nothing was said as to when the petition was sanctioned. In Barrett & Carswell v. Devine, 60 Ga. 632, decided in 1878, it was held that a writ of certiorari was not "brought" within the meaning of section 2920 of the Code of 1873, until filed in the clerk's office. Warner, C. J., said:

"A writ of certiorari is merely the judicial means of enforcing a right, and must not only be allowed to be brought by the sanction of the judge, but must actually be brought within three months after the rendition of the judgment sought to be reversed."

This showed that emphasis was laid on the language which required something more than the sanctioning of the writ to be done in three months. See, also, Fuller v. Arnold, 64 Ga. 599 (3); Shaw v. Griffin, 65 Ga. 304; Western & Atlantic R. Co. v. Carson, 70 Ga. 388; Johnson v. State, 69 Ga. 732; Hilt v. Young, 116 Ga. 708, 710, 43 S. E. 76. In Carson v. Mayor, etc., of Forsyth, 97 Ga. 258, 22 S. E. 955, decided in August, 1895, it was held:

"Under section 4057 of the Code, as amended by the act of 1889 (Acts of 1889, p. 84), in order to authorize the issuing of a writ of certiorari, it must be 'applied for' within 30 days from the date of the judgment complained of; and if this is done, and the sanction obtained, then, under section 2920 of the Code, which was not amended by the above-recited act, the petition may be filed at any time within three months from the date of the judgment sought to be reversed."

This decision was criticized by counsel for the plaintiff in error. But our recognition of his zeal fails to convince us of the correctness of his legal position. We think that the two lines of legislation, one dealing with the ap-

plication to the judge for his sanction of the petition, the other with the allowance and bringing of the writ, including the filing of the proceeding, and the fact that both provisions have been retained in successive Codes as separate sections, and thus adopted, is sufficient to indicate that it was not intended that one should repeal the other by implication, and that this furnished a basis for the decision last cited.

[2] 2. Another ground of the motion to dismiss the writ of certiorari was that appeal, not certiorari, was the proper remedy, if the defendant in error was dissatisfied with the judgment of the court of ordinary.

By article 6, § 4, par. 5, of the Constitution (Civil Code of 1910, § 6514), it is declared that the superior courts "shall have power to correct errors in inferior judicatories, by writ of certiorari." The writ of certiorari was a common-law writ, and the authority by it to correct errors in inferior judicatories was declared as a constitutional power of the superior courts as early as in the Constitution of 1798 (article 3, § 1). In article 6, § 6, par. 1, of the Constitution of 1877 (Civil Code of 1910, § 6520), it is declared:

"The powers of a court of ordinary, and of probate, shall be vested in an ordinary for each county, from whose decision there may be an appeal (or, by consent of parties, without a decision) to the superior court, under regulations prescribed by law."

This gives the right of appeal, but does not necessarily exclude the remedy by certiorari. Turning to the statutes, it is provided by section 4999 of the Civil Code of 1910 that:

"An appeal lies to the superior court from any decision made by the court of ordinary, except an order appointing a temporary administrator."

Section 5180 declares:

"The writ of certiorari will lie for the correction of errors committed by justices of the peace, corporation courts or councils, or any inferior judicatory, or any person exercising judicial powers, including the ordinary, except in cases touching the probate of wills, granting letters testamentary and of administration."

The exception shows that the word "ordinary" was not used in contradistinction to the court of ordinary, because the probate of wills and granting of letters testamentary and of administration were matters appertaining to the jurisdiction of the court of ordinary; and if the previous mention of the ordinary was intended to refer only to his acts otherwise than as a court of ordinary, the exception would have been useless. Our Code sometimes employs the word "ordinary" and sometimes the expression "court of ordinary." The ordinary performs certain administrative duties touching county matters, sometimes acts as the judge of the court of ordinary, and sometimes discharges certain special duties imposed on him by law. Whether the statute is dealing with him as the judge of the court of ordinary, or has reference to the person who is ordinary, is

often to be determined rather with reference to the subject-matter being considered than by a narrow consideration of the form of words used. Under a former Constitution, which declared that the superior courts should have power to correct errors of inferior judicatories by writs of certiorari, and also that there might be an appeal from the court of ordinary the powers of which were then vested in the inferior court, and an act carrying this latter provision into effect, Hon. T. U. P. Charlton and Hon. R. M. Charlton, presiding in the superior court, were of the opinion that the complaining party had an election to pursue either remedy. *McCaskill v. McCaskill*, T. U. P. Charlt. 151; *Roser v. Marlow*, R. M. Charlt. 542. In the latter case Judge Charlton said:

"There is nothing in the Constitution or laws of our state, which prohibits a certiorari from being issued, because an appeal is given from the same tribunal to which it issues. * * * The nature of the two remedies is well understood, and one of the distinctions which has been drawn between them is that an appeal can only be had when it is expressly given, and a certiorari always lies, unless it has been expressly taken away."

As we have seen above, neither the Constitution nor the statute expressly or impliedly takes away the right to review rulings of the court of ordinary by writs of certiorari, save in certain specified instances named in the statute. This view is further sustained by section 5181 of the Civil Code of 1910, which provides the method of procedure in order to obtain a writ of certiorari to review a judgment of the court of ordinary. The passing statement made in *Comer v. Ross*, 100 Ga. 652, 653, 28 S. E. 387, to the effect that appeal "and not certiorari" was the remedy, was obiter dictum, the only question there being whether appeal would lie in that case. So the discussion in *Cunningham v. United States Savings & Loan Co.*, 109 Ga. 616, 34 S. E. 1024, does not militate against the view here expressed. It was there held that a certain ruling did not furnish any ground of appeal, but was open to attack by certiorari.

In the brief of counsel for the plaintiff in error, it was alleged that no exceptions were filed in the court of ordinary. But no such point was raised by the motion to dismiss the writ of certiorari. The point there raised was that an appeal could be taken, but not a writ of certiorari. This does not raise the question of proper procedure in order to obtain a writ of certiorari. It is unnecessary to discuss the statutes relating to appeals and writs of certiorari as means of correcting decisions in justices' courts, or the various decisions in regard to them. One who desires to enter on this field of investigation might consult *Toole v. Edmondson*, 104 Ga. 776, 784, 31 S. E. 25, and the cases there cited.

One or two other grounds of the motion to dismiss the writ of certiorari are not referred to in the brief of counsel for the plaintiff in error.

[3, 4] 3. It was argued that the court erred in sustaining the certiorari and reversing the judgment dismissing the petition to set aside the judgment. A judgment of the court of ordinary discharging an administrator, which has been fraudulently obtained by falsely representing to the ordinary that the applicant has fully discharged his duties as administrator, can be set aside by a proper proceeding for that purpose, instituted in the court rendering it. Civil Code 1910, § 4091. *Davis v. Albritton*, 127 Ga. 517, 56 S. E. 514, 8 L. R. A. (N. S.) 820, 119 Am. St. Rep. 352; *Singer v. Middleton*, 135 Ga. 825, 70 S. E. 662; *Power v. Green*, 139 Ga. 64, 76 S. E. 567; *Ford v. Clark*, 129 Ga. 292, 58 S. E. 818. But it was contended that only a party to the proceeding could move to set the judgment aside. Who were parties to the proceeding? The petitioner for the discharge was one. Who were the others? The law does not provide in such a case for naming all of the parties whom it is sought to bind, nor ordinarily require personal service on them. The usual method of service is by citation duly published. Civil Code 1910, § 4089. If this discharge would in no way affect creditors, it would be unnecessary for them to take any steps to set it aside. But as the grant of the discharge operates as a release from all liability as administrator (Civil Code 1910, § 4090), it is clear that a creditor cannot be so far a party as to be bound by the judgment, and yet not sufficiently a party to object to its rendition or to move to set it aside in a proper case. In accord with this view is section 3218 of the Civil Code of 1910, which declares:

"Creditors may attack as fraudulent a judgment or conveyance, or any other arrangement interfering with their rights, either in law or in equity."

In the instant case it was alleged, in the petition to set aside the judgment, that the petitioner obtained a judgment against S. E. Seagraves and Mrs. J. P. Seagraves, and garnished Seagraves as administrator of J. P. Seagraves, deceased; that the garnishee answered, and his answer was traversed; that, while the case was pending in the superior court, the administrator fraudulently procured a discharge by representing to the court of ordinary that he had fully administered the estate and had discharged all of his duties as administrator; and that the plaintiff had no knowledge of the application or judgment of discharge, which was granted on July 7, 1913, until September 30th, thereafter. The petition to set aside the judgment was filed October 6, 1913. It was further alleged, that, to the best of the petitioner's information and belief, the administrator was indebted to the judgment debtors, who were insolvent and had no other property on which to levy, and that the petitioner is entitled to judgment against him. The petition was not subject to general demurrer. Nor did such laches on the part of the petitioner appear as to prevent its obtaining relief.

The garnishment proceeding was authorized. Civil Code 1910, §§ 4734, 4735. The administrator was not entitled to be discharged while the case was pending in the superior court on a traverse to his answer, and thus affect the rights of the plaintiff. If he fraudulently procured a judgment of discharge, it was subject to be set aside on a proper proceeding therefor; and the plaintiff in the garnishment proceedings, who alleged that it had no knowledge of the application for discharge or notice of the hearing thereof until a few days before the proceeding to set aside the discharge was filed, did not show it to be barred by laches. *Davis v. Albritton*, 127 Ga. 520, 56 S. E. 514, 8 L. R. A. (N. S.) 820, 119 Am. St. Rep. 352, *supra*.

There was no error in the rulings of the superior court.

Judgment affirmed. All the Justices concur.

(143 Ga. 597)

CARGLE v. KNOX.

(Supreme Court of Georgia. June 25, 1915.)

(*Syllabus by the Court.*)

EXECUTION §219 — LEVY — DELIVERY TO CREDITOR WITHOUT SALE.

A landlord rented land to a tenant for a term of years, for a stated sum of money annually. In addition to the rent, the tenant became indebted to the landlord for supplies, who sued the tenant and obtained a judgment based on promissory notes given for the supplies. Pending the suit the tenant made to his wife a bill of sale of the growing and matured crops on the rented land. Execution was levied on the crops grown on the land during the year in which the judgment was obtained, at the instance of the landlord; and a part of the crop was turned over to the landlord. The property levied on was not sold at public sale, nor before the courthouse door, but was turned over by the levying officer to the landlord, who appropriated the money to certain claims, after deducting the expenses of gathering, ginning, hauling, etc. The vendee in the bill of sale from the tenant brought the present suit against the landlord, to recover damages on account of his taking the property and appropriating the proceeds to his execution and his claim for rent. The case was tried by the court on the theory that the transfer of the crop by the husband to the wife involved the question whether such transfer was fraudulent and void. The jury found for the defendant. A motion for a new trial was overruled, and the plaintiff excepted. *Held:*

(a) Even if the title to the crop was in the tenant, that title was not divested when the bailiff turned the property over to the landlord without a legal sale, but simply by delivery.

(b) As between the vendee in the bill of sale and the landlord (who held the property by an illegal possession acquired from the bailiff), the title was in the vendee.

(c) There having been no legal sale of the property in question, the landlord, under the facts, acquired no title thereto; and the plaintiff, who held the title under the bill of sale, could recover damages for the wrongful interference with the property.

(d) Under the facts and the foregoing rulings, a verdict for the defendant was contrary to law, and the court erred in refusing a new trial.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 621; Dec. Dig. §219.]

Atkinson, J., dissenting.

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Action by J. A. Cargle against T. R. Knox. Judgment for defendant, and plaintiff brings error. Reversed.

C. D. Rivers, of Summerville, for plaintiff in error. J. M. Bellah and Wesley Shropshire, both of Summerville, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur, except ATKINSON, J., dissenting.

(143 Ga. 584)

LEVINSON v. J. O. S. ROSENHEIM SHOE CO. (No. 396.)

(Supreme Court of Georgia. June 23, 1915.)

(*Syllabus by the Court.*)

NEW TRIAL §70—GROUNDS—VERDICT CONTRARY TO LAW AND EVIDENCE.

The question involved was whether a waiver of homestead was a mere general waiver, disconnected from the creation of an indebtedness, so as to fall within the ruling in *Ragan v. Taff*, 134 Ga. 835, 68 S. E. 579, or whether the waiver was made in connection with the creation of the indebtedness and contemporaneously therewith, within a proper construction of that expression as used in the Civil Code of 1910, § 3413, so as to fall within the ruling in *Pincus v. Meinhard*, 139 Ga. 365, 77 S. E. 82. That question was submitted to the jury, who found that the waiver was valid. The evidence authorized such a finding; and, no error being complained of in the rulings of the judge pending the trial, a motion for a new trial, based on the general grounds that the verdict was contrary to law and evidence, was properly overruled.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. §70.]

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Action between Robert Levinson and the J. O. S. Rosenheim Shoe Company. Judgment for the latter, and the former brings error. Affirmed.

M. H. Boyer and H. E. Coates, both of Hawkinsville, for plaintiff in error. H. F. Lawson, of Hawkinsville, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 602)

HAMMOCK v. BATTLE.

(Supreme Court of Georgia. June 25, 1915.)

(*Syllabus by the Court.*)

SALES §348—VALIDITY—FRAUD.

A suit was brought upon a note containing a stipulation that it was given for the purchase money of two mules "which I buy from J. J. Battle, to work on my place in Colquitt county, after a full inspection and without warranty; and it is expressly understood that J. J. Battle does not insure the health, life, soundness, or work of said mules, only the title thereto, and there are no other agreements than herein stated." The maker pleaded that one of the mules was vicious and unfit for the use intend-

ed, and that with such knowledge the seller falsely and fraudulently represented that the mule was safe and suited for the use intended, and thus induced him to make the purchase; and he prayed to recoup certain damages alleged to have been sustained by reason of the viciousness of the mule. *Held*, that this plea was properly stricken, because it was deficient in alleging fraud, in that it contained nothing to show that the defendant was misled or deceived as to the contents of the note sued on (which integrated the contract of sale), or in any manner was prevented from ascertaining the same. *Case Threshing Machine Co. v. Broach*, 137 Ga. 602, 73 S. E. 1063.

[*Ed. Note.*—For other cases, see *Sales*, Cent. Dig. §§ 973-986; Dec. Dig. §§ 848.]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by J. J. Battle against J. T. Hammock. Judgment for plaintiff, and defendant brings error. Affirmed.

J. D. McKenzie, of Moultrie, for plaintiff in error. T. H. Parker, of Moultrie, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(143 Ga. 696)

OWENS et al. v. BENTON-SHINGLER CO.
et al. (No. 442.)

(Supreme Court of Georgia. July 13, 1915.)

(*Syllabus by the Court.*)

NONSUIT—EVIDENCE.

Under the evidence submitted by the plaintiff, it was not error for the court to grant a nonsuit; and if the evidence, the exclusion of which is the subject of an exception, had been admitted, it should not have affected the result.

Error from Superior Court, Decatur County; E. E. Cox, Judge.

Action by J. R. Owens and others against the Benton-Shingler Company and others. Nonsuit was granted, and plaintiffs bring error. Affirmed.

W. V. Custer, of Bainbridge, for plaintiffs in error. Erle M. Donelson, of Macon, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(143 Ga. 539)

HEATON et al. v. HAISTEN et al.

(Supreme Court of Georgia. June 23, 1915.)

(*Syllabus by the Court.*)

APPEAL AND ERROR—§337—DECISIONS APPEALABLE—FINALITY.

Civ. Code 1910, § 6138, declares: "No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause, or final as to some material party thereto." An action on a promissory note, in which persons not parties to the original action were made parties and ordered to interplead, and upon the trial of which the verdict of the jury consisted only of answers to certain questions propounded by the court in terms of

section 5422 of the Civil Code, is still pending in the superior court where tried, until the judge shall have made a written judgment or decree upon the verdict; and the Supreme Court will not exercise jurisdiction of a writ of error, brought before the rendering of such judgment or decree, to reverse the judgment refusing a new trial. Leave, however, is granted to enter the official copy of the bill of exceptions retained in the superior court *pendente lite*; and direction is given accordingly. *McGowan v. Lufburrow*, 81 Ga. 358, 7 S. E. 314; *Buford v. Kennedy*, 85 Ga. 212, 11 S. E. 561.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1877, 1878; Dec. Dig. §§ 337.]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action between W. W. Heaton, executor, and others, and Agnes Haisten, administratrix, and others. From the refusal of their motion for new trial, Heaton and others bring error. Writ of error dismissed.

J. M. McBride, of Tallapoosa, for plaintiffs in error. M. J. Head, of Tallapoosa, Griffith & Matthews, of Buchanan, and Hewlett, Dennis & Whitman, of Atlanta, for defendants in error.

ATKINSON, J. Writ of error dismissed, with direction. All the Justices concur.

(18 Ga. App. 568)

MATTOX v. CITY OF GLENNVILLE.

(No. 6190.)

(Court of Appeals of Georgia. July 2^d 1915.)

(*Syllabus by the Court.*)

1. MUNICIPAL CORPORATIONS—§642—VIOLATION OF ORDINANCE—CERTIORARI—RESERVATION OF DECISION.

The fact that a judge of the superior court, after the hearing upon a petition for certiorari, which was had during the term, reserved his decision (desiring time to further consider the case), and thereafter, in vacation, rendered a judgment overruling the certiorari without notice to either party or their counsel, affords no ground of exception to the judgment rendered, when it appears that the action of the judge in reserving his decision was taken with the "consent and at the suggestion of counsel for plaintiff in error." And this is true even though no order allowing the case to be determined in vacation was taken during term time.

[*Ed. Note.*—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1412-1415; Dec. Dig. §§ 642.]

2. MUNICIPAL CORPORATIONS—§642—VIOLATION OF ORDINANCE—CERTIORARI.

It was within the power of the petitioner in certiorari, by timely exceptions, to require that the affidavit and warrant upon which his trial in the municipal court proceeded be incorporated in the record, and thus presented to the judge of the superior court for review. Since the municipal ordinance which he was charged with violating not only forbade the keeping of intoxicating liquors for sale, but also penalized the carrying of intoxicants for the purpose of sale on the streets of the municipality, the judge of the superior court, upon the hearing of the certiorari, was authorized to assume (in view of the omission to except to the answer above referred to) that the municipal accusation was broad enough to include the charge that the defendant had violated the ordinance in both

of the ways therein mentioned; and, since both the evidence and the defendant's statement authorized his conviction of the municipal offense of carrying spirituous liquors on his person for the purpose of unlawful sale within the municipality, the judge of the superior court did not err in overruling the certiorari.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.]

Error from Superior Court, Tattpall County; W. W. Sheppard, Judge.

Bruce Mattox was convicted of violating an ordinance of the City of Glennville, certiorari was overruled, and he brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. C. L. Cowart, of Glennville, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 571)

BEATTY v. STATE. (No. 6322.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 958—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—AFFIDAVIT.

Where a motion for a new trial is based on alleged newly discovered evidence, if such evidence "is that of witnesses, affidavits as to their residence, associates, means of knowledge, character, and credibility must be adduced." Civ. Code 1910, § 6086. No such affidavit was presented in this case. In addition, the alleged newly discovered evidence was impeaching in its character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.]

2. VERDICT—EVIDENCE—NEW TRIAL.

The verdict was supported by evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Jefferson; G. A. Johns, Judge.

Action between H. C. Beatty and the State. Judgment for the State, and Beatty brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error. P. Cooley, Sol., of Jefferson, for the State.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 571)

LESTER v. CONE. (No. 6193.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

CERTIORARI § 43—APPROVAL OF BOND.

A valid certiorari bond must be approved by the magistrate who tried the case. Under the rulings in Southern Ry. Co. v. Oliver, 13 Ga. App. 5, 78 S. E. 684, and Dykes v. Twigg County, 115 Ga. 698, 42 S. E. 36, the fact that the trial magistrate certifies that "all costs

have been paid by the petitioner and he has given bond as required by law" is not an equivalent or sufficient substitute for such approval. Accordingly the judge of the superior court did not err in dismissing the certiorari in this case.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 74, 80, 91-97; Dec. Dig. § 43.]

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action between C. W. Lester and R. L. Cone before a magistrate. From the judgment, Lester brought certiorari; and from a judgment dismissing the writ, he brings error. Affirmed.

H. B. Strange, of Statesboro, for plaintiff in error. Fred T. Lanier, of Statesboro, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 589)

DICKEY v. SWEENEY et al. (No. 6060.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD § 75 — SALE BY GUARDIAN—ORDER—PROCEDURE.

A guardian has no authority to sell his ward's property, except by order of the judge of the superior court (Civ. Code 1910, § 3064), or by order of the ordinary, and then such sale must be at public outcry, under rules governing administrators' sales (Civ. Code 1910, §§ 3066, 4022).

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 323; Dec. Dig. § 75.]

2. GUARDIAN AND WARD § 108 — SALE BY GUARDIAN — MISAPPROPRIATION OF PROCEEDS—LIABILITY OF PURCHASER.

One who buys municipal or state bonds from a guardian, at private sale, and without any court order, after he has had actual or constructive notice that such bonds belong to the estate, is liable to the ward for the bonds if their proceeds are misappropriated by the guardian. Ignorance of the law in respect to such sales will not protect the buyer. Civ. Code 1910, §§ 4286, 4291; Fidelity Trust Co. v. Mays, 142 Ga. 821, 83 S. E. 961.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 369, 395-398; Dec. Dig. § 108.]

3. OVERRULING OF DEMURRERS APPROVED.

The petition, as finally amended, set forth a cause of action, and was not subject to general or special demurrer; and the court did not err in overruling the same.

Error from City Court of Richmond County; H. C. Hammond, Judge.

Action by M. A. Sweeney and others against J. W. Dickey. Judgment for plaintiffs, and defendant brings error. Affirmed.

C. H. & R. S. Cohen and Cumming & Hull, all of Augusta, for plaintiff in error. Wm. H. Fleming and D. G. Fogarty, both of Augusta, for defendants in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 546)

BRANSON v. PIEDMONT FERTILIZER CO.
(No. 5821.)

(Court of Appeals of Georgia. July 2, 1915.)

*(Syllabus by the Court.)***1. AGRICULTURE — SALE OF FERTILIZER—ACTION ON PURCHASE PRICE NOTE—DIRECTION OF VERDICT.**

Suit was brought on a note given by the defendant for commercial fertilizers of certain brands therein mentioned and containing stated ingredients indicated by certain numbers carrying a recognized meaning to the general farming public. The note recited that the seller expressly refused to make any warranty of the fertilizer sold as to its quality or value, but left the purchaser and maker of the note "to rely solely upon the fact that the laws of Georgia have been complied with." No analysis of the fertilizer was shown to have been made under the provisions of sections 1785-1792 of the Political Code or otherwise, and there was no proof tending to show that the seller had not complied with the laws of Georgia, and that the fertilizer was not branded and tagged in accordance therewith. There was testimony from the defendant that the fertilizer was used by him without any good results and testimony from others tending to show that fertilizers of the same brand and of the same analysis as some of that described in the note had been used by them and found to be worthless, or practically so. The court directed a verdict in favor of the plaintiff. *Held*, that in view of the recital in the note as to the seller's express refusal to warrant anything touching the guano sold, except that the laws of Georgia in regard thereto had been complied with, and in the absence of any legal evidence tending to show that the analysis of the guano was other than that branded on the sacks, the court's action in directing the verdict in behalf of the plaintiff is not error requiring a reversal.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 13, 14; Dec. Dig. —7.]

2. ASSIGNMENTS OF ERROR.

There is no merit in any remaining assignment of error.

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by the Piedmont Fertilizer Company against B. B. Branson. Judgment for plaintiff on directed verdict, and defendant brings error. Affirmed.

Jas. R. Whitaker, of Cartersville, for plaintiff in error. Wm. T. Townsend, of Cartersville, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 569)

NUTTING & CO. v. KENNEDY. (No. 6191.)

(Court of Appeals of Georgia. July 2, 1915.)

*(Syllabus by the Court.)***1. BROKERS — 54, 64—COMMISSION—RIGHT.**

Generally, a real estate broker's commission is earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner (Civ. Code 1910, § 3587); but, when an agreement to pay a definite amount as commission is included in a preliminary contract of sale between the owner and the proposed purchaser, by the terms of which a commission "for making the trade"

is to be paid only in the event "it is closed," a verdict in favor of the broker suing for such commission is not demanded, when there is evidence that the would-be purchaser declined to complete the sale, upon the ground that she had been advised that the title to the real estate in question was defective.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 67, 75-81, 97; Dec. Dig. —54, 64.]

2. BROKERS — 85—ACTION FOR COMMISSION—MEANING OF CONTRACT—EVIDENCE.

The court did not err in admitting evidence illustrative of the meaning of the phrase "it is closed," in the contract, as it was understood by the parties at the time of entering into the agreement.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. —85.]

3. BROKERS — 40—CONTRACT FOR COMMISSION—VALIDITY.

The plaintiff's right to recover a commission as a real estate broker being wholly dependent upon its relation as agent of the vendor, it was immaterial that the agreement to pay a commission was incorporated in the anticipatory contract between the vendor and purchaser, rather than in a separate instrument, or that it may have rested in parol.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. —40.]

4. VERDICT AND DENIAL OF NEW TRIAL APPEARED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from Municipal Court of Atlanta.

Action brought in the municipal court of Atlanta by Nutting & Co. against Mrs. Jane Kennedy. Judgment for defendant, and plaintiffs bring error. A judgment for defendant was affirmed by the appellate division of the municipal court, and plaintiffs bring error. Affirmed.

Simmons & Simmons, of Atlanta, for plaintiffs in error. John W. Crenshaw, of Atlanta, for defendant in error.

RUSSELL, O. J. Nutting & Co., real estate agents, sued Mrs. Jane Kennedy in the municipal court of Atlanta for the recovery of \$75 as commission for the sale of certain real estate. The plaintiffs alleged that the defendant, through her attorney in fact, authorized them to negotiate a sale for \$1,500, and, in fixing the amount of commission at \$75 relied on a custom in Atlanta under which 5 per cent. is paid brokers on the first \$2,000 of the purchase price of real estate. They alleged that after they had secured a purchaser, Mrs. Kennedy "failed to furnish to the customer a good and sufficient title to the property, and as a result the purchaser refused to buy the property." On the trial it appeared that T. Æ. Means was the attorney in fact for Mrs. Kennedy, and was authorized to consummate a sale of the real estate in question, and that he was approached by a representative of the plaintiff firm, and signed the contract as attorney in fact for Mrs. Kennedy. It was signed also by Mrs. Bates, who was alleged to be the purchaser. In the contract Mrs. Kennedy agreed

to sell a certain house and lot for \$1,500, and there were certain undertakings on her part in regard to cleaning the premises and certain repairs. Mrs. Bates, on her part, agreed to pay \$250 as earnest money, \$500 or more in cash, and to give a note for the balance due on or before two years after date as soon as good and sufficient title was furnished her to the property. The contract contained also the following stipulation:

"It is understood that vendor is to pay usual commission of \$75.00 to J. R. Nutting & Co. for making this trade, if it is closed."

It is undisputed in the evidence that Mr. Cook, as representative of the plaintiffs, proposed and presented to Prof. Means the contract in question, and that the sale did not go through, because Mrs. Bates objected to the title, but it was not proved that the title was, in fact, defective, nor was it shown in what respect; if any, it was defective. The only evidence upon this point was that of Mrs. Bates, who testified that:

She "refused to carry out the trade, because the Title Guarantee Company said it was not perfect; it was faulty. He showed me where-in he thought it was defective. I refused to take it on his statement."

This testimony was mere hearsay, and did not go to the point of proving that there was, in fact, any defect in the title, and for this reason the court did not err in refusing to direct a verdict for the plaintiffs, even if the jury would have been authorized to find in favor of the plaintiffs. It is true that generally a real estate broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner. But in the present case, according to the plaintiffs' own testi-

mony, their right to a commission was dependent upon the contract of sale which they tendered in evidence, and in which it was provided that the commission should not be due unless the trade was "closed."

[1-3] In the absence of an express agreement to the contrary, if the owner of real estate who wishes to sell it and has placed it in the hands of a broker accepts a purchaser proposed by the broker, the vendor will, of course, become liable for the commission, whether a sale results or not. In the present case, however, there is not only no evidence that the proposed purchaser was accepted by the defendant, but there is, on the contrary, an express stipulation that the commissions are payable only in the event that the trade "is closed." The evidence shows that the trade was never closed, and the plaintiffs entirely failed to show that the refusal of the proposed purchaser to take the lot was due to the fact that the title was bad. The mere expression of an opinion on the part of some one at the office of the Title Guarantee Company that the title was, in his opinion, defective, would not suffice, without a statement of the facts upon which that opinion was based, to show that the title was in fact defective, and that therefore Mrs. Bates had a good reason for declining to take the property. Furthermore, in the form in which the opinion was presented, it was mere hearsay, of no probative value, and properly disregarded by the jury.

[4] There was no error in the refusal of the trial judge to grant a new trial, and the appellate division of the municipal court correctly affirmed the judgment in favor of the defendant.

Judgment affirmed.

(101 S. C. 318)

CITY OF GREENVILLE v. FOSTER.

(No. 9126.)

(Supreme Court of South Carolina. July 8, 1915.)

1. CRIMINAL LAW \S 1179—ERRORS NOT URGED IN INTERMEDIATE COURT.

Assignments not urged in the circuit court from which defendant, convicted of violating a municipal ordinance, appealed, cannot be urged in the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3001; Dec. Dig. \S 1179.]

2. CRIMINAL LAW \S 1048—REVIEW—PRESENTATION IN COURT BELOW.

Exceptions not urged in recorder's court, where accused was convicted of violating a municipal ordinance, cannot be urged on appeal to the circuit court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2656, 2657, 2670; Dec. Dig. \S 1048.]

3. CRIMINAL LAW \S 977—TRIAL—CONVICTIONS.

A sentence imposed by a de facto court cannot be attacked on the ground that the court had no de jure organization.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2482, 2483, 2488, 2489, 2492, 2499, 2502; Dec. Dig. \S 977.]

4. CONSTITUTIONAL LAW \S 61—DELEGATION OF LEGISLATIVE POWER—WHAT CONSTITUTES.

Const. art. 5, \S 1, declares that the judicial power of the state shall be vested in the Supreme Court and circuit courts, etc., and that the Legislature may also establish county courts, municipal courts, and such other inferior courts as may be necessary. Article 8, \S 1, declares that the General Assembly shall provide by general laws for the organization and classification of municipal corporations. *Held*, that Civ. Code 1912, \S 3001, declaring that it shall be lawful for the city council of any city whose population is between 2,000 and 20,000 to establish a municipal court, is not void as an illegal delegation of legislative powers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 103-107; Dec. Dig. \S 61.]

Appeal from Common Pleas Circuit Court of Greenville County; T. G. Mauldin, Judge.

William Foster was convicted in the recorder's court of violating an ordinance of the City of Greenville, and he appealed to the circuit court. From the judgment upholding the conviction, defendant appeals. Appeal dismissed.

Mauldin & Turner and Cothran, Dean & Cothran, all of Greenville, for appellant. Wilton H. Earle, of Greenville, for respondent.

GARY, C. J. This is an appeal from the order of his honor the circuit judge sustaining the constitutionality of the municipal court of the city of Greenville. The following facts appear in said order:

"Defendant was tried before the recorder of the city of Greenville and a jury on five charges of selling whiskey in violation of the city ordinances. Formal warrants were waived by the attorneys of defendant, but it was conceded in the argument before me that at the trial before the recorder that counsel for the city and

for defendant agreed that the five cases should be tried on the same testimony, before the same jury, and as if upon separate warrants. The jury found defendant guilty upon each of the charges, and the recorder sentenced him to a fine of sixty dollars (\$60), or to serve thirty days (30) on the city chain gang in each case. The exceptions which were served on the recorder and the city attorney were not argued before me. The only question argued on appeal was as to the constitutionality of the recorder's court of the city of Greenville; appellant contending that said court is unconstitutional, in that the Legislature has delegated to the city council the creation of the court, whereas the Constitution (article 5, \S 1) requires the Legislature to create all courts. This question was not raised in the recorder's court, nor by any of the exceptions. The act of 1904 (24 Statutes at Large, p. 897), amended in 1905 (24 Statutes at Large, p. 911), gives a city council of any city in this state whose population is between 2,000 and 20,000 inhabitants authority to establish by ordinance a municipal court. This act is codified in the Civil Code of 1912 as section 3001, vol. 1, of said Code. The city council of Greenville by an ordinance regularly created the recorder's court for said city. The question now presented is the constitutionality of the act, codified as section 3001 of the Code of 1912, assuming that this question has been properly raised here."

[1] The first question raised by the exceptions is whether the defendant was guilty of one or of five offenses. His honor the circuit judge states that the exception raising this question on appeal from the sentence imposed by the recorder was not argued before him. It was therefore waived. We may say, however, that even if it had not been abandoned, it could not be sustained. *State v. Kelly*, 89 S. C. 303, 71 S. E. 987.

[2] The next question presented by the exceptions is whether the municipal court of Greenville had jurisdiction to try the defendant.

Section 3001, Civil Code of Laws 1912, is as follows:

"It shall be lawful for the city council of any city in this state whose population by the last census was not less than two thousand, and not more than twenty thousand, * * * by ordinance duly enacted, to establish in said city a municipal court, for the trial and determination of all cases arising under the ordinances of such city."

This provision conferred upon the city council of Greenville the power to establish the court in question, unless said section was in violation of the Constitution. The question whether this provision was unconstitutional is not properly before this court for consideration, as it was not raised in the recorder's court, nor by any exception assigning error in that respect, on the appeal from the sentence imposed upon the defendant by the recorder.

[3] Furthermore, the sentence was imposed by a de facto, if not by a de jure, court.

[4] But, waiving such objection, the exceptions raising this question cannot be sustained.

Section 1, art. 5, of the Constitution contains the provision that:

"The judicial power of this state shall be vested in a Supreme Court, in two circuit courts, to wit: A court of common pleas having civil jurisdiction and a court of general sessions with criminal jurisdiction only. The General Assembly may also establish county courts, municipal courts and such courts [may be established] in any or all of the counties of this state inferior to circuit courts as may be deemed necessary, but none of such courts shall ever be invested with jurisdiction to try cases of murder, manslaughter, rape or attempt to rape, arson, common-law burglary, bribery or perjury."

But section 1, art. 8, of the Constitution also contains the provision:

"The General Assembly shall provide by general laws for the organization and classification of municipal corporations."

These two sections must be construed together, and, when so construed, it is apparent that the General Assembly may either establish such municipal courts as it may deem necessary, in any or all the counties of this state, or it may provide by general laws for the organization and classification of municipal corporations.

The municipal court of Greenville is, therefore, not in conflict with section 1, art. 5, of the Constitution, and had jurisdiction to try the defendant for the offense of which he is charged. The power conferred upon the General Assembly to provide by general laws for the reorganization and classification of municipal corporations includes the power to establish municipal courts.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 325)

BOUNDS et al. v. SOVEREIGN CAMP OF WOODMEN OF THE WORLD.

(No. 9124.)

(Supreme Court of South Carolina. July 9, 1915.)

1. INSURANCE — §825 — FRATERNAL INSURANCE — FORFEITURE — QUESTIONS OF FACT.

Under a fraternal benefit certificate void if the member die in consequence of a violation of the state laws, if the facts are admitted, the question whether death was so caused is one of law; but, if the facts are denied or disputed, the question is one of fact.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.]

2. INSURANCE — §825 — FRATERNAL INSURANCE — CAUSE OF DEATH — VIOLATION OF LAW — QUESTION FOR JURY.

A fraternal benefit certificate provided that, if the holder died in consequence of the violation of the laws of the state, the certificate should be void. In an action on the policy the defense was interposed that the holder came to his death by a gunshot wound inflicted by another in self-defense when attacked by the insured. It was disputed who fired the first shot and who brought on the difficulty, and whether assured acted in self-defense. Held that, under the evidence, the question as to whether deceased met his death in consequence of a violation of the state's criminal laws was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.]

Appeal from Common Pleas Circuit Court of Dillon County; John S. Wilson, Judge.

Action by Richard Bounds and another, by J. Rich Hayes, their guardian ad litem, against the Sovereign Camp of the Woodmen of the World. From a judgment for plaintiffs, defendant appeals. Affirmed.

Lee & Moise, of Sumter, and Gibson & Muller, of Dillon, for appellant. L. D. Lide, of Marion, and Joe P. Lane, of Dillon, for respondents.

GAGE, J. The plaintiffs had a verdict for \$2,126.87 against the defendant on a beneficiary certificate issued by the defendant to Marion H. Bounds, in which the plaintiffs were named as beneficiaries. There is written in the certificate this stipulation:

"If the member holding this certificate * * * should die * * * in consequence of the violation of the laws of the state, * * * this certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits which accrued on account of this certificate, shall be absolutely forfeited without notice or service."

The sole defense is that Marion H. Bounds came to his death under circumstances which brought him within the stipulation, and his children thereby forfeited all benefits under the policy. The defense is expressed in a letter by the general attorney of the defendant to McDaniel, clerk of the local camp where Bounds had held his membership. It reads thus:

"Referring to the claim for benefits under the certificate of the late Marion H. Bounds, we find that Sovereign Bounds' beneficiary certificate was issued October, 1911, and that he died December 30, 1913. We have made a careful investigation of his death, and find that he died of 'gun shot wound' inflicted by A. S. Parham on December 24th. The investigation shows, by evidence of eyewitnesses, that Bounds made an assault on Parham with his fist, knocking him from three to four feet away, and then drew his revolver and fired the first shot. Parham then drew his revolver in self-defense and inflicted the wounds upon Bounds that proved fatal. Bounds' death was, therefore, the consequence of violation of law, and under the terms of his certificate the certificate thereby became null and void."

There testified five alleged eyewitnesses to the transaction, meaning the event of December 24, 1913, when Bounds was killed by Parham.

The three exceptions make the single issue, and it is this: Does the testimony warrant only one reasonable conclusion, which is that Bounds died in consequence of the violation of the laws of the state? The appellant admits in his printed argument that "there is only one point raised by the exceptions."

[1] Whether a man has violated the laws of the state may be a single question of law, or a mixed question of law and of fact. If the fact be admitted, the law makes the inference; if the fact be denied or disputed, the jury must determine the fact, and then

apply the law as declared to it by the court to the fact so determined. *Pythias Knights v. Beck*, 181 U. S. 52, 21 Sup. Ct. 532, 45 L. Ed. 741. Almost every day in the year men are tried in the sessions courts of the state for a "violation of the laws," and the issue of guilty or not guilty is always for the jury, unless the defendant shall admit the fact, and that amounts to a plea of guilty. So in the case at bar, had the deceased, Bounds, not died, but survived, and been brought to trial for a "violation of the laws," the public prosecutor must have particularly indicated what specific law he had violated. The words of the stipulation are "violation of the laws of the state." The judgments of the courts of the different states are in disarray about the meaning of these words, and that, we think, accounts for the different conclusions at which they have arrived. Some of the courts have gone so far as to hold that the violation of a civil law would forfeit the policy. *Bloom v. Franklin*, 97 Ind. 478, 49 Am. Rep. 469.

In the instant case that is plainly not the right construction. The stipulation is that the policy should be forfeited if the insured should die in consequence of a violation of the state's law. The stipulation by necessary inference has reference to the state's criminal laws; and so does the full context of the beneficiary certificate. If that be so, and it must, what criminal laws are referred to? "There must be a clear violation of some criminal law." 1 Cyc. 266. The stipulation works a forfeiture, and he who pleads it must put his finger on the very act which violated a very law, and that act must have been the cause standing next before the death, that is to say, it must have been the proximate cause of the death. The defendant surely admits that; for in this case the plea and the proof are both directed to that end.

The general attorney wrote a letter to the local lodge, already quoted, and stated the facts which worked a forfeiture of the policy. The third paragraph of the answer pleaded the same facts to defeat the policy, to wit:

"The defendant alleges that the said Marion H. Bounds came to his death in consequence of the violation or the attempted violation of the laws of the state of South Carolina, in that the said Marion H. Bounds, without just cause or excuse, commenced a difficulty with one Vernan Parham, struck him with his fist on his head, and drew a gun on the said Vernan Parham and attempted to shoot and murder the said Vernan Parham, and the said Parham killed the said Bounds in self-defense.

Four witnesses were sworn to sustain the allegations of the complaint. The allegation amounts to a charge of assault and battery with intent to kill, and the testimony tended to prove it. Plainly, therefore, the defendant had cast upon it the burden of proving, and it undertook to prove before the jury, that Bounds assaulted Parham and intended

to kill him, and that without cause, that is to say, unlawfully.

It has been frankly admitted by appellant's counsel that "it could not be said that one who was engaged in protecting his own life (or body from serious harm) was violating any law of this state"; that is to say, if Bounds assaulted Parham in self-defense, then Bounds was within, and not without, the law, and the policy has not been forfeited. The admission is but a statement of the law; for he who defends himself preserves the law as well as himself. In legal contemplation then, Bounds is now, though dead, on trial for assault and battery, and his counsel has pleaded for him not guilty. If Bounds acted in self-defense, he is not guilty, and his policy has not been forfeited. To determine that issue appeal must be had to the testimony.

[2] And the issue here is not whether the testimony by a preponderance satisfies a court that Bounds violated the law, that is, that he made the assault upon Parham with malice, and not in self-defense; the issue here is whether the testimony thereabout is conflicting, much or little, so that it ought to go to the constitutional tribunal, the jury, to find the fact. It is true that, if all the testimony be one way, then the issue comes to be one of law for a court.

Testimony: The fight happened in a country store, on Christmas Eve, about 11 o'clock at night, in the presence of six or more witnesses. Both of the principals, and perhaps others, had been "drinking," and both the principals had pistols on their persons, and fired the one at the other, and there were seven or eight shots. The transaction was started and ended in "five or ten minutes." Bounds was leaning on a counter. Parham "pushed" or "pulled" or "shoved" him down to the floor. Parham apologized, and Bounds said, "All right." But "they kept talking on for something like five minutes, arguing, and got to cursing." Bounds called Parham a "damn rascal," and Parham returned the epithet. Bounds struck Parham with his fist. Four of the witnesses say Bounds then shot first at Parham. One witness says:

"I saw Parham reach for his gun, * * * and I saw Bounds reach for his, * * * and when I saw Bounds reach for his I got across the other side, and time I could turn around both were shooting."

This recital is the essence of the testimony. Plainly, it does not make a case of mutual combat, but, if it does, the issue thereabout is so complex as to require a verdict of a jury as to whether it was an agreement to fight or a sudden affray. The fight was in time and place so closely connected as to make one the whole transaction, starting with a shove by Parham, and ending with a shot by Parham; but, if it was not one transaction, the testimony is so involved thereabout as to require the submission to a jury

of the issue as to whether it was one fight or one assault and the renewal of it.

Upon the controlling issue of self-defense, had Bounds not died, and had there been cross-indictments for assault and battery with intent to kill on the trial thereof, and upon the testimony here adduced, a court could no more have instructed the jury, as a matter of law, that Bounds was guilty than it could have instructed the jury that Parham was guilty. In the trial of Parham for murder the issue was submitted to a jury; and the issue of Bounds' guilt must also be so submitted. It is surely not beyond dispute who brought on the difficulty; it is not beyond dispute who fired the first shot, and, if it was, that single fact would not settle the issue of self-defense (*State v. Watson*, 94 S. C. 458, 78 S. E. 324); it is not beyond dispute whether Bounds was in a place of imminent danger to his person or his life; it is not beyond dispute whether Bounds so believed, and assaulted Parham to save his own life or to save his body from serious harm. It is elementary law, and therefore law of the gravest import, that all these issues affect the liberty of the citizen, and may only be settled by the verdict of a jury. It matters not that a jury has acquitted Parham of murder; it is not pretended by the appellant that such verdict is conclusive of the issue here. The plea in that case was "not guilty," and we do not know from the record, and cannot know from other sources, upon what ground Parham was acquitted.

Finally, we have not discussed the many cases from other jurisdictions cited by counsel. Some of the courts go a long way towards assuming to decide for themselves whether a particular act is a violation of law. They fully sustain the contention of the defendant. Others of them take the view which we have come to, that where the facts are at all in reasonable dispute, a jury must decide whether in a particular case the policy holder "died in consequence of the violation of the laws of the state."

Our opinion is that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 340)

LONDON et al. v. SMITH. (No. 9130.)
(Supreme Court of South Carolina. July 13, 1915.)

FRAUDS, STATUTE OF §84—SALE OF GOODS
—PURCHASE BY AGENT.

Where defendant applied to plaintiffs to buy a car load of cattle at a certain price, whereupon, not having such cattle, plaintiffs advised defendant that they would notify him in case they found one, which was done, whereupon defendant instructed the plaintiffs to purchase for him, which they did, advancing the price, and upon his refusal to pay therefor suing him for the amount, the statute of frauds was no

defense, since it has no application to a case where an agent is directed to purchase goods for his principal.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 154-161; Dec. Dig. § 84.]

Appeal from Common Pleas Circuit Court of Abbeville County; I. W. Bowman, Judge.

Action by W. A. London and J. T. Elder, partners trading under the name and style of London & Elder, against Enoch Smith. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wm. N. Graydon, of Abbeville, for appellant. Wm. P. Greene, of Abbeville, for respondents.

GARY, C. J. This is an action for the recovery of money, alleged to have been advanced by the plaintiffs, in the purchase of certain cattle for the defendant, which were delivered to the defendant at Greenwood, S. C., in accordance with the instructions of the defendant. The negotiations out of which the contract between the plaintiffs and the defendant arose, are thus stated in the complaint:

"That on and prior to January 20, 1911, the defendant, Enoch Smith, applied to the plaintiffs to purchase for him on commission a car load of medium price cattle, costing from 3½ to 3¾ cents. Not having any cattle which could be sold on that date, the plaintiffs advised the defendant that they would look out for a car of cattle such as he desired, and in case the same were found, he would be notified. On or about January 20, 1911, the plaintiffs located a car load of cattle at Chattanooga, Tenn., which could be purchased at the price named, and immediately notified the defendant thereof, whereupon the defendant instructed the plaintiffs to purchase the same for him, and to ship the same to Greenwood, S. C."

The defendant denied the allegations of the complaint, and set up the statute of frauds as a defense. The jury rendered a verdict in favor of the plaintiffs for \$384.25, the amount claimed, with interest, and the defendant appealed.

His honor, the presiding judge, construed the complaint as alleging a cause of action based upon agency, and not upon a contract of bargain and sale. He also charged the jury as follows:

"That if the jury find from the testimony in this case that the defendant instructed the plaintiffs to purchase for him a car load of cattle, and if the jury find that it was necessary for plaintiffs to advance moneys, for the account of the defendant, in order to get such cattle, and if the jury find that the plaintiffs did so advance money for the benefit of the defendant, and if they find that the plaintiffs in such matter acted in good faith, without fraud, without unfair dealing, and without negligence, and if the jury find that when such cattle was tendered to the defendant he refused to receive it, then the plaintiffs would have the right to sell the said cattle, for the account of the defendant, to give him credit for the net proceeds, after the payment of all legitimate expenses. . . . While the contract sued on is the only one the plaintiffs can recover on, the jury is instructed that if they have proven the contract sued on,

the statute of frauds has no application, and it makes no difference in this case whether the defendant received the cattle or not."

His charge to the jury that the statute of frauds was inapplicable to a cause of action, based on agency, is sustained by the case of *Bird v. Muhlinbrink*, 1 Rich. 199, 44 Am. Dec. 247.

The motions for nonsuit and for the direction of a verdict were properly refused, as there was ample testimony tending to sustain the allegations of the complaint.

The construction which the plaintiffs placed upon their contract with the defendant appears from the following letter:

"Atlanta, Ga., Jan. 25, 1911.

"Mr. Enoch Smith, Greenwood, S. C.—Dear Sir: You will find inclosed bill for car of cattle shipped you to Greenwood, S. C., to-night. We had some trouble about getting them shipped as the seaboard road would not take them, as they would have to go by Augusta and be inspected.

"We bought this load of cattle. They are not quite as good as we expected, but very good butcher cattle. This is just what they cost us. We charged you \$25.00 com. Now if these cattle look too light to you and do not make you any money, and you do not want to pay the com. write us and we will mail you a ck. as we do not want you to lose on them. We think you received good weight on them, as we weighed them after feed and water, and they lost less than 200. Hope they will arrive in good shape and make you some money. We did not want to draw a draft for the load, but we are loaded very heavy this week, having several drafts to take care of tomorrow. We was compelled to draw as we could get credit for it in bank. Now if this is not all O. K. let the draft come back, and mail us ck. We will be in shape to take care of it if it returns, which is perfect satisfactory to us.

"Yours very truly, London & Elder."

When the other exceptions are considered in connection with these rulings, and with the charge in its entirety, especially that portion hereinbefore quoted with approval, it will be seen that they cannot be sustained.

Judgment affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 347)

PENDARVIS v. GENERAL ASBESTOS & RUBBER CO. (No. 9131.)

(Supreme Court of South Carolina. July 13, 1915.)

1. TRIAL \S 296 — INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

In a servant's action for personal injuries, where the court fully and correctly charged as to contributory negligence, a charge thereafter that if the negligence of the master and the negligence of the servant both operated as proximate causes, each being "equally" guilty of negligence, the servant could not recover was not prejudicial error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 706-713, 715, 716, 718; Dec. Dig. \S 296.]

2. APPEAL AND ERROR \S 237—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EVIDENCE—RULE OF COURT.

Under circuit court rule 77 (73 S. E. vii), providing that the point that there is no evi-

dence to support an alleged cause of action shall be first made either by motion for nonsuit or motion to direct the verdict, in a servant's action for injuries resulting in verdict for him, where the defendant employer made no motion below for nonsuit or for direction of verdict, whether the verdict was contrary to the weight of the evidence could not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1302½; Dec. Dig. \S 237.]

Appeal from Common Pleas Circuit Court of Charleston County; H. P. Rice, Judge.

Action by Joseph R. Pendarvis, by S. C. De Pass, guardian ad litem, against the General Asbestos & Rubber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mordecai & Gadsden & Rutledge, of Charleston, for appellant. Logan & Grace, of Charleston, for respondent.

GARY, C. J. [1] This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, while employed in its factory at Charleston, S. C. The defendant denied the allegations of negligence, and set up the defense of contributory negligence. The jury rendered a verdict in favor of the plaintiff for the sum of \$5,700, and defendant appealed upon two exceptions, the first of which is as follows:

"Because the presiding judge erred in charging the jury as follows: 'And if the negligence of the master and the negligence of the servant both operated as the proximate cause, each being equally guilty of negligence, then the servant cannot recover'—the error assigned being that, having charged the jury fully upon the question of negligence and contributory negligence, the charge excepted to was incorrect as a summary of his charge, and was calculated to mislead the jury, in that it declared the law to the jury to be that if the servant was equally guilty with the master, he could not recover, whereas, the law is that any contributory negligence of the servant constituting the proximate cause of the injury would defeat his recovery."

His honor, the presiding judge, charged the jury fully in regard to contributory negligence; and when the charge is considered in its entirety, it will be seen that the error assigned in the exception was not prejudicial to the rights of the appellant.

[2] The second exception is as follows:

"Because the presiding judge erred in refusing the motion for a new trial, made upon the following grounds: (a) Because the verdict was contrary to the manifest weight of the evidence; (b) because the only inference from the testimony in the case is that the plaintiff was guilty of contributory negligence, as alleged in the answer."

Rule 77 (73 S. E. vii) of the circuit court is as follows:

"The point that there is no evidence to support an alleged cause of action shall be first made either by a motion for nonsuit, or a motion to direct the verdict; and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict."

No motion was made in this case for a nonsuit, or the direction of a verdict. There-

fore the question raised by the exception is not properly before this court for consideration. *Lyon v. Railway*, 77 S. C. 328, 58 S. E. 12. But waiving such objection, the exception is without merit, and cannot be sustained.

Judgment affirmed.

HYDRICK and WATTS, JJ., concur.

FRASER, J. I concur in the result. His honor's statement was inaccurate, but he invited corrections that were not given.

GAGE, J. I concur in the opinion of the CHIEF JUSTICE.

(101 S. C. 312)

FRIPP et al., Township Com'rs, v. COBURN et al., County Com'rs. (No. 9123.)

(Supreme Court of South Carolina. July 6, 1915.)

1. CONSTITUTIONAL LAW — 26—POWER OF LEGISLATURE.

The Constitution of the state is a restraint of power, and the Legislature may enact any law not prohibited thereby.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. — 26.]

2. TOWNS — 52—BONDS—ISSUANCE.

An act validating an election authorizing the issuance of bonds by two townships, and providing for the issuance of the bonds and their payment, is not invalid, Const. art. 10, § 5, vesting power to issue bonds in townships, not precluding their issuance by the Legislature.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 90-94; Dec. Dig. — 52.]

3. TOWNS — 52—ISSUANCE OF BONDS—LEGISLATURE—POWER.

That Const. art. 10, § 6, provides that the General Assembly may not authorize any county or township to issue bonds except for educational purposes, to build and repair roads, buildings, and bridges, etc., does not preclude the Legislature itself from providing for the issuance of township bonds to construct bridges.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 90-94; Dec. Dig. — 52.]

4. COUNTIES — 173—ISSUANCE OF BONDS—LEGISLATURE—POWER.

Const. art. 10, § 13, declaring that the General Assembly shall provide for the assessment of all property for taxation, and that state, county, township, etc., and all other taxes, shall be levied on the same assessment, does not preclude the Legislature from directing the issuance of township bonds to build a bridge; the regular assessment not being interfered with.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 261, 262, 266, 267, 275, 276; Dec. Dig. — 173.]

5. CONSTITUTIONAL LAW — 299—TOWNS — 52—BONDS—DUE PROCESS OF LAW—WHAT CONSTITUTES.

An act validating an election, whereby the majority of the voters in two townships voted to issue bonds to construct a bridge and providing for the issuance of the bonds, is not in violation of Const. art. 1, § 5, prohibiting the deprivation of property without due process of law, for as the Legislature could have

authorized the issuance of bonds without an election, the bonds were issued by due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 851, 852, 858-862, 867-869; Dec. Dig. — 299; Towns, Cent. Dig. §§ 90-94; Dec. Dig. — 52.]

6. CONSTITUTIONAL LAW — 243 — EQUAL PROTECTION OF THE LAW.

In such case, the act did not deprive persons in the townships of the equal protection of the law, contrary to Const. art. 1, § 5, for the Legislature could, as it did, have consolidated the townships for the purpose of the bond election.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 702; Dec. Dig. — 243.]

7. CONSTITUTIONAL LAW — 48—VALIDITY OF STATUTES—PRESUMPTIONS.

There is a presumption in favor of the constitutionality of legislative enactments, and a statute authorizing the issuance of township bonds cannot be held invalid on the theory that the bonds would exceed the limit of indebtedness prescribed by Const. art. 10, § 5, where there was no proof of that fact.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. — 48.]

Appeal from Common Pleas Circuit Court of Beaufort County; R. W. Memminger, Judge.

Action by E. W. Fripp and others, as Township Commissioners of St. Helena Township, and also individually, against R. A. Coburn and others, as County Commissioners of Beaufort County. From a judgment for plaintiffs, defendants appeal. Reversed.

See, also, 81 S. E. 1135.

Thos. Talbird, of Beaufort, for appellants.
J. P. K. Bryan, of Charleston, for respondents.

FRASER, J. In 1911 the General Assembly of this state passed—

"An act to empower Beaufort and St. Helena townships in Beaufort county to issue bonds for the purpose of building a bridge and approaches from the town of Beaufort to Ladies Island and to provide for payment." Act Feb. 18, 1911 (27 St. at Large, p. 291).

That act provided for an election to be held in the two townships before the bonds should be issued. The election was held, and the majority in St. Helena voted against the bonds. The majority in Beaufort township was in favor of the bonds. Taking the whole vote, the majority was in favor of the bonds. In 1914 another act was passed, entitled—

"An act to validate and confirm the election and all acts of Beaufort and St. Helena townships of Beaufort County in relation to the issuance of certain bonds for the purpose of building a bridge and approaches from the town of Beaufort to Ladies Island and make provision for their payment and retirement at maturity." Act Feb. 28, 1914 (23 St. at Large, p. 860).

This is a proceeding to enjoin the issuance of the bonds on the ground that the act authorizing the issuance of said bonds is unconstitutional and in violation of the following provisions of the Constitution:

Section 5, art. 10: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Section 6, art. 10: "The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds * * * except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay jurors, county officers, and for litigation, quarantine and court expenses, and for ordinary county purposes, to support paupers, and pay past indebtedness."

Section 13, art. 10: "The General Assembly shall provide for the assessment of all property for taxation; and state, county, township, school, municipal and all other taxes shall be levied on the same assessment, which shall be that made for state taxes; and the taxes for the subdivisions of the state shall be levied and collected by the respective fiscal authorities thereof."

Section 5, art. 1: "The privileges and immunities of citizens of this state and of the United States under this Constitution shall not be abridged, nor should any person be deprived of life, liberty or property without due process of law, nor should any person be denied the equal protection of the law."

Section 7, art. 1: "No tax, subsidy, charge, impost tax or duties shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled."

And your petitioners further show that the said act approved February 18, 1911, so constructed as aforesaid, also violates section 1 of the fourteenth amendment of the Constitution of the United States as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[1] The Constitution of the state is a restraint of power, and the Legislature may enact any law not prohibited by the Constitution.

[2] 1. This act is not prohibited by article 10, § 5. The power vested in the township to issue bonds does not prohibit the Legislature from exercising a similar power.

[3] 2. The Legislature is not divested of power to direct the issuance of these bonds by article 10, § 6, because the purpose is to build a bridge and its approaches as these are specifically provided for.

[4] 3. The Legislature is not prohibited from directing the issuance of these bonds by article 10, § 13, because the regular assessment is not interfered with.

[5, 6] 4. Article 1, § 5, is not violated because the bonds were issued by due process of law. Nor were the bonds issued without equal protection of the law. The Legislature could have ordered the issuance of the bonds without an election. It had the right to create new townships or consolidate old townships, either permanently or for a special

purpose. It did consolidate these two townships for the purpose of this election and the issuance of these bonds.

[7] 5. The further question is raised that the issuance of these bonds will violate the following provision of article 10, § 5:

"The bonded debt of any county, township, school district, municipal corporation or political subdivision of this state shall never exceed eight per centum of the assessed value of all the taxable property therein."

6. The tax was levied by the lawful representatives.

The presumption is in favor of the constitutionality of an act of the Legislature. It has not been made to appear that the bonded indebtedness, after the issuance of these bonds, will exceed the constitutional limit.

The judgment is reversed.

GARY, C. J., and WATTS, HYDRICK, and GAGE, JJ., concur.

(101 S. C. 334)

KILPATRICK v. CITY OF SPARTANBURG
et al. (No. 9129.)

(Supreme Court of South Carolina. July 12, 1915.)

1. LANDLORD AND TENANT \S 164—INJURIES TO TENANT'S CHILD—LIABILITY FOR.

Plaintiff was the lessee of premises abutting on a street which was higher than the house. A board walk three or four feet wide extended from the house to the sidewalk. Thereafter the street was widened, and the lessor directed the contractor to saw the walk in two. The piece sawed off was left, and the lessor's wife and another occupant moved it into the yard, where it was used as a fence. Held that, defendant not having directed the placing of the portion sawed off upon the demised premises, he was not liable for an injury sustained by plaintiff's minor child when the fence fell on it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-637, 639, 641; Dec. Dig. \S 164.]

2. LANDLORD AND TENANT \S 164—INJURIES TO TENANT'S CHILD—INTERVENING CAUSES.

In such case, defendants were not liable; there being two intervening causes, the removal of the walkway and its use as a fence.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-637, 639, 641; Dec. Dig. \S 164.]

3. PARENT AND CHILD \S 7 — INJURIES TO CHILD—IMPUTED NEGLIGENCE.

In such case, where those in charge of the infant were guilty of negligence, the tenant could not recover.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 72, 86-99; Dec. Dig. \S 7.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Moore, Judge.

Action by Arthur Kilpatrick against the City of Spartanburg and others and L. D. Dunbar and P. A. Dunbar. From a judgment against the last-named defendants, they appeal. Reversed, and complaint dismissed.

Carson & Boyd, of Spartanburg, for appellants. Sanders & De Pass, of Spartanburg, for respondent.

GARY, C. J. [1] The facts are thus substantially stated by appellant's attorneys:

"Plaintiff rented from defendants a house on North Liberty street, in the city of Spartanburg, and, together with two other families, was living in it. Under defendants' deed properly recorded a short time prior to beginning of plaintiff's tenancy, they owned lot upon which house is located, extending eastward to a line 15 feet west of the outer edge of the liberty street sidewalk, as it existed at the time plaintiff's tenancy began; the 15 feet being reserved in deed for purpose of widening the street. The street had been raised, and, for convenient access to the street, a board walkway three or four feet wide extended from the front steps of the house some two or three steps above the ground to the sidewalk. During plaintiff's tenancy, the city developed the street by raising it and by filling in this 15-foot strip, which had been acquired by the city, and extending the width of the street to cover same. This filling in was done by one Lowe, who, being employed by Geilfuss for that purpose, hauled dirt from the excavation of Geilfuss, and with the permission of the city dumped said dirt upon this strip. To facilitate this work, Dunbar, at Lowe's request, told Lowe to saw the walkway in two and move it, which he did, pulling the end towards the street on the ground near the house, and swinging the end towards the house around toward the house, leaving one corner fastened on the step, the adjacent corner suspended, and the other end on the ground. A few days thereafter, this piece was moved by plaintiff's wife and Mary McKenzie, a 14-year old girl, a member of a family having apartments in the house occupied by Kilpatrick, and was by them placed flat on the ground in the side yard at the end of the front porch. A day or two later the McKenzie girl, playing and wanting to make a fence between the front yard and the back yard, set this piece of walkway up on edge, extending it from the house towards the outer side of the lot, and tacked a stick on each side to hold it up. This was done about 10 or 11 o'clock a. m. About 4:30 o'clock p. m. of the same day, the McKenzie girl and her smaller sister and Kilpatrick's 4-year old girl, with her mother's knowledge and consent, were playing in the yard, and, while the McKenzie girl was under the house reading a book, this walkway fell on plaintiff's child, breaking her leg."

His honor, the presiding judge, granted the motion for a nonsuit as to all the defendants except the Dunbars, against whom the jury rendered a verdict for \$288. The circuit judge ruled that the plaintiff was not entitled to punitive damages.

The witness Lowe testified that:

"When he started the work he went and asked Dunbar about this board walk, and that Dunbar told him not to cover it up, but to saw it in two, and lay it out of the way; that he borrowed a saw from Dunbar, and he and his son sawed the walkway in two, and took both pieces out of their position and laid them flat down on the ground."

This was a mere suggestion of Dunbar as to the manner in which Lowe should prosecute his work, but was not intended to make him the agent of Dunbar. Dunbar did not even instruct him to place his walkway on the premises occupied by the plaintiff and others. The nonsuit should therefore have been granted as to all the defendants.

[2] Another reason why the nonsuit should have been granted in favor of the Dunbars

is that there were two intervening circumstances that prevented the action of the Dunbars from being the proximate cause of the injury, to wit, the removal of the walkway by the plaintiff's wife, and afterwards by Mary McKenzie. *Cooper v. Richland*, 76 S. C. 202, 56 S. E. 953, 10 L. R. A. (N. S.) 799, 121 Am. St. Rep. 946; *Snipes v. Railway*, 76 S. C. 207, 56 S. E. 959.

[3] It furthermore appears from the testimony that those in charge of the injured infant and of the premises were guilty of contributory negligence. *Cantrell v. Fowler*, 32 S. C. 580, 10 S. E. 934; *Berger v. Electric Co.*, 93 S. C. 372, 76 S. E. 1096.

The judgment of the circuit court in refusing the nonsuit as to the Dunbars is reversed, and the complaint dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(76 W. Va. 532)

VANCE v. ELLISON et al.

(Supreme Court of Appeals of West Virginia.
June 22, 1915.)

(Syllabus by the Court.)

1. EVIDENCE ⇨440 — PAROL EVIDENCE AFFECTING WRITINGS — CONTEMPORANEOUS ORAL CONTRACT.

A verbal contract, covering the subject dealt with in a written contract entered into between the same parties at the time the verbal one is made, can not be established.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 1874-1899, 1929-1944, 2030-2051; Dec. Dig. ⇨440.]

2. CONTRACTS ⇨75—CONSIDERATION — PERFORMANCE OF LEGAL OBLIGATION.

The doing of what one is already legally bound to do can not constitute good consideration for a promise made to him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. ⇨75.]

3. ATTORNEY AND CLIENT ⇨143—COMPENSATION—ADDITIONAL COMPENSATION.

A court of equity will cautiously scrutinize a contract for additional compensation obtained by an attorney from his client after the relation between them is once established, and will frequently interfere, at the election of the client, to prevent the enforcement of such a contract or to restore to him what has been obtained thereunder.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328-331; Dec. Dig. ⇨143.]

4. MORTGAGES ⇨413—INJUNCTION—INVALID DEBT.

Equity will enjoin the enforcement of a deed of trust given to secure payment of money under a contract which is invalid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1187-1201; Dec. Dig. ⇨413.]

Appeal from Circuit Court, Logan County.
Suit by James M. Vance against J. B. Ellison and others. Decree for defendants, and plaintiff appeals. Reversed, and decree entered for plaintiff.

Maynard F. Stiles, of Charleston, for appellant. Ira P. Hager and E. T. England, both of Logan, for appellees.

ROBINSON, P. By this suit in equity Vance sought to enjoin Ellison and others from the enforcement of a deed of trust on real estate, which had been given to secure the payment of fees for legal services. Plaintiff rested his claim for relief on the ground that no valid consideration supported the contract to pay; that the contract was one not enforceable as between attorney and client; and that in any event the services had not been performed. Upon the bill, answer, and proofs the court denied the relief asked, and plaintiff has appealed.

We shall by no means go into all the matters disclosed by the record. Those which control decision are marked and suffice for attention.

Vance contends that the deed of trust, which is for eight hundred and sixty dollars, covers the unpaid part of a contingent fee of one thousand dollars for legal services to be rendered him by Ellison in the case of the Buffalo Coal & Coke Company v. Vance and others. He claims that Ellison obtained the contract for this fee from him after the relation of attorney and client was established between him and Ellison, and after the latter was already bound in a prior written contract to render him the same services for an absolute fee of five hundred dollars. Vance maintains that, Ellison having become his attorney, the contract for the additional compensation is one which a court of equity will not countenance; that, Ellison being already bound by the original contract to render the services, there was no consideration for the additional contract; and that whether there was consideration or not, Ellison neglected to render the services he agreed to render, so that it was necessary to employ other lawyers. Ellison admits that the one thousand dollar fee was additional to the other fee, but says it was verbally contracted for at the time he was employed and the other fee stipulated, though the written contract for the additional fee is dated about a year thereafter. He maintains that Vance at the time of the original employment in the case willingly and fairly contracted to pay him this additional, contingent fee of one thousand dollars, and both fees only represent fair compensation for the services covered by the agreement of employment. He denies that he neglected the case or failed to render the services.

Vance stipulated to pay Ellison the original five hundred dollar fee in a written contract whereby Ellison and another lawyer, Avis, agreed to render for Vance all legal services necessary to a full defense of the suit, both in the circuit court and in the appellate court. That contract on its face plainly covered the entire subject of the employment of Ellison as an attorney in the case. By it he clearly

bound himself to render all services necessary to a defense of the suit on behalf of Vance, even on appeal. By its written stipulations he agreed as a lawyer to see Vance through the litigation, for five hundred dollars. Nothing is said in it about any additional fee to Ellison. The express terms of the contract negative any other contract covering or relating to the same subject. Though Avis was also a party to the contract, yet in a sense it is separable as to both Ellison and Avis. They were not law partners. Each by the written contract of employment agreed to act in the litigation fully to its termination as far as was necessary in Vance's behalf, and each was separately to have five hundred dollars for his services.

Vance insists that the written contract for the additional fee of one thousand dollars, dated about a year after the Ellison-Avis contract, represents no prior verbal contract for such additional fee; that it was made long after the original contract of employment; and that it was extorted from him by Ellison's threat to throw down the case unless the additional compensation was forthcoming. On the issue in this relation we have only the testimony of Ellison and Vance, the testimony of the one in direct conflict with that of the other. But our view of the case makes further consideration in this behalf unnecessary.

[1] We are clearly of the opinion that Ellison's parol testimony that a verbal contract for the additional fee was made contemporaneous with the written Ellison-Avis contract, is subject to the exception taken to it and can not be read. The express terms of the written contract whereby Ellison agreed to render all legal services in the case for five hundred dollars, so clearly bars intention of the parties to have any other contract at the time for additional compensation, that we can not under a well established rule hear parol evidence of other negotiation of the parties at the time than that expressed by the writing. As between Ellison and Vance the written contract covered the subject of employment in the case fully. It purports that they did not mean to negotiate about the subject in any different terms. A verbal contract covering exactly the same subject dealt with in a written contract entered into between the same parties at the time the verbal one is made, can not be established. Enc. Dig. Va. & W. Va. 646; Seitz v. Brewers', etc., Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; Wigmore on Evidence, sec. 2436.

[2] While Ellison may not depend on his alleged verbal contract, he may introduce, as has been done, the written contract which Vance executed to him for the additional fee about a year after he had originally bound himself to render the legal services by the Ellison-Avis contract. But this subsequent contract that Vance shall pay him an additional thousand dollars for the legal serv-

ices, rests on no new consideration. Ellison was already obligated by the former contract to do for five hundred dollars what he agreed to do for one thousand dollars by this subsequent contract. Where the consideration for the payment of this one thousand dollars? It does not exist. Whether, as Vance claims, the subsequent contract of employment was obtained by extortion and unfairness as between attorney and client, or not so obtained, the contract has no consideration to give it validity. Recently, in *Thomas v. Mott*, 74 W. Va. 493, 82 S. E. 325, we held that the doing of what one is already bound to do, does not constitute good consideration for a promise. See review of that case in our state law journal, *The Bar*, April, 1915, page 41.

[3] Moreover, the contract between attorney and client for the additional fee of one thousand dollars is one which a court of equity will not sanction under the facts and circumstances appearing in this case. Though actual fraud or extortion may not be shown, the contract is presumptively invalid. It was at most a mere gift during the confidential relation, which for reasons of public policy is generally not allowable. Not an extenuating fact appears to take this feature of the case out of the general rule. An attorney does not deal with his client at arm's length. That which an attorney obtains from the client after the relation is established between them and while it exists, will be cautiously guarded. A court of equity will most frequently interfere, at the election of the client, and restore to him fully what has been obtained from him by his attorney beyond the compensation originally fixed. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806; *Weeks on Attorneys*, secs. 268, 273, 281.

[4] Ellison claims that Vance paid him one-half of the one thousand dollars at the time he paid him the five hundred dollars contracted to be paid in the Ellison-Avis contract. That he paid him a full one thousand dollars and some interest at that time, is fully established. The testimony of Vance, Ellison, and the latter's partner, is conflicting as to what the additional five hundred dollars was a payment on. But full consideration of all the evidence, facts, and circumstances in the case leads us to hold that but two hundred dollars of the payment was meant to go on the additional fee contract. At the time the payment of one thousand dollars and interest was made by Vance to Ellison, five hundred dollars was not owing on the additional contract. The suit had not been decided in any court. As we have indicated, payment under the additional contract was contingent on success in the Buffalo Coal & Coke Company suit. That success at last came to Vance in this court, after adverse decision below. But before the payment of which we are speaking, Ellison by a third writing with Vance had eliminated the contingent feature as to a portion of the

amount, so that three hundred and thirty-three and a third dollars was virtually absolute. Vance says the five hundred dollars which he paid over and above the amount due under the Ellison-Avis contract, was three hundred dollars due in another case—the Stollings suit—just then decided, and two hundred dollars which Ellison obtained from him in some way that he never understood. Controlling facts and circumstances lead us to find that the payment of this five hundred dollars was meant to cover the three hundred dollars in the Stollings case and two hundred dollars on the additional fee of one thousand dollars. The Stollings case was just ended. The fee therein, contingent itself on success in that case which had come, was then due. But the Buffalo Coal & Coke Company case was not then ended. It was not ended until months thereafter. Only the five hundred dollars under the Ellison-Avis contract which was absolute, and the portion of the additional fee as to which contingency had been removed, could Ellison then demand, or was Vance likely to pay. These circumstances rather confirm the testimony of Vance and negative the testimony of Ellison that the five hundred dollars was paid him on the additional fee of one thousand dollars not then due because the litigation on which it was contingent was not then terminated. But stronger than all these considerations, plainly fitting and confirming them, is the language of the deed of trust which Ellison obtained from Vance as security at a time subsequent to the payment of the one thousand dollars and interest. The eight hundred and sixty dollars secured by the deed of trust is recited therein by the parties to be "for legal services performed, and to be performed, in the case of the Buffalo Coal & Coke Company against the said J. M. Vance." This certainly means that the debt which the deed of trust purports to secure, exists out of what has not been paid on account of the Buffalo Coal & Coke Company case. It proves that the five hundred dollars was applied to the Stollings fee, as Vance says, and to two hundred dollars of the additional fee of one thousand dollars in the Buffalo Coal & Coke Company case. The two hundred dollars from one thousand dollars accounts for the eight hundred dollars as the amount which figures in the deed of trust, with sixty dollars added to it evidently on the score of interest. Assuredly the deed of trust in describing the debt secured, negatives the claim that five hundred dollars was paid on the additional fee. It confirms the fact that the two hundred dollars over and above the Stollings fee was what Ellison applied on the additional fee at the time of the payment. Ellison's claim that the Stollings fee is covered by the deed of trust is inconsistent with what the deed of trust itself says.

We must take the deed of trust on its

face, and hold that the money secured thereby is based on the additional contract which we have found invalid for reasons hereinbefore given. That contract is unenforceable. Equity will step in with its injunctive process and halt a sale under the deed of trust for a collection of the amount claimed under the invalid contract.

Vance further claims right to a decree for the two hundred dollars paid on the invalid contract. That we shall not grant him, though ordinarily equity under the circumstances of the case would restore it to him. For, it appears that by the contract in the Stollings case, Ellison was to have two hundred dollars additional to the three hundred dollars which has been paid him thereon, in the event the Buffalo Coal & Coke Company case was decided in Vance's favor. That two hundred dollars by the favorable decision in the last named case is now due to Ellison. The Stollings contract seems free from any invalidity. Equity in its fairness will say that the account between Ellison and Vance is square.

The decree will be reversed. The injunction prayed for, and heretofore preliminarily awarded, will be perpetuated.

LYNCH, J., absent.

(76 W. Va. 587)

STATE ex rel. HEIRONIMUS v. TOWN OF DAVIS et al.

(Supreme Court of Appeals of West Virginia. June 22, 1915.)

(Syllabus by the Court.)

MANDAMUS \S 23, 74—SUBJECTS OF RELIEF—MUNICIPAL ELECTION—RIGHT OF CITIZEN.

The officers composing the common council of the Town of Davis, are under clear legal duty, by Code 1913, ch. 47 (secs. 2382-2494), and ordinances made in pursuance thereof, to cause an election to be held annually in the town, and, where they fail to hold such election on the date named by law, mandamus will lie on behalf of a citizen of the town to compel them to hold the election on a later date.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 55-58, 150-157; Dec. Dig. \S 23, 74.]

Error to Circuit Court, Tucker County.

Proceedings for mandamus by the State, on the relation of R. D. Heironimus, against the Town of Davis and others. Judgment denying relief, and relator brings error. Reversed, and peremptory writ issued.

R. D. Heironimus, of Davis, for plaintiff in error. Frank C. Reynolds, of Keyser, for defendants in error.

ROBINSON, P. The Town of Davis is a municipal corporation under Code 1913, ch. 47. By that statute, sec. 17, the officers of the town "shall be elected on every first Thursday of January, at such place in the town * * * and under such supervision,

rules and regulations, not inconsistent with the laws regulating district elections, as the council may prescribe." An ordinance of the town made in keeping with this statutory provision, provides "that the annual town election shall be held on the first Thursday in January, at such place, or places, as the council may designate." Thus we see that the law fixes a time for the holding of the general town election annually, and provides virtually that the council shall provide for the holding of the same. Moreover, certain provisions of the general election laws are applicable to the holding of municipal elections. By those provisions it is the duty of the council to prepare for the holding of the town election by the appointing of election officers, the furnishing of the election paraphernalia, and the doing of other necessary things. While the law itself calls the election and does not provide for a special proclamation by the mayor or council to call the same, yet the law provides in effect that the council shall cause the election to be held by making all the preparations for it which are essential to its holding. The town officers must open the polls. They must see that the electorate are given the opportunity to vote. In a sense the council must hold the election which the law calls. In many towns it is usual for the mayor or council to emphasize the coming of the election, and to call attention to the preparations made for it, by published notice proclaiming the time and places for its holding and other things in connection therewith. The doing of this, though not specially provided for, is perhaps incidental to the provisions of the law for the holding of town elections. It is at least good practice. That practice had generally been observed in the town of Davis until the instance out of which arises this case.

For the annual town election which the law prescribed to be held on the first Thursday in January, 1915, the council of the Town of Davis made no preparation whatever. No election was held. The members of the council for the preceding year continued to hold over. More than this, the record of the council shows that "in view of the fact that no election was held" the members of the council declared themselves "elected to their respective positions for the ensuing year," and issued certificates of election to themselves. After they so declared themselves elected and entitled to hold for another year, Heironimus, a citizen, voter, and taxpayer in the town, sought the writ of mandamus to compel them to cause to be held the annual election which he avers they neglected to bring about as the law enjoined them to do. The circuit court, upon returns of the town and its officers to the alternative writ, denied the relief sought. To such judgment Heironimus prosecutes writ of error.

The substance of the returns to the alternative writ is that Helronimus allowed the day fixed by law to go by without demanding an election to be held, that he is acting not in good faith and for ulterior motives in now demanding an election, and that it was generally conceded by the people of the town that no election should be held, because they were satisfied with the present officers, and the holding of no election would save expense. But to us it seems clear that these considerations can not excuse the neglect of that which the law enjoined upon the officers composing the common council of the town—the causing of an election of persons to succeed them. There was no duty upon Helronimus to demand that these officers do their legal duty. It was to be assumed that they would do without other demand what the law commanded them to do. Nor does it appear that the relator is barred on consideration of bad faith or ulterior motives from the enforcement of the legal right on which he relies. And, though every person in the town may have been in every way satisfied with the officials in office and desired to retain them, or to save the expense of an election, the law provided for an election nevertheless. It made no provision for the continuance of officers beyond their terms whenever the people were satisfied with them or would like to save the expense of an election. The law said that there should be an election in any event, the expense notwithstanding. It contemplated that if the people were satisfied with the town officials, they could re-elect them.

It is argued that the relator was not a candidate and was deprived of no special or pecuniary right. But as a citizen, voter, and taxpayer in the Town of Davis, he may maintain mandamus to compel the council to perform a ministerial duty imposed on it by law in favor of the public. This he may do though he has no special or pecuniary interest in the performance of the duty. *Frantz v. County Court*, 69 W. Va. 734, 73 S. E. 328.

It is further submitted that the law fixes a day for the election and does it so mandatorily that an election can be held on no other day. True, the provision of the law fixing a particular day for the holding of the election is in a sense mandatory. It is intended to be obeyed. But, in another sense it must be considered directory. 2 Kent's Comm. 295; *State v. Smith*, 22 Minn. 218; *State v. County Commissioners*, 29 Md. 516. May the council of the town by plain disobedience of this minor mandate as to the time, deprive the citizens of the greater mandate that they shall have an election annually? May it, by disobedience of a mere particular embraced in the whole of the grant to the citizens of a legal right, exonerate itself from disobedience of the whole? Assuredly not. That the council may be compelled by mandamus to reconvene and do

that which it was enjoined by the law to do at a particular time before, is only the requirement of reason and right. *Frantz v. County Court*, supra. The same officers are in office. They hold over only by virtue of their original election, not on the pretended election by themselves. Nothing has put it beyond their power to do that which they should have done before. Surely they can not take advantage of the fact that the day fixed for the election has passed. They themselves allowed it to pass. They can not thwart the right of the citizens to an election by allowing the date fixed therefor to pass, and thus rely on their own wrong to justify a greater wrong on their part. That they may defeat and nullify the law providing for an annual election by simply neglecting or refusing to obey it, is a startling proposition which does not meet our approbation.

The point we are considering is by no means new. In *People v. Trustees of the Town of Fairbury*, 51 Ill. 149, the court held:

"Where the president and board of trustees of a town incorporated under the general law, have neglected to give the requisite notice for holding the annual election for the new board, within the year for which they were elected, as prescribed by law, and refuse afterwards to give notice and call a meeting of the qualified voters of such town, for the election of their successors in office, a mandamus will be awarded, compelling them to do so."

It was argued in *McConihe v. McMurray*, 17 Fla. 238, that mandamus would not lie to compel the holding of an election, because the day fixed by law for it had passed. The matter was dismissed in this wise:

"Nor is it any objection that the precise date at which the election was to be held has passed. * * * Such a doctrine would practically abolish the remedy by mandamus in such cases. The writ does not lie before, but only after default in the performance of a ministerial duty, and if it be a good defense to allege that the time fixed for its performance has passed, it is evident that the very ground upon which you must base your application for the writ becomes a sufficient reply to the alternative writ when granted."

Again, in *State v. Young*, 6 S. D. 406, 61 N. W. 165, we read:

"If the annual election has not been called and held upon the day designated in the village charter, and the president and board of trustees neglect to call an election upon the demand of an elector and taxpayer of such village, the circuit court has power by mandamus to compel said president and trustees to call such an election, and provide the necessary ballots, booths, and judges for holding the same."

A further quotation from that case is peculiarly pertinent here:

"It would be intolerable that a president and board of trustees of a village could perpetuate themselves and the other village officers in office indefinitely, by neglecting to perform their duty of calling an election, providing ballots, booths, judges, etc. Such neglect of duty cannot be beyond the correction of the courts, and if the officers do not choose to act the court will set them in motion, and see that the rights of the electors to elect and be governed by of-

ficers of their own selection shall not be either denied or prevented."

It is plain from the record that the relator shows a clear legal right to the writ of mandamus. The judgment of the circuit court will be reversed, and the judgment which that court should have entered will now here be entered. It will therefore be ordered that the peremptory writ of mandamus prayed for do issue, commanding the holding of the election which should have been held for the Town of Davis on the first Thursday of January last, on as early a date to be fixed by the council as may be consistent with the provisions of law relative to preparations for the same.

LYNCH, J., absent.

(78 W. Va. 576)

Ex parte DICKEY.

(Supreme Court of Appeals of West Virginia.
June 22, 1915.)

(Syllabus by the Court.)

1. HIGHWAYS §168 — USE — COMMON CARRIERS.

All rights of common carriage on highways, such as those conducted by means of drays, omnibuses, hackney coaches, and taxicabs, are legislative grants or concessions, much lower in legal quality and dignity than the rights of ordinary use to which highways are incidentally subjected by citizens in travel and the prosecution of their business.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 456, 457; Dec. Dig. §168.]

2. MUNICIPAL CORPORATIONS §680, 681 — USE OF STREETS — COMMON CARRIERS — IMPLIED GRANT.

Legislative recognition of such right of common carriage, as one common to all citizens, by grant of authority to municipal corporations, to license and tax persons engaged in the exercise thereof, in the manner in which they are authorized to license and tax ordinary vocations, is an implied grant of such common right.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. §680, 681.]

3. HIGHWAYS §165 — USE — COMMON CARRIERS.

But the Legislature may so limit, qualify, and regulate such right as to make the exercise thereof subserve the interest and convenience of the public, as in the case of ferries, street railways, telegraphs, and telephones.

[Ed. Note.—For other cases, see Highways, Dec. Dig. §165.]

4. CONSTITUTIONAL LAW §63—HIGHWAYS §165—USE OF STREETS—COMMON CARRIERS—REGULATION.

To that end, it may prescribe the number, character, routes, rates, and hours of service of common carrying vehicles on the highways, or delegate such power of regulation to municipal corporations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. §63; Highways, Dec. Dig. §165.]

5. MUNICIPAL CORPORATIONS §703 — POWERS—REGULATION OF USE OF STREETS.

A charter provision empowering a municipal corporation to grant, refuse, or revoke licenses to the owners of vehicles kept for hire therein, and to subject them to such regulations

as the interest and convenience of the inhabitants thereof, in the opinion of the municipal authorities, may require, delegates to the corporation full legislative power over such vehicles.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. §703.]

6. MUNICIPAL CORPORATIONS §703 — POWERS — REGULATION OF USE OF STREETS — BUSES.

Under such authority, the corporation has power to prescribe the routes and hours of service of motor vehicles commonly called "jitney buses," carrying passengers along the streets and taking in and discharging them in a manner similar to that in which they are received and discharged by street cars, and to require from them indemnity against injury to persons and property occasioned by the operation thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. §703.]

7. MUNICIPAL CORPORATIONS §703 — ORDINANCES—VALIDITY—DISCRIMINATION.

A municipal corporation having full legislative power to limit and regulate the use of vehicles kept for hire may classify them, for purposes of regulation; and an ordinance dealing fully with one class of such vehicles, as determined by the nature of their business and the prices they charge, is not discriminative because of its lack of provision for the regulation of other distinct classes of vehicles kept for hire.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. §703.]

8. MUNICIPAL CORPORATIONS §703 — ORDINANCES—VALIDITY—DISCRIMINATION.

Specification of the price charged by a common carrier vehicle, as an element of its description in an ordinance prescribing its class, does not make the classification arbitrary or discriminative, unless it appears that there are other vehicles of the same class, as determined by the nature of their business, that charge prices other than those specified.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. §703.]

(Additional Syllabus by Editorial Staff.)

9. MUNICIPAL CORPORATIONS §592—USE OF STREETS—REGULATION OF MOTOR BUSES—VALIDITY.

A city ordinance regulating jitney buses on city streets does not conflict with Code 1913, c. 43B, regulating motor vehicles generally.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. §592.]

Original proceedings for habeas corpus by M. T. Dickey against Sam Davis, Chief of Police. Writ refused.

Daugherty & Riggs, of Huntington, for petitioner. F. M. Livezey, of Huntington, for respondent.

POFFENBARGER, J. Charging illegality of an ordinance for violation of which he is held in restraint of his liberty, the relator seeks his discharge on a writ of habeas corpus.

The ordinance in question is one made by the commissioners of the city of Huntington, for the regulation, licensing, and taxing of certain vehicles commonly known as "jitney

busses," designated in the ordinance as motor busses and therein defined as vehicles "propelled by either gasoline or electricity, operated over any of the streets in the city of Huntington, for the purpose of carrying passengers for hire, at a rate of fare of 15 cents or less for each passenger, and which receives and discharges passengers along the route traversed by such vehicles." It makes it unlawful for any person, firm, or corporation to use or occupy any public street in the city of Huntington with a motor bus, without a permit or license therefor and compliance with the terms of the ordinance. It imposes an annual license tax of \$50 for such of them as have capacities of four passengers or less and \$70 for such as have capacities of five passengers or more, but allows an apportionment of the tax when the license is taken out for the unexpired portion of a year. It also requires the licensee to enter into a bond in the penalty of \$5,000, with a condition for compliance with the provisions of the ordinance and payment of any and all lawful claims for damages for injury to persons or property sustained by passengers in them or by other persons that may be killed or injured or suffer damage to property in the city of Huntington in the operation thereof. A condition precedent to the issuance of the license is the filing of an application showing: (1) The name, residence, and business address of the person, firm, or corporation owning and operating the bus; (2) the type of motor bus to be used; (3) the number of such vehicles to be operated by the applicant and the state license number of each; (4) the seating and weight capacity of each; and (5) the terminals and the routes over which it is to be operated, and the hours of its operation. The commission reserves to itself the right to refuse or grant such permit or license as applied for, or to change the route or the hours set forth in the application and then grant the license upon such changed route or hours or both.

[1] As regards legislative power or control, the business or interest regulated by the ordinance is clearly distinguishable from vocations, the pursuit of which does not involve the use of public property. The right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means, can neither be denied nor unduly abridged by the Legislature, for the preservation of such right is the principal purpose of the Constitution itself. In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic evils, such as gaming, the liquor traffic, and numerous others. To this list may be added such useful occupations as may, under certain circumstances, become public or private nuisances, because offensive or dangerous to health. All of these fall

within the broad power of prohibition or suppression, some wholly and absolutely and others conditionally. Such pursuits as agriculture, merchandising, manufacturing, and industrial trades cannot be dealt with at will by the Legislature. As to them, the power of regulation is comparatively slight, when they are conducted and carried on upon private property and with private means. But when a citizen claims a private right in public property, such as a street or park, a different situation is presented. Such properties are devoted primarily to general and public, not special or private, uses, and they fall within almost plenary legislative power and control. In them, all citizens have the usual and ordinary rights in an equal degree and to an equal extent. In the regulation thereof, the Legislature cannot discriminate. But, as regards unusual and extraordinary rights respecting public properties, its power of control and regulation is much more extensive. Such rights are in the nature of concessions by the public, wherefore the Legislature may give or withhold them at its pleasure. It may give them for some purposes and withhold them for others, and, in the case of those given, it may, upon considerations of character, quality, and circumstances, discriminate, permitting some things of a general class or nature to be done and refusing to permit others of the same general class to be done, or extending the privilege to some persons and denying it to others because of differences of character or capacity.

The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities:

"A distinction must be made between the general use, which all of the public are permitted to make of the street for ordinary purposes, and the special and peculiar use, which is made by classes of persons in the pursuit of their occupation or business, such as hackmen, drivers of express wagons, omnibusses, etc. Tiedeman on Municipal Corporations, § 299.

"The rule must be considered settled that no person can acquire the right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power." *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *McQuillen*, *Municipal Corporations*, 1620.

An ordinance of the city of Boston provided that no person should make an address in or upon or near the public grounds of the city, without a permit from the mayor. Having been denied such a permit, one Davis did make a public address on public grounds known as "Boston Commons." Under this ordinance, he was convicted of an offense, and the Supreme Judicial Court of Massachusetts affirmed the judgment, holding the Legislature had conferred upon the city of Boston the power to pass and enforce such an ordinance. On an appeal to the Supreme Court of the United States, the judgment of the state court was affirmed, and Mr. Justice White, delivering the opinion of the court, said:

"The fourteenth amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control. * * * and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the state." *Davis v. Massachusetts*, 167 U. S. 43, 47, 17 Sup. Ct. 731, 733 (42 L. Ed. 71).

[2] Plainly, therefore, the result of this inquiry depends, not upon the power of the Legislature over the subject-matter of relator's alleged right, but upon the action of the Legislature respecting the same. That he has no natural or indefeasible right to maintain upon a public highway a vehicle for the carriage of passengers for hire is unquestionable. Though, in point of theory, special rights in highways are vested in individuals only by legislative grant, it is matter of common knowledge and judicial cognizance that, without express legislative permission to do so, citizens use them in special ways consistent with their nature. They naturally enter upon them and carry on business, not inconsistent with their use for ordinary purposes, or rather not obstructive of such use, until prohibited by a statute or an ordinance. In the early history of this country, before the establishment of railroads, the public roads were used by stage lines. Indeed, passenger transportation through the country, other than that by navigable waters, was carried on by means of stage lines, and the Legislatures exercised little, if any, authority over them, beyond the establishment of such regulations as were applicable to other vehicles on the public roads. How their rights were acquired, and just what regulations were imposed, would be matter of historic interest, but its importance or relevancy upon this inquiry would hardly justify the examination of the early statutes, requisite to the ascertainment of the creation, recognition, or regulation of the right. At this late day, they are not readily to be found in the text-books. City cabs and omnibuses are of the same general nature and are permitted to use the streets of all cities and villages throughout the country, without any special grant from the Legislature. Proceeding upon the as-

sumption of the right of owners of vehicles to use highways for the purposes of common carriage, the Legislatures deal with them in much the same manner as that in which they deal with ordinary vocations, confining themselves to measures of regulation. While it does not amount to an express grant of right to make use of the highways, it is a recognition thereof which fairly amounts to an implied grant. In the general statutes of the state, there is neither a grant nor a prohibition of the use of the public highways for the purposes of common carriage, such as stage lines or omnibuses, and in the charters granted by the Legislature to cities, towns, and villages, as well as in chapter 47 of the Code, under which corporations having a population of less than 2,000 may be organized, there is neither an express grant nor a prohibition of such right; but by the special charters, as well as by chapter 47, municipal corporations are authorized to license vehicles kept for hire, just as they license hotels, peddlers, brokers, billiard and pool tables, slot machines, and numerous other persons and enterprises. Section 28 of chapter 47 of the Code, serial section 2409, among other things, authorizes the councils of cities, towns, and villages "to impose a license tax on persons or companies keeping for hire carriages, hacks, buggies, or wagons, or for carrying passengers for pay in any such vehicle, in such city, town or village." A similar provision is found in most of the special charters granted by the Legislature. This implies the right and, if necessary, grants it. What is necessarily implied in a statute, or must be included in it to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms. *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; *Hasson v. City of Chester*, 67 W. Va. 278, 67 S. E. 731.

A similar method of dealing with them in other states is disclosed by the statutes and decisions thereof. Everywhere such enterprises are regarded and treated as of rightful existence and subjected to regulation and control in the same manner as ordinary vocations not in any sense involving the use of public property. Generally the authority and power of regulation in cities and towns is treated as having been delegated to them by the Legislatures. *Frommer v. City of Richmond*, 31 Grat. (Va.) 646, 31 Am. Rep. 746. In *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 48 Am. Dec. 679, the authority of the mayor and aldermen of the city of Boston to require licenses from citizens of other towns and cities for the maintenance of hackney coaches and omnibuses, for the carrying of passengers from neighboring towns into the city and out of the city to such neighboring towns, without legislative authority therefor, was denied, as was also their authority to impose any tax upon such carriers.

[3, 4] However it may be regarded as having been acquired, the right claimed by the relator, in the absence of legislative prohibition, seems to be considered in all jurisdiction as one common to all citizens who care to exercise it. Public highways are treated as navigable waters, in the sense that any citizen, desiring to use them as a common carrier thereon, may acquire the necessary equipment, select the portion of the highway or river he desires to use, and enter upon the business in common with all other persons engaged in it. It is equally clear, however, that the Legislature has full and complete power for drastic regulation of such business and to take away the right to pursue it upon such highways as it may see fit to devote exclusively to ordinary public uses. In *O'Connor v. Pittsburgh*, 18 Pa. 187, Gibson, C. J., said:

"To the commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the quarter sessions. In England the public road is called the king's highway; and, though it is not usually called the commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the commonwealth's authority. Every railroad, canal, turnpike, or bridge company has its franchise by grant from the state, and consequently with its original qualities and immunities adhering to it. Every highway, toll or free, is licensed * * * and regulated by the immediate or delegated action of the sovereign power; and in every commonwealth the people in the aggregate constitute the sovereign."

To accomplish the exclusion of automobiles from the use of certain streets or public ways in cities and towns, the Legislature of Massachusetts deemed it necessary to pass a statute authorizing the aldermen of the cities and selectmen of the towns to make such regulations, subject to a power of review in the state highway commission. The constitutionality of this statute was questioned in *Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513, but the court upheld it.

It would be inconsistent with this theory to say the Legislature, in committing to county courts, villages, towns, and cities the control of such portions of the highways as happen to be within their limits, intended to make them absolute owners and proprietors of the same, with power to do as they please with them. Such municipalities own such portions of the highways for such public uses and purposes as the Legislature, by express declaration or implication, recognizes as lawful. They hold them as agencies of the state for such public uses, and therefore they can limit, restrict, or regulate such uses in such manner and to such extent only as the Legislature has authorized. For the promotion of local comfort, convenience, and prosperity, the Legislature has empowered them to establish, maintain, and improve highways and

given them authority to raise money by taxation for such purposes; and, at the same time, it has compelled them to assume, not only the burden of construction and maintenance, but also liability for injuries occasioned by defects. Nevertheless, it would be inconsistent with sovereign legislative power and control over the highways to infer from this agency legislative purpose to confer upon local municipalities power to deny any right of the public in them. Therefore such authority does not exist, unless it has been expressly or impliedly conferred.

[5, 6] In the light of these general principles and conclusions, the provisions of the charter of the city of Huntington, applicable to the subject, must be read and interpreted. The most comprehensive one of these, and the only one it is deemed necessary to consider, is found in section 68 of chapter 3 of the Acts of 1909. After having authorized the commissioners to require a city license for anything for which a state license is required and to impose a tax thereon for the use of the city, it proceeds as follows:

"And the board of commissioners shall have the power to grant, refuse or revoke any such license of owners or keepers of hotels, carts or wagons, drays, and every other description of wheeled carriages kept or used for hire in said city, and to levy and collect tax thereon and to subject the same to such regulations as the interest and convenience of the inhabitants of said city, in the opinion of the board of commissioners, may require."

Power in the city to subject all kinds of wheeled carriages kept for hire to such regulations as the interest and convenience of the inhabitants thereof may require, in the opinion of the board of commissioners, and to refuse them license, is as broad as the power of the Legislature itself over them. They, with the owners and keepers of hotels, are segregated from all other subjects of license and taxation, by the terms of the statute, and put into a separate and distinct class over which the city is accorded full and complete power. In all other cases, it is authorized merely to require licenses and impose taxes, and nothing is said about regulation. In these, there is an explicit grant of power to grant, refuse, or revoke licenses and to regulate in a manner and to an extent left in the discretion of the commissioners. It is wholly unlike the power over the same subjects, granted by section 28 of chapter 47 of the Code, and necessarily evinces legislative intent greatly to enlarge that power. How far? The terms are unlimited. Nothing in the nature of the subject-matter affords a basis or ground for a presumption against intent to allow the words effect accordant with their full literal import. The presumption of intent to allow such vehicles the rights previously enjoyed by them and recognized in most of the special charters and the general law is completely overthrown and broken down by the use of terms in this charter, wholly inconsistent with it. It is difficult to conceive of more comprehensive terms. Of

course, the provisions could have been so framed as expressly and in terms to have authorized exclusion from certain streets, the observance of certain hours, and the like, but it is unusual for legislative acts granting full discretionary power to descend into such details. In every such attempt at enumeration, there is always danger of omission of things intended to be included. The standards of regulation here are the interest and convenience of the inhabitants of the city as seen and understood by the commissioners, not any pre-existing law relating to the subject-matter, except, perhaps, the limitations inhibiting discrimination and unreasonableness, to which the Legislature itself is subject.

"While the mere power to license, or to license and regulate, does not confer the power to grant an exclusive license, yet authority delegated to a municipality to grant or refuse license empowers it to grant such exclusive license." 25 Cyc. 603; *Burlington, etc., Ferry Co. v. Davis*, 48 Iowa, 133, 30 Am. Rep. 390; *Rosa v. New Orleans*, 1 La. 126; *Carroll v. Campbell*, 25 Mo. App. 630.

"The power to grant an exclusive license must be found, we think, if at all, in other words of the charter. Upon looking into it, we find that it conferred the power to grant and refuse license." Herein, we think, was conferred the power to grant an exclusive license. The power to license necessarily includes the power to inhibit unlicensed persons from doing the acts authorized by the license. The power to refuse license necessarily gives the power to limit the issuance of licenses." *Burlington, etc., Co. v. Davis*, cited.

Under the broad power given by this charter, to grant, refuse, and revoke licenses to hotel keepers and operators of vehicles kept for hire, and to regulate them for the interest and convenience of the inhabitants of the city, the commissioners may do anything respecting these subjects that the Legislature itself could do, and, as we have shown, that power is almost unlimited.

For the grant of such power, reason is found in the nature of these subjects. Whether a hotel or tavern should be permitted in a given place depends upon its character and how it is conducted, for the privilege is peculiarly liable to abuse, and the comfort of the traveling public demands the maintenance of suitable accommodations, just as in the case of a ferry or other provision for public necessities and conveniences. Conveyances on the streets, for the use of the general public, are of the same character, and, in addition to this, cabs, hackney coaches, omnibuses, taxicabs, and hacks, when unnecessarily numerous, interfere with ordinary traffic and travel and obstruct them. Prescription of routes or places of business for them is a fair, reasonable, and efficacious means of preventing such results. Nor is it unreasonable to require them to maintain the service during prescribed hours. They are engaged in a public service which the Legislature may always regulate. Nor is there any constitutional inhibition of legislative requirement of indemnity from persons so engaged, against injury to persons or

property. *State ex rel. Case v. Howell* (Wash.) 147 Pac. 1159; *City of Portland v. Western Union Telegraph Co. (Or.)* 146 Pac. 148; *Springfield Water Co. v. Darby*, 199 Pa. 400, 49 Atl. 275.

[7, 8] While this ordinance is said to be discriminatory in favor of omnibuses, taxicabs, hacks, and other vehicles kept for hire, not of the class described in the ordinance, and against that class, there is no suggestion, in the petition for the writ or in the argument, of the existence of "jitney busses" in the city not included by the description. The price charged is made an element of the description, and, if there were "jitney busses" charging more than 15 cents, this might operate as a classification with reference to the price charged for service and render the ordinance unreasonable. In the opinion of a majority of the members of this court, it would. But there is no pretense of the existence of such vehicles, and, if there are such, we have no judicial knowledge of them. The popular name of the vehicle signifies the contrary. A "jitney bus," charging more than 5 cents as the ordinary fare, would be a contradiction in terms, and the ordinance may be amenable to criticism for misdescription, on that ground, but clearly not void for that reason.

[9] The ordinance is not obnoxious to the provisions of chapter 43B of the Code of 1913, regulating motor vehicles generally, nor within the scope thereof, except in so far as it imposes the duty of state regulation and a state tax and prescribes the law of the road. These vehicles are more than mere automobiles incidentally used by the citizens for purposes of business and pleasure. They include an additional element, common carriage, bringing them within the municipal power of control, just as horse-drawn carriages and other vehicles fall within it, by reason of the peculiar uses made of them.

Our conclusion is that the ordinance is free from constitutional and other defects, and therefore valid. It may be burdensome and, in the opinion of many people, oppressive and unwise, just as many other valid laws are regarded. But the question submitted here is one of municipal power, not policy. With the latter the courts have nothing to do, nor can they overthrow laws, ordinances, or regulations made by competent authority, merely because, in the opinion of the judges, they might or should have been made more liberal or less rigorous. *Spedden v. Board of Education*, 81 S. E. 724, 52 L. R. A. (N. S.) 163; *Charleston v. Littlepage*, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353.

For the reasons stated, the discharge prayed for is refused, and the relator remanded to the custody of the authorities of the city of Huntington.

LYNCH, J., absent.

(76 W. Va. 572)

STATE ex rel. PETERS v. PINSON, Mayor,
et al.(Supreme Court of Appeals of West Virginia.
June 22, 1915.)*(Syllabus by the Court.)*1. MUNICIPAL CORPORATIONS \S 149—OFFICERS—TENURE—AMENDMENT OF CHARTER.

An act of the Legislature, to take effect 90 days from its passage, amending the charter of a city, and providing that "all persons holding office at the time of the passage of this act shall continue in office in the performance of their duties until the first day of July, one thousand nine hundred and fifteen," refers to those officers lawfully holding office at the time the act takes effect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 327-332; Dec. Dig. \S 149.]

2. MUNICIPAL CORPORATIONS \S 149—OFFICERS—TENURE—AMENDMENT OF CHARTER.

If, between the passage of such act and its taking effect, a city election is held pursuant to the provisions of its old charter, the officers then elected are entitled to hold, and not those in office at the time of the passage of the act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 327-332; Dec. Dig. \S 149.]

3. STATUTES \S 199—CONSTRUCTION—"AT THE TIME OF THE PASSAGE OF THIS ACT."

The term, "at the time of the passage of this act," used in an act of the Legislature which does not take effect until 90 days after its passage, generally means the time the act takes effect, and not the time when it is passed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 277; Dec. Dig. \S 199.]

Original application for mandamus by the State, on relation of J. W. Peters, against one Pinson, Mayor, and others. Peremptory writ refused.

Burdett & White, of Charleston, for petitioner. Vinson & Thompson, of Huntington, G. R. C. Wiles, of Williamson, and Campbell, Brown & Davis, of Huntington, for respondents. Wells Goodykoontz, of Williamson, and John H. Holt, of Huntington, amici curiæ.

WILLIAMS, J. [1-3] By an act passed February 8, 1915, to take effect in 90 days from its passage, the Legislature amended the charter of the city of Williamson. On the first Thursday of April, 1915, a city election was held under the old charter. Relator was then serving as councilman from the Second ward of said city, having been elected at the next preceding election to serve for a biennial period beginning the 1st of May, 1913. At the 1915 election all the old officers were re-elected, except relator, who was not a candidate, and respondent Nunemaker was elected in his stead as councilman from the Second ward, and is now serving as such. By this proceeding relator seeks to oust him and obtain possession of the office. The question to be decided is: Which of the two claimants is justly entitled to the office at the present time? Relator claims it by virtue of the new charter, which did not go into effect until the 8th of May, 1915, 8 days

after the expiration of the term for which he was elected; and respondent claims it by virtue of his election on the first Thursday of April, 1915, under the provisions of the old charter, which he insists remained in force until the new one took effect. A decision of the issue calls for a construction of section 54 of the new charter, which reads as follows:

"All persons holding office at the time of the passage of this act shall continue in office in the performance of their duties until the first day of July, one thousand nine hundred and fifteen, and until the appointment and qualification of the commissioners as provided for in section ten herein. When such appointment has been made and the appointee shall have taken the oath of office, then the term of the officers acting for said city at the time this act shall take effect shall expire on the thirtieth day of June, one thousand nine hundred and fifteen."

Section 10, referred to, provides that the first election of officers under the new charter shall be held on the first Thursday in June, 1917, and makes it the duty of the Governor, on or before the first Thursday in June, 1915, to appoint five commissioners, not more than three of whom shall be of the same political party, whose terms of office shall begin on the 1st of July, 1915, and continue until the 30th of June, 1917, and until their successors are elected and qualified. Relator's counsel insist that the first clause of section 54 expressly continued him in office until the 1st day of July, 1915, because he was in office on the 8th of February, 1915, when the act was passed. The soundness of that contention, however, depends on what the Legislature intended by the use of the term "at the time of the passage of this act." Did it thereby intend the time the act was passed, or the time when it was to take effect? Not having otherwise directed by a two-thirds vote, as the Legislature might have done, the act did not take effect until 90 days after its passage. Section 30, art. 6, Constitution. No purpose to supersede the election, provided by the old charter to be held on the first Thursday in April, 1915, is otherwise shown than by section 54; provided, however, the words "at the time of the passage of this act" do inferentially indicate such purpose, which is not conceded. Unless those terms can be properly interpreted according to relator's contention, there is nothing in the new charter from which it can even be inferred that the city election, coming between the dates of the passage of the act and its taking effect, was superseded. The last clause of section 54, providing that "the terms of the officers acting for said city at the time this act shall take effect shall expire on the thirtieth day of June, one thousand nine hundred and fifteen," seems to indicate that the Legislature meant, by the term "passage of this act," the time when it was to take effect. However, the last clause harmonizes with either construction of the first clause. The old charter was in force

when respondent was elected; and the purpose to abolish the election therein provided to be held on the first Thursday in April, 1915, is not clearly indicated in the new charter. In legal contemplation the term "at the time of the passage of this act," in section 54, relates to the time when the act takes effect. This construction is supported both by reason and the weight of authorities. *Mills v. State Board of Osteopathic Registration and Examination*, 135 Mich. 525, 98 N. W. 19, 3 Ann. Cas. 735; *Shook v. Laufer* (Tex. Civ. App.) 100 S. W. 1042; *State v. Bentley*, 80 Kan. 227, 101 Pac. 1073; *Harding v. People*, 10 Colo. 337, 15 Pac. 727; *State v. Bemis*, 45 Neb. 724, 64 N. W. 348; *Rogers v. Vass*, 6 Iowa, 405; *Schneider v. Hussey*, 2 Idaho (Hasb.) 8, 1 Pac. 343; *Matter of Howe*, etc., 48 Hun (N. Y.) 235.

The constitutionality of the provision in section 10, authorizing the Governor to appoint city commissioners to hold office until the 30th of June, 1917, is assailed on the ground that it contravenes the principle of local government. A determination of that constitutional question, however, is not essential to a decision of the issue here involved, and we express no opinion respecting it; in fact, it would be improper to do so.

Respondent is clearly entitled to the office of councilman of the city of Williamson until the 30th day of June, 1915. We express no opinion as to whether he will be entitled to it thereafter.

The peremptory writ is refused

LYNCH, J., absent.

(16 Ga. App. 522)

J. H. SCHROETER & BRO. v. SLIDER.
(No. 5998.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 1003 — VERDICT — EVIDENCE.

It is not within the province of this court to set aside a verdict returned by a jury, where there is evidence accepted by them as true which supports their finding on every material issue, even should it appear to the members of this court, who neither heard the testimony delivered nor observed the demeanor of the witnesses on the stand, but are confined to the record, that the weight of the evidence was perhaps against the finding. Upon the jury rests the sole responsibility of determining what witnesses they will believe, and this court cannot attempt to analyze the possible reasons for their belief, if there be any evidence warranting the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. — 1003.]

2. APPEAL AND ERROR — 1051 — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

A certain "ledger was offered in evidence after witnesses for defendant had sworn it was not the book of original entry, but was copied from original expense books and original checks, and up to the time this ledger was offered in evidence none of the original expense books and checks had been offered." The evidence disclosed that the book tendered in evidence was "made up from original expense books furnished by

plaintiff," and that it was "posted from the original expense books and checks," which "canceled checks corresponded with all checks on this account" against the plaintiff on the book tendered, and which, together with the "original expense books" themselves, were in existence, were in the possession of the defendants, and were actually introduced in evidence. To afford ground for reversal, both error and injury must concur; and even if the book which was rejected should have been admitted for any reason as a book of original entry, its exclusion could have worked no harm to the plaintiffs in error, who proved the same facts by original memoranda which they were permitted to introduce.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. — 1061.]

3. DENIAL OF NEW TRIAL.

The appellate division of the municipal court of Atlanta did not err in overruling the motion for a new trial.

Error from Municipal Court of Atlanta.

Action between J. H. Schroeter & Bro. and J. R. Slider. From the judgment, J. H. Schroeter & Bro. bring error. Affirmed.

Dillon, Burress & Kobak, of Atlanta, for plaintiffs in error. T. B. Higdon, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 546)

BOWMAN v. WINN, Sheriff. (No. 5862.)
(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. JUDGMENT — 139, 162—DEFAULT—REFUSAL TO OPEN—DISCRETION.

A motion to open a default judgment is addressed to the sound legal discretion of the judge, and this discretion cannot be said to have been abused when, after a hearing upon the only valid ground of the motion, upon conflicting testimony, he adjudges that that ground of the motion is not sustained by the evidence.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 149, 178; Dec. Dig. — 139, 162.]

2. REPLEVIN — 69—TROVER—ISSUES—EVIDENCE.

A defendant in an action of trover, who has failed to file an issuable defense, is restricted, in his cross-examination of the witnesses, to an inquiry as to the value of the property, and cannot contest the plaintiff's title or right of possession, as the case may be, by testimony, for the reason that he has failed to file any plea which denies the plaintiff's title or right of possession.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 257-279; Dec. Dig. — 69.]

3. REPLEVIN — 72—TROVER—PROOF OF OWNERSHIP.

In an action of trover, brought by a sheriff or other levying officer as nominal plaintiff, for the use of another, the nominal plaintiff's ownership of the chattel is sufficiently established if it be shown that the title to the property is in fact in the use, for whose benefit the action was instituted.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 292-295; Dec. Dig. — 72.]

4. TRIAL — 168—DIRECTION OF VERDICT—EVIDENCE.

A judgment directing a verdict will not be reversed, when the finding directed was demanded by the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 376-380; Dec. Dig. — 168.]

Error from City Court of Houston; A. C. Riley, Judge.

Action by G. W. Winn, Sheriff, for the use of A. J. Evans, against E. W. Bowman. Judgment for plaintiff, and defendant brings error. Affirmed.

R. N. Holtzclaw, of Perry, for plaintiff in error. C. L. Shepard, of Ft. Valley, for defendant in error.

RUSSELL, C. J. Winn, sheriff, for the use of A. J. Evans, instituted an action in trover against Bowman, to recover certain mules. The plaintiff elected to take a money verdict, and at the conclusion of the evidence the court directed a verdict for the plaintiff. There is no complaint that the amount of the verdict is not authorized by the evidence, but it is insisted: (1) That the court erred in refusing to open the default and to permit the defendant, who had filed no answer at the appearance term, to plead; (2) that the court erred in refusing to permit the defendant to cross-examine Evans, the real plaintiff, as to any fact, except the value of the mules sued for; and (3) that the court erred in directing a verdict in favor of the plaintiff, because the plaintiff failed to show that the mules belonged to Winn, sheriff, for the use of Evans, and, on the contrary, it was shown by undisputed evidence that they were the property of A. J. Evans.

[1] I. We do not think the court erred in refusing to open the default. Section 5656 of the Civil Code declares that:

"At the trial term the judge in his discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of a plea, or for excusable neglect, or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instant, and announce ready to proceed with the trial."

In this case the defendant set up, as reasons for opening the default: (1) That he was ignorant that the statute required a plea to be filed at the appearance term; and (2) that the defendant was told by Winn, sheriff, that the defendant had a good title to the mules. It is evident that the trial judge correctly sustained a demurrer to these two grounds of the motion to open the default, for neither ignorance of the law nor the advice of a sheriff would excuse the defendant for failure to file his defense in time. In the third ground of the motion the defendant averred that the plaintiff's attorney informed him, in response to an inquiry, that "there was nothing to it, and it was all off," and that by these remarks he was misled and made to believe the case would be dismissed or discontinued, and that therefore it was not necessary for him to do anything further or even to employ an attorney. The plaintiff traversed the grounds of the motion to open the default, and, upon the issue thus formed,

the court heard evidence. The defendant testified in effect to the statements alleged by him to have been made by the plaintiff's counsel, and that attorney testified that he had never made any such statements to the defendant or to any one else; that he at one time told the defendant that he thought the defendant "had him," but that he was going to do all he could to recover the mules. He testified that he made a proposition to give the defendant his fee, amounting to \$50 or \$60, in another case, if he would restore the mules to Evans, and that the defendant replied with a counter proposition which he (the attorney) would not even consider. According to the testimony of this attorney, he never sought to advise the defendant, and did not mislead him. If the attorney made the statement which the defendant attributed to him, it would have constituted a legal fraud, which might have required the court to open the default under the provisions of section 5656, supra, authorizing the opening of a default, where a proper case has been made. However, the credibility of the witnesses was a matter for the court, and, it being established to the satisfaction of the trial court that the averments of that ground of the motion to open the default which set up the fraud were disproved, it cannot be said that the discretion with which the court was clothed was abused.

It is true this discretion should be liberally construed in promotion of truth and justice. *Thompson v. Kelsey*, 8 Ga. App. 23, 68 S. E. 518. The requirement as to punctuality in pleading should never be so construed as to prevent inquiry into the real merits of a case. *Bass v. Doughty*, 5 Ga. App. 458, 63 S. E. 516. But since, as held in *Brawner v. Maddox*, 1 Ga. App. 337, 58 S. E. 278, every presumption is against the abuse of this trusted discretion, and the maxim, "Lex vigilantis, non dormientis subvenit," applies in such cases, one who moves to open a default must allege and prove some reason good in law why he failed to make a defense at the time he was required by law to present it. *Florida Central R. Co. v. Luke*, 11 Ga. App. 293, 75 S. E. 270. The trial judge, having heard evidence upon the only ground of the motion which could have entitled the movant to have the default opened, and having upon a consideration of that evidence, concluded that he failed to prove this ground, and exercising, as we must assume, his undoubted prerogative to determine the credibility of the witnesses who testified, the one in support of, and the other in opposition to, the motion to open the default, we cannot say that he erred. In the present case the motion was made at a term succeeding the appearance term, and the Code section which we have quoted confers upon the judge no authority to open defaults for reasons which fall short of a reasonable excuse and for the negligent failure to answer. *Brucker v. O'Conner*, 115 Ga. 95, 41 S. E. 245. On the same subject, see

Kellam v. Todd, 114 Ga. 981, 982, 41 S. E. 39, and citations; Ingalls v. Lamar, 115 Ga. 296, 41 S. E. 573; Deering Harvester Co. v. Thompson, 116 Ga. 418, 42 S. E. 772.

[2] 2. Did the court err in refusing to permit the defendant to interrogate the witness A. J. Evans as to any fact, except as to the value of the mules sued for? We think not. The petition seems to contain all the necessary and proper allegations, and, not being denied by plea, must be treated as being admitted. This left, then, only the question of the value of the property to be fixed by evidence. In O'Conner v. Brucker, 117 Ga. 452 (2), 43 S. E. 731, which was a suit for personal injuries, where the defendant was in default, the Supreme Court held that:

"In view of the default, the only question that could have been considered was the amount of damages. The defendant had the right to contest this issue by rigid cross-examination or by the introduction of evidence, but had no right to extend the examination into matters of fact confessed by the failure to deny the allegations in the petition."

Trover, like the issue in O'Conner's case, supra, sounded in tort, and it would seem that the rule should not be more rigid in an action for personal injuries than in an action in trover. The question of the extent to which inquiry into testimony affecting the merits of a case is allowable to a defendant, who is in default in various actions, is discussed in Durden v. Carhart & Bros., 41 Ga. 81; Craig v. Pope, 48 Ga. 551; Hayden v. Johnson, 59 Ga. 106; Stephens v. Gate City Gas Light Co., 81 Ga. 150, 6 S. E. 838; Davis v. Wimberley, 86 Ga. 48, 12 S. E. 208; Phillips v. Collier, 87 Ga. 66, 13 S. E. 260. And upon consideration of these decisions, as well as the controlling authority in the rule announced in O'Conner v. Brucker, supra, we conclude that the trial judge correctly restricted the defendant's inquiry to the single question as to the value of the mules.

[3, 4] 3. If proof that the mules in question were the property of A. J. Evans would not have authorized a jury to find for the defendant, because the suit was proceeding in the name of Winn, sheriff, for the use of A. J. Evans, then the court would have erred in directing a verdict. On the other hand, if the uncontradicted evidence of A. J. Evans that the mules, for the recovery of which the sheriff had instituted an action in behalf of the witness, demanded a verdict for the plaintiff, the fact that a verdict was directed would afford no ground for reversal. The witness Evans was the real party in the case. The sheriff was a mere nominal party, confessedly bringing the suit for the use of Evans. It does not appear from the evidence that the nominal party had any actual interest in the property, and the proof that Evans was the true owner of the property not only supported the allegations of the petition, but demanded the finding reached. Upon the coming in of the evidence that the

real plaintiff, and not the nominal plaintiff, was the owner of the property sued for, the petition might have been amended by striking the name of the nominal party plaintiff from the action. Civil Code, § 5690. But, in any event, the failure to make this amendment, even if it was necessary, was cured by verdict. We hardly think it was necessary, because the allegation that Winn, sheriff, was suing for the use of Evans, naturally implied that Evans was the real owner of the property.

Judgment affirmed.

(16 Ga. App. 586)

H. C. COPELAND & CO. v. MONROE.
(No. 5891.)

(Court of Appeals of Georgia. July 3, 1915.)

(Syllabus by the Court.)

1. ATTACHMENT \S 133, 136—DISMISSAL AND NONSUIT \S 67—ORAL MOTION—VOID BOND—PARTNER AS SURETY.

An oral motion is not sufficient to reach mere amendable defects in legal proceedings, but a motion to dismiss a void proceeding is in order at any time, as well as at the trial term as at the appearance term of the case. A defective attachment bond is amendable, but a paper purporting to be such a bond, signed by a plaintiff firm as principal, and with no other security than a member of the partnership which had signed the bond as principal, is void as an attachment bond. The signature of an individual member of the partnership adds no force or value to the obligation, and provides no additional security in behalf of the defendant, and hence the signing of such a bond by one of the members of the firm individually is ineffectual to provide security upon the attachment bond, as required by law, and amounts to no more than if no one had attempted to sign the attachment bond as security.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 371-376, 378-381, 383, 384; Dec. Dig. \S 133, 136; Dismissal and Nonsuit, Cent. Dig. §§ 161, 162; Dec. Dig. \S 67.]

2. NAMES \S 18—PRESUMPTION OF IDENTITY.

Upon the hearing of a motion to dismiss an attachment upon the ground that no bond has been given as required by law, and where it appears from the record that the name of the person who signed the attachment bond as security was identical with that of one of the alleged partners in whose behalf the attachment was sued out, the court may assume, prima facie, that the partner and the security are the same individual, and it devolves upon the plaintiff in attachment to show that the security on the bond was in fact a different person from the partner having the same name.

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 1, 4, 17; Dec. Dig. \S 18.]

3. ATTACHMENT \S 136—BOND—AMENDMENT—STATUTE.

The provisions of section 5062 of Civil Code 1910 apply in cases where an attachment bond is insufficient as to amount or where the solvency of the security is questionable, but this section of the Code does not authorize the amendment of a bond which is absolutely void, or permit the filing of an attachment bond for the first time at the trial term.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 378-381, 383, 384; Dec. Dig. \S 136.]

4. AMENDMENT — ATTACHMENT BOND — VOID BOND.

The lower court did not err in refusing to allow the amendment of the attachment bond, nor in dismissing the attachment on the ground that no bond had been given as required by law.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by H. C. Copeland & Co. against Colon Monroe. From a judgment refusing to allow amendment of the attachment bond and dismissing the attachment, plaintiff brings error. Affirmed.

Theodore Titus and Lebbeus Dekle, both of Thomasville, for plaintiff in error. Snodgrass & MacIntyre, of Thomasville, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 573)

VAUGHN v. STATE. (No. 6539.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 913, 1050 — APPEAL — PRESENTING QUESTIONS IN LOWER COURT — EXCEPTIONS — NEW TRIAL — GROUNDS.

Before this court can properly consider a judgment overruling a plea of former jeopardy, the judgment must be excepted to in a final bill of exceptions, or in exceptions pendente lite. A judgment of this character does not constitute a ground for a new trial, and should not be incorporated in a motion for a new trial. Collier v. State, 8 Ga. App. 371, 69 S. E. 29.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2145, 2656, 2658, 2660; Dec. Dig. —913, 1050.]

2. CONVICTION—EVIDENCE—ERROR.

The evidence supports the verdict, and no error appears in the trial on the merits.

Error from City Court of Griffin; J. J. Flynt, Judge.

Mill Vaughn was convicted of a crime, and he brings error. Affirmed.

W. H. Connor, of Griffin, for plaintiff in error. Wm. H. Beck, Sol., of Griffin, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 567)

CONTINENTAL AID ASS'N v. LEE.
(No. 6182.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. PROCEDURE IN MUNICIPAL COURT.

The act establishing the municipal court of the city of Macon (Acts 1913, p. 252) provides the same rule of procedure in that court as prevails in the superior courts of this state.

2. MASTER AND SERVANT — 80—WORK AND LABOR — 14 — WRONGFUL DISCHARGE OF SERVANT—REMEDIES—DAMAGES.

One who is employed as a clerk, and who is discharged, has the right of electing either of three remedies: (1) He may bring an immediate action for any special injury received from the discharge; (2) he may wait until the expiration

of the term for which he was employed, and sue for the entire amount due him under the contract; or (3) he may treat the contract as rescinded and seek to recover upon quantum meruit the value of the services actually performed. Reasonably construed, the present suit is an action to recover the value of the plaintiff's services for the entire term fixed by the contract, though it was brought before the expiration of the term; and a finding for the plaintiff was not supported by the evidence. Proof that the plaintiff was willing to perform the services for the unexpired part of the term, and that the value of the services as fixed by the contract amounted to \$137.30, would not authorize a recovery of that amount, where it appeared that the suit was brought prior to the expiration of the term.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. —80; Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. —14.]

Error from Municipal Court of Macon; Augustin Daly, Judge.

Action by L. A. Lee against the Continental Aid Association. Judgment for plaintiff, and defendant brings error. Reversed.

A. L. Dasher, Jr., of Macon, for plaintiff in error. Feagin & Hancock, of Macon, for defendant in error.

RUSSELL, C. J. Judgment reversed.

(16 Ga. App. 344)

GEORGIA NORTHERN RY. CO. v. SNELL-GROVE & BOZEMAN. (No. 5850.)

(Court of Appeals of Georgia. May 17, 1915.)

(Syllabus by the Court.)

1. PLEADING — 248—ACTION FOR DAMAGES—AMENDED PETITION—NEW CAUSE OF ACTION.

The original petition alleged certain specific damage resulting from a failure by the carrier to furnish cars for the movement of a shipment of lumber in response to a written application therefor, duly filed, and did not seek a recovery of the penalty provided for by section 2635 of the Civil Code of 1910, or by any rule of the Railroad Commission, and the amendment offered by the plaintiff setting out that the defendant was bound by a definite express contract to furnish cars for the purpose named, did not add a new and distinct cause of action. The court did not err in overruling the demurrer to the petition as amended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. —248.]

2. CARRIERS — 67—OBLIGATION TO FURNISH CARS—EXPRESS CONTRACT—DEFENSE.

"The obligation of a carrier to furnish cars to a patron may arise either from the duty imposed by law, or from a special contract between the carrier and the patron. In a suit for a breach of a special contract, matters which will not excuse performance of the contract, but only tend to excuse performance of the general duty imposed by law, are not relevant." Chattanooga Southern Railroad Co. v. Thompson, 133 Ga. 127, 65 S. E. 285. "Where the obligation springs from the contract, the carrier will be held liable in all cases where the circumstances are not such as to relieve from the performance of contracts generally." 133 Ga. 130, 65 S. E. 287.

(a) There was evidence in behalf of the

plaintiff from which the jury were authorized to infer that there was a definite contract between the carrier and the shipper to furnish the cars, the failure to supply which was the cause of the damage sued for, and that no sufficient excuse for the nonperformance of such contract existed.

(b) The contract as alleged, and as shown by the proof in behalf of the plaintiff, which was accepted by the jury, was not too vague or uncertain to afford a cause of action for its breach. *Chattanooga Southern Railroad Co. v. Thompson*, supra.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 224-229; Dec. Dig. ¶67.]

3. CARRIERS ¶44, 100—VIOLATION OF PUBLIC DUTY—RECIPROCAL DEMURRAGE ACT—APPLICATION.

The act of 1905 (Acts 1905, p. 120), known as the "reciprocal demurrage act," is applicable only where the gist of the plaintiff's claim is based on the violation of the carrier's public duty, irrespective of contract. *Georgia Coast & Piedmont Railroad Co. v. Durrence & Sands*, 6 Ga. App. 615, 65 S. E. 583. See, also, in this connection, *Southern Railway Co. v. Melton*, 133 Ga. 277, 65 S. E. 665.

(a) Where the gist of the plaintiff's claim as set out in his petition is based on the failure of the carrier to perform a specific contract, section 2635 of the Civil Code is not applicable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 120-122, 230, 427-433; Dec. Dig. ¶44, 100.]

4. PARTNERSHIP ¶62 — DISSOLUTION — PROOF.

Under the evidence, the jury were authorized to find that the partnership between the plaintiffs had not been dissolved before the bringing of the suit in the firm name, notwithstanding the firm had ceased to do active business, as it appeared that there were debts due the firm, in process of collection, and no final settlement had been effected between the parties. See *Harris v. Mathews*, 107 Ga. 46, 32 S. E. 903.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 86; Dec. Dig. ¶62.]

5. DENIAL OF NEW TRIAL.

The court did not err in overruling the motion for a new trial.

Error from Superior Court, Colquitt County; *W. E. Thomas*, Judge.

Action by *Snellgrove & Bozeman* against the *Georgia Northern Railway Company*. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. W. Walters, of Albany, and *Shipp & Kline*, of Moultrie, for plaintiff in error. *Jas. L. Dowling*, of Moultrie, for defendants in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 475)

ATLANTA TELEPHONE & TELEGRAPH CO. v. FAIN et al. (No. 6047.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. PETITION—DEMURRER.

The petition, as amended, set forth a cause of action, and the court did not err in overruling the demurrer.

2. PAYMENT ¶85—MISTAKE—RIGHT TO RECOVER.

Where money is paid under a mistake of fact, or in ignorance of facts, it may be recovered, if the circumstances are such that the party receiving it ought not in equity and good conscience to retain it. *Camp v. Phillips*, 49 Ga. 456; *Pine Belt Lumber Co. v. Morrison*, 13 Ga. App. 455, 79 S. E. 363. Under the facts in the instant case it is clear that the plaintiffs received nothing in return for the payments made by them, and there is nothing in the evidence which would render it inequitable for them to recover this money. See, also, *Logan v. Sumter*, 28 Ga. 242, 73 Am. Dec. 755; *Georgia Railroad Co. v. Crossley*, 128 Ga. 35, 57 S. E. 97.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 272-281; Dec. Dig. ¶85.]

3. JUDGMENT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the judgment. There was no error of law, and the court did not err in overruling the motion for a new trial.

Error from Municipal Court of Atlanta.

Action by *W. L. and W. M. Fain* against the *Atlanta Telephone & Telegraph Company*. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lewis W. Thomas, of Atlanta, for plaintiff in error. *Simmons & Simmons*, of Atlanta, for defendants in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 472)

MURPHEY v. SMITH. (No. 5964.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. EXECUTION ¶168—LEVY ON REALTY—AFFIDAVIT OF ILLEGALITY—FORTHCOMING BOND—NECESSITY.

No forthcoming bond is required upon the filing of an affidavit of illegality interposed to a levy on realty. The provisions of section 5305, Civ. Code 1910, apply to levies upon personalty only. This section of the Code and section 6040 should be construed together.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 487, 490-496; Dec. Dig. ¶168.]

2. EXECUTION ¶166—AFFIDAVIT OF ILLEGALITY—ATTACK ON JUDGMENT—RIGHT.

A defendant cannot, by affidavit of illegality, attack a judgment for any cause that he could have set up as a defense in the original suit. Civ. Code 1910, § 5311; *Butler v. Hall*, 7 Ga. App. 777, 68 S. E. 331. In this case the alleged lack of service upon a codefendant should have been pleaded in the original suit, and was not a sufficient ground for an affidavit of illegality.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 485, 486; Dec. Dig. ¶166.]

3. EXECUTION ¶168—AFFIDAVIT OF ILLEGALITY—DISCHARGE IN BANKRUPTCY.

Where the affidavit of illegality alleges that the judgment debt has been discharged in a court of bankruptcy, it is error to dismiss the affidavit because of failure to set forth or attach a copy or abstract of the record of the proceedings in that court. It is not necessary that the affidavit shall contain this, but it should be submitted as evidence upon the trial.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 487, 490-496; Dec. Dig. ¶168.]

4. BANKRUPTCY §20 — LEVY — PROPERTY SUBJECT—HOMESTEAD EXEMPTION — BANKRUPTCY.

A homestead exemption, set apart by the court of bankruptcy, is no more subject to be levied on than if it had been set apart by the ordinary of the county. *Ross v. Worsham*, 65 Ga. 624; *Evans v. Rounsaville*, 115 Ga. 684, 42 S. E. 100.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. §20.]

5. HOMESTEAD §107—LIABILITY FOR DEBT —ENFORCEMENT—LEVY—VALIDITY.

Where a homestead is being levied on, and the fi. fa. fails to show upon its face a lien superior to the homestead, and where the plaintiff in fi. fa. has not filed the affidavit required by section 3400, Civ. Code 1910, the levy is proceeding illegally.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 165, 166, 168-172; Dec. Dig. §107.]

6. DISMISSAL OF AFFIDAVIT OF ILLEGALITY.

The court erred in dismissing the affidavit of illegality.

Error from City Court of Floyd County; J. H. Reece, Judge.

Action between M. M. Murphey and John M. Smith. From the judgment, Smith brings error. Reversed.

John W. Bale, of Rome, for plaintiff in error. M. B. Eubanks, of Rome, for defendant in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 484)

MORGAN v. LAMB. (No. 6217.)

(Court of Appeals of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. NEW TRIAL §11—POWER TO GRANT—DISCRETION—SECOND NEW TRIAL.

The first grant of a new trial does not exhaust the discretion of the trial judge relatively to the grant or denial of another trial, where it appears from the record that the evidence in support of the verdict was weak and unsatisfactory, or the decided preponderance of the testimony was on the side of the losing party; but, in the second grant of a new trial, that discretion is not so ample and must be exercised with great caution.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 14-16; Dec. Dig. §11.]

2. NEW TRIAL §11—DISCRETION — SECOND VERDICT.

The trial judge did not abuse his discretion in granting a new trial, notwithstanding the verdict complained of was a second verdict in favor of the same party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 14-16; Dec. Dig. §11.]

Error from City Court of Waycross; John C. McDonald, Judge.

Action by Henry Morgan against E. T. Lamb, receiver. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Affirmed.

Parker & Walker, of Waycross, for plaintiff in error. Bolling Whitfield, of Brunswick, and J. L. Sweat, of Waycross, for defendant in error.

WADE, J. This was an action by a father to recover damages for the homicide of his son, a negro, 16 years of age at the time of his death. The sole witness in behalf of the plaintiff as to the manner in which the deceased met his death was James B. McCrary, who testified that he himself was on a train of the defendant railway company going from Waycross to Bolen station, and that between Haywood (another station) and Bolen he saw the deceased come into the negro coach and approach the "news butch," who sold newspapers, candy, and various other things on the train, and stand there talking for a time, but did not see him purchase any merchandise, though he had some money in his hand at the time; that the conductor and the porter started to enter the white coach, but seeing the deceased, Ira Morgan, they turned in haste, and one of them caught the boy by his shirt sleeves and shoved him out of the door; that the conductor, whose name was Morris, and the porter, Ernest Montgomery, caught the boy by the sleeves immediately after entering the colored coach, and went out of the front door of the coach "and shoved him off and came back into the colored coach," and the conductor said, "That damn negro don't mind hitting the cross-ties," and the porter laughed; that he saw the porter catch the deceased by the "neck of his collar and shove him off," as he got up on the side of the seat he was sitting on and leaned through the window and could just get a glimpse of the porter's hand, and saw the boy going off just as he fell from the train; that the train was running pretty fast, and that, when the deceased fell therefrom, he burst his head open; that this happened about three-quarters of a mile from Haywood station, and the witness was sitting at the time on a seat with a man named Ben Smith, the witness on the left side next to the passage between the seats, and Ben next to the window. On cross-examination this witness was interrogated as to his testimony at the coroner's inquest, and he admitted that he had not then told all he was now telling, though he said the oath had been administered to him from a certain book, and it later appeared that the oath so administered was to tell "the truth, the whole truth, and nothing but the truth." He explained that he had been advised by a girl with whom he was "going," as well as by other apparent friends of his, that the less he had to say about the matter the better it would be for him, and therefore he "told only a little to the coroner and his jury" when sworn as a witness there, and "held back the balance of [his] testimony," though he said that, if not mistaken, he had answered all the questions asked him at the inquest.

There was testimony from the father of the deceased that he saw his son's dead body, and found the head "broken in and his

brains knocked out"; that Haywood station, where it appears the boy entered the train, was a flag station only, and no tickets were sold there; that when he reached the body of his son there were two nickels lying by the body, which would have been sufficient to pay for a ticket from Haywood to Bolen, but he did not know what money the boy had, as he was not there and had not seen him in a week, and knew nothing about the occurrence; that the boy earned \$1.50 per day and helped to support him and his family; that he boarded his son free of charge, and bought the boy's clothes, as he received all of his son's wages.

The coroner, who held the inquest, testified that the body of the deceased was found lying with the head about one or two feet from the end of the railroad cross-ties, and the feet towards the ditch, and the head was bruised badly on the side of the forehead and broken in, and he saw signs indicating where the head hit the end of the ties near which the body was lying; that a can of Prince Albert tobacco, a package of baking powders, a cap, 10 cents in cash, a handkerchief, and a pocket-knife were found with the body; that he assumed that the death had been brought about by a fall from the train, for the reason that the body was found by the railroad track, and no other cause was known; that at the inquest the witness McCrary testified that Ira Morgan got aboard the train and "went to the news butch and seemed to buy something, then, after the train started and left Haywood for some distance, walked to the platform like he was going to get off; * * * the conductor and porter were behind him; that, when the conductor and porter came back again through the car, he heard them say, 'That negro must not mind getting off a train;'" that he was familiar with the construction of railroad coaches, and it was impossible to look through an Atlanta, Birmingham & Atlantic passenger car window and see what is going on on the steps of the coach in front of him; that he had noticed a little strip of iron just outside of the coach windows about three or four inches wide, and that, if a man sitting inside the coach went to look out of a window, he would have to put his head far enough out to look around the strip of iron to see what was going on in front of him, and it was only possible to raise the Atlanta, Birmingham & Atlantic windows half way; that when McCrary was questioned before the coroner's jury, and asked specifically if he knew anything more about the matter, he said he did not; that this was all he knew about it.

The conductor, J. S. Morris, testified that he knew absolutely nothing about any negro who was ejected from the front end of the second-class coach by his porter, Montgomery, between Haywood and Bolen, on Saturday night, July 26, 1914, the time the homicide occurred; that no one, so far as his knowledge extended, got off the train between

those two points, and there was no truth in the plaintiff's allegation that he and his porter forcibly, maliciously, and in violation of the rights of Ira Morgan, ejected and threw him from the passenger train at a point about a quarter of a mile above Haywood station, when the train was running at the high rate of 20 miles per hour; that he was conductor in charge of that particular train, and did not remember seeing such a negro as the deceased on the train that night at all; that a person looking out of a window in one of the coaches on this train and around the window shields, projecting from the side of the windows to keep cinders out, "would have to get his head out a pretty good ways to see around" the shields, and he did not think a person could see what was happening on the steps of the car in front of him, unless he got his head and shoulders out of the window, as he did not believe he could see in front at all; that a person so situated could not see what was happening on the platform of the coach; that a man sitting in a seat on the inside of the coach could not see what was happening on the platform of the car; that one passenger got on at Haywood and went into the second-class car, and that passenger was a Mr. Robinson, and that he himself stood in the aisle of the car all the way from Haywood to Bolen, talking to Robinson; that he did not know why Robinson went into the negro coach, as he did not ask Robinson, but he had a sack with him and was in his shirt sleeves, and there were no negroes in that part of the car where he and Robinson were talking, though there were five or six in the other end of the car; that he did not sit down in the negro car at all, or in the end where the negroes were, and there was a partition between the place where he and Robinson were and the main body of the car.

Ernest Montgomery, the porter, testified that he did not remember a man or negro boy getting on at Haywood, and that he and Capt. Morris did not talk with anybody at the news stand on the train that night; that Morris did not have a dispute with any person about his fare between Haywood and Bolen, and that he did not help the conductor put a negro off the car, nor did he put his hands on anybody's collar or coat that night in the colored coach between Haywood and Bolen; that nothing at all happened that he knew of, as they did not stop between Haywood and Bolen; that it is not quite three miles from Haywood to Bolen, and when the train left Haywood he went into the white coach to see if there were any windows up (as he had instructions from the superintendent to keep the windows down, in order to keep cinders off the seats), and then went into the second-class coach, remaining there until the train blew for Bolen; that he did not know whether the conductor went into the white coach between Haywood and Bolen or not, and that he himself did not go to the front end of the second-class coach that he

knew of, as he was back in the first-class coach; that two or three colored passengers got on at Haywood, but he did not know whether they went into the car to buy cigarettes or cigarette papers or not, or what they got on the train for, and they may have kept on going across the platform and may not have stayed on the train at all, as they got on the front end, and he was standing there at the time they got on, and when the train left he went back through the car but did not remember seeing them; that, after they went up the steps, he did not know whether they went into the car or got off.

G. R. McLeroy, baggage master of the train, testified that he was on the baggage car on the night when the deceased was killed, and his car was next to the second-class coach, but he could not say whether the door opening from his car on the platform of the car was open, though there was such a door that generally stayed open between his car and the negro car; that, after leaving Haywood that night, he neither saw nor heard any struggle, and he did not see the conductor or porter putting of a passenger from the train between the colored coach and his coach; that, if such a thing had happened at or near Haywood, he would have seen and heard it, and it would have been impossible for him not to see and hear it if it had happened; that he was back in the car several minutes after the train left the station, and when they pulled away from Haywood the door was open, though it was possible it may have blown shut later and have been closed between Haywood and Bolen; he did not know whether it was open all the way or not.

J. B. McCorkle testified that he had no connection with the defendant company or its receivers, but was a news agent on the Atlanta, Birmingham & Atlantic passenger train leaving Waycross for Atlanta, on which Capt. Morris was conductor, on Saturday night, the last of July, 1913; that the railroad company allowed him four seats in front of the second-class coach, in which he packed his stock of merchandise for sale; that, on the night referred to, Conductor Morris did not take a negro man or boy from his seat in that car or from the second-class car with the help of the porter, and carry him and put him off the car between Haywood and Bolen stations; that no young negro between 16 and 18 years old came to his stand in the car to buy something and was taken away from that place; that, to the best of his recollection, some one bought a package of cigarettes or cigarette papers on leaving Haywood, but no one disturbed this person, and he went back behind, "somewhere back the other way, walked back and sat down, and nobody bothered him at all"; that if any one had got on at Haywood that night he would not have known anything about it, because he paid no attention to who got on or off; that, after this negro bought the

cigarettes from him, he went back and sat down back of his stock in the car, but the witness could not say if this was the negro killed or not, and he did not know where this person got on the train, or whether he got on at Haywood or was already on when they reached Haywood; that this was the only negro he remembered coming to him at or near Haywood to buy something from him, and he did not remember if any one got on the train at Haywood; that the reason he remembered the circumstances connected with this particular trip was that the next morning, on his trip back to Waycross, some one told him a negro had been killed at Haywood that night, and he then remembered that a negro purchased some cigarettes from him at Haywood on the same night; that he did not sell anything else that he could recall; that he did not sell the dead negro the package of baking powders and package of Prince Albert tobacco, as he could not have got any of these things from him.

J. E. Robinson testified, in behalf of the defendant: That he knew the deceased and saw him at Haywood station on the night of July 26, 1913, and, shortly before the train arrived at the station, Morgan came to him to borrow 50 cents to get to a place called Beach, and, when he refused to let Morgan have it, Morgan turned off and said he could "beat the blinds that far." That he did not see the deceased again that night, and when the train came he himself entered it, expecting to go into the white smoker, in the rear of the colored coach, but went into the smoker in the colored coach by mistake, and, when the conductor told him he was in the wrong coach, he replied that the coach would answer for a man as black and dirty as he was, and remained there. That he paid the conductor his fare in cash, and the conductor gave him his change and stayed and talked with him for some distance after giving him his receipt slip, and, when the train blew for Bolen, the conductor turned away and said that he might have another ticket to take up, and he had better see about it. That "Capt. Morris and the porter did not go up to Ira Morgan and take hold of him and force him ahead of him and through the front door of the car next to the baggage car, and there thrust him off of the moving train. * * * It did not happen, couldn't have happened, for, if it had, I would have seen it. The conductor was standing there talking to me and fixing my slip, and he couldn't have been in two places. If he had not been there with me, if such a thing had happened I would undoubtedly have seen it." That he did not know whether Ira Morgan borrowed from some one else the money which Ira asked him to lend.

Tuten, Summerlin, and Colson all testified that they were members of the coroner's jury that held an inquest over the body of Ira Morgan, said to have been killed at Haywood on July 26, 1913, and all said that they re-

membered the testimony of James McCrary, the witness who testified that the conductor and porter ejected Morgan from the train; that McCrary testified at the inquest that he did not hear the conductor and the Morgan boy have any conversation at all, as the boy walked out of the coach ahead of the conductor and the porter, and, when the two last walked back into the coach, one or the other said, "That negro don't mind jumping from a train, do he?" or "He don't mind jumpin' off of a train;" or "That negro don't mind jumpin' off of a train."

E. C. Davis, the foreman of the coroner's jury testified that he heard McCrary testify at the inquest, and that McCrary then said that Morgan came into the end of the car at Haywood and stopped where the "news butch" was and talked to him, but, if the deceased bought anything, he did not see it, and, after the train left the station a short distance, the conductor and the porter came through, and, when they got within about 10 feet of where Morgan was, Morgan turned and walked out of the door, and that was the last McCrary saw of him; that, in response to a question whether "they had any trouble or any words," McCrary said they did not; that Morgan went out of the door, and that was the last he saw of Morgan, and, when McCrary finished his statement, he was asked whether that was all he knew, and he said it was; that other members of the jury asked him some questions; that the reason McCrary was summoned as a witness was because he was the only witness whose name they had who was on the train or saw the boy in the train, as the train had gone on and they could not get the train crew at that time, and they wished to ascertain, if possible, the cause of the death of the deceased. A copy of the oath administered to the witness McCrary and the Carlisle Mortality Tables and the annuity tables were introduced.

On this evidence the jury returned a verdict for \$5,000 in favor of the plaintiff. A motion for a new trial was made on various grounds, among others the ground that the verdict was against the overwhelming weight of the evidence; and the trial judge, in granting the motion, passed the following order:

"At Chambers, Waycross, Georgia, November 19, 1914. The motion for a new trial in the above-stated case, by orders previously granted, was heard on the 16th day of November, 1914, and the decision thereon held up until to-day. There have been two verdicts in this case. The first verdict was for the plaintiff, and for the sum of \$100, and on motion of the plaintiff that verdict was set aside. The present verdict is for the plaintiff and for \$5,000, and the motion for a new trial is made by the defendant. The facts in each trial were practically the same. The plaintiff has voluntarily written off \$1,500 from the last verdict, reducing the amount to \$3,500. The court has gone over this case very carefully, and given every consideration to it. The court is not satisfied with the verdict, and is especially dissatisfied with the evidence upon which it rests.

The plaintiff's right to recover cannot be sustained without the evidence of James B. McCrary, and this witness' evidence is so contradictory and wavering in character, until the court is not satisfied to sustain the finding thereon without further corroboration. Therefore the court, after mature deliberation, has concluded to grant the motion for new trial, filed by the defendant in this case, and the verdict and judgment heretofore rendered in said case is hereby set aside and annulled, and a new trial in said case hereby granted and ordered. [Signed] John C. McDonald, Judge of City Court of Waycross."

It will be noticed the order recites that the first verdict in behalf of the plaintiff was for \$100 only, and the record discloses that on the first trial of the cause, in June, 1914, a verdict was returned by another jury in favor of the plaintiff for \$100, which, upon the motion of the plaintiff, was set aside, and a new trial granted on the ground that the amount of the verdict was too small and was for this reason contrary to the evidence introduced in the case; and it further appears that pending the present motion for a new trial, and before the rendition of the judgment granting the motion, the plaintiff, by and through his attorneys, voluntarily wrote off from the amount of the verdict the sum of \$1,500, thereby reducing it to \$3,500.

The plaintiff excepted to the judgment setting aside the verdict and judgment and granting a new trial, and insists that the verdict was authorized by the evidence, and that, since the right to a recovery upon the part of the plaintiff had been established by the verdicts of two separate juries, the court had no legal discretion to set aside the recovery; that the question as to the sufficiency of the evidence and the character of the evidence was for the consideration of the jury; that the court fully charged the jury the law with reference to preponderance of evidence, impeachment of witnesses, and credibility of witnesses, and had no right to set aside the said finding of the jury upon questions of fact, since the judge's order recited that the evidence in each trial was practically the same.

[1] 1. It appears to be conclusively settled in Georgia that, notwithstanding the return of a second verdict in favor of the same party, the trial judge may still exercise his discretion in granting or refusing a new trial, though that discretion may not then be as ample as on the hearing of the motion for a first new trial. It was said in *Seaboard Air Line Ry. v. Randolph*, 136 Ga. 505-507, 71 S. E. 887, 888, that:

"If it had appeared from the order of the court that it refused its approval of the verdict generally, but denied the motion for a new trial on the ground that the court had no discretion, upon a second finding for the same party, where there was sufficient evidence to support it, we might feel constrained in this case to set aside this verdict, although it is a second finding in favor of the plaintiff, and for an amount substantially the same as the amount awarded in the first verdict, allowing interest on that amount to date of last verdict, because a trial court is not without discretion relative

to the grant of a new trial after a second verdict in favor of the same party. In dealing with the second verdict, his discretion may not be as ample as is that of a court hearing a motion for a first new trial. But certainly, under the decisions of this court, the first grant of a new trial does not exhaust the discretion of the court relatively to the grant or denial of another trial."

And in the same case it was further said:

"It is said in the case of *Dethrage v. City of Rome*, 125 Ga. 802, 54 S. E. 654, that 'after the first grant of a new trial, if the matter in controversy be one of fact for the jury, and for a second time in passing upon the same facts the verdict upon the question at issue be concurrent with the first, the mere discretion of the court can play but little part in the second motion for a new trial. It is true that it may sometimes be exercised, but only in cases where it is palpably apparent, from the entire evidence, that the verdict was strongly and decidedly against the weight of the evidence and manifestly wrong.' But even here there is no holding that the trial court is entirely divested of his discretion in the matter of granting a second new trial, and the language which we have just quoted should be considered in connection with the cases cited to support the proposition laid down. One of these is *Taylor v. Central Railway Co.*, 79 Ga. 330, 340, 5 S. E. 114, 119. There it was said: 'From all that has been said and shown, we conclude that the power of the superior courts to grant new trials, being expressly conferred by statute, as well as arising from common-law principles (vide Code [1882] §§ 3711-3718), is not limited by any absolute and invariable rule as to the number of times of its allowable exercise, but that the presumption of the legality of such grant, generally speaking, weakens upon each additional concurrent verdict; and that a third, or even a second, grant of a rehearing on the ground of the evidence being decidedly and strongly against the verdict, will be carefully reviewed to see that the discretion to grant it has been justly, wisely, and prudently exercised, letting each case stand as to this question upon its peculiar issues and facts, and allowing due weight to the general considerations of the fitness of juries to find the facts, and of the necessity that there shall be some end to litigation.'"

In *Davis v. Chaplin*, 102 Ga. 587, 27 S. E. 726, the Supreme Court said:

"This court will not reverse a judgment granting a second new trial on the ground that the verdict is contrary to evidence, when it appears from the record that the evidence in support of the verdict was at best weak and unsatisfactory, and the decided preponderance of the testimony was on the side of the losing party."

In *Taylor v. Central Railroad*, supra, it appeared that a judge had granted the defendant below a new trial from an earlier verdict, and the question arose whether a second new trial could be allowed in such a case on the ground that the verdict was strongly and decidedly against the weight of the evidence. The court said:

"This court has held, in cases too numerous for citation to be needful, that where there is any evidence to sustain the verdict, and the court below has refused the new trial, the judgment will not be reversed because the weight of the evidence is strongly and decidedly against it. It cannot be denied that there was evidence on every issuable point in support of this verdict. We could not, therefore, grant a new trial, had the presiding judge refused

to do so. The principle on which that rule is based may well be distinctly stated in this case. This court having no original jurisdiction, but being a tribunal for the correction of errors of law in lower courts, and the superior courts being, as a matter of original jurisdiction, clothed with discretion to pass upon motions for new trials (*Gay v. Parker*, 74 Ga. 407), a judgment granting or refusing a rehearing will be reversed only when this court can affirm that such judgment is contrary to law. The judge presiding below is justly recognized as enjoying superior advantages for insight into the causes which control juries, and for estimating the value of testimony adduced before him, than the appellate court can have. A serious deference is therefore exercised by the reviewing court towards the lower one."

In the same case (79 Ga. 335, 336, 5 S. E. 116, 117) it was said that:

"In behalf of a first grant of a new trial, the greatest deference has been uniformly shown. * * * But how stands the second grant? The Code says: 'In any case when the verdict is found contrary to evidence and the principles of justice and equity, the presiding judge may grant a new trial.' Section 3713 [Civil Code of 1910, § 6082]. Again it says, in section 3717 [Civil Code of 1910, § 6087]: 'The presiding judge may exercise a sound discretion in granting or refusing new trials, in cases where the verdicts may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding.' Here, in the statute, is no limitation of the discretion conferred to the first verdict. Wisely such limitation is omitted."

The court still further said in *Johnson v. Renfro & McCrary*, 73 Ga. 139, that:

"Where the motion for a new trial is grounded alone on the position that the verdict is contrary to the evidence and the law, * * * the statute vests the discretion to grant or refuse a new trial, and, unless that discretion be abused, this court has no legal power to interfere. This language concerning the authority conferred by the statute is used without limitation to the first verdict. We find no case where it is adjudicated that the judge cannot grant a second new trial because the verdict is *strongly and decidedly* against the weight of the evidence." (Italics ours.)

The Supreme Court affirmed the judgment of the lower court granting a new trial in the *Taylor Case*, supra, where the only substantial complaint was that the court erred in granting a second new trial where the weight of the evidence was strongly and decidedly against the verdict returned.

In *Christian v. Westbrook*, 75 Ga. 852, the Supreme Court intimated that the "discretion" to grant or refuse a new trial extends to the second verdict. In that case the second motion for a new hearing was denied below. The affirmance in the Supreme Court rested on the fact that the judge was satisfied with the verdict, and not on the ground that he could not have lawfully vacated it.

In *Hazzard v. Savannah*, 72 Ga. 205, the Supreme Court affirmed a judgment granting a first new trial, and said:

"There was no abuse of discretion in granting a new trial on the ground that the verdict was not supported by the evidence; the case being quite a weak one on the evidence."

The jury found for the plaintiff again on the second hearing, and increased the amount

of recovery by \$700. On the second hearing the judge granted another new trial. That judgment was reviewed in 74 Ga. 377, and the Supreme Court held that:

"The presiding judge did not abuse his discretion in granting a second new trial."

It is true it was said by this court in *Scribner v. Mutual Building Co.*, 1 Ga. App. 527 (2), 58 S. E. 240, that:

"Where two verdicts have been rendered in favor of the same party on substantially the same issues of fact, and two new trials have been granted by the presiding judge, the rule of discretion applicable to the first grant of a new trial has no application; and if the evidence on the last trial, although conflicting, supported the second verdict, it should not be set aside."

But, as already said, a different rule of discretion is applicable to the second grant of a new trial than the rule applied to the first grant, and what is quoted above in the *Scribner* Case is not at variance with the numerous holdings of the Supreme Court on this question. It does not appear whether the verdict in that case was "decidedly and strongly against the weight of the evidence" or not; it appears merely that the evidence was "conflicting," and the court properly held that the presiding judge could not, in the exercise of his discretion set aside a second verdict in behalf of the same party simply because there was a conflict in the evidence.

In *Merchants' & Miners' Co. v. Corcoran*, 4 Ga. App. 654 (2), 62 S. E. 130; this court said:

"A second verdict, found with no evidence to sustain it, should be set aside as readily as a first, but a second verdict cannot be set aside, as a first verdict might be, merely because upon the second trial the judge may think that the preponderance of the evidence is in favor of the losing party."

This holding is not at variance with the several rulings made by the Supreme Court, since it does not appear in that case that the weight of the evidence was "strongly and decidedly" in favor of the losing party, even though there may have been an apparent preponderance in his favor.

These last-named two cases are referred to in order to emphasize the rule, as laid down in *Seaboard Air Line Railway v. Randolph*, supra, that, in dealing with a second verdict, the discretion of the trial judge is not as ample as when hearing a motion for a first new trial, but, nevertheless, this discretion may be exercised in cases where it is palpably apparent, from the entire evidence, that the verdict was strongly and decidedly against the weight of the evidence; and though the presumption as to the legality of the grant of a new trial because of the insufficiency of the evidence grows weaker upon each additional concurrent verdict, and the reviewing court must carefully investigate to determine if the discretion to grant a second new trial has been justly, wisely, and prudently exercised, this court will not reverse a judgment granting a second new trial

on the ground that the verdict is decidedly and strongly against the weight of the evidence, or that the evidence upon which it rests is weak and unsatisfactory, where, from an examination of the entire record, it does not appear that the trial judge abused his discretion in granting the second new trial. So, in conclusion, we may say on this point that where the evidence in behalf of the prevailing party is "weak and unsatisfactory," notwithstanding the verdict may be the second verdict in his favor, the trial judge may, in the exercise of his discretion, set aside the verdict; or if, upon careful scrutiny by the reviewing court, it appears clear and unmistakable that the verdict is strongly and decidedly against the weight of the evidence, the reviewing court will not reverse the order of the trial judge, who, in the exercise of his discretion, has granted a second new trial, notwithstanding both verdicts have been in favor of the same party.

The only remaining question that it is necessary to determine in this case is whether the verdict, which the trial judge set aside at the instance of the defendant, was strongly against the weight of the evidence or was supported only by evidence that was in its nature weak and unsatisfactory. Of course, this court could not itself set aside a verdict merely for the reason that the evidence sustaining it was weak and unsatisfactory, or because the verdict was against the weight of the evidence, since no such discretion is vested in us, but we may nevertheless examine the testimony appearing in a record and determine, from such an examination and from a careful review of the record, that the trial judge committed no abuse of discretion in determining that because the evidence was weak and unsatisfactory, and because the verdict was strongly against the weight of the evidence, the preservation of the just and lawful rights of the losing party in the court below demanded the grant of a second or a third or any number of new trials in the exercise of the discretion with which he is endowed by law. If it were otherwise, and a trial judge could not set aside a verdict which he believed to be contrary to law and the principles of equity, where no error is complained of, except that the evidence does not warrant the verdict, litigants against whom there is strong prejudice at the time of the trial, with or without sufficient reason, would be wholly helpless and might be delivered bound into the hands of their enemies or into the hands of any designing person who might take advantage of the existing prejudice. Of course, we do not mean to say that any such state of fact existed in this case, but we refer to this merely to illustrate the possibilities if there was a hard and fast rule preventing a trial judge from exercising his discretion in the grant of a new trial, where previous verdicts have been in favor of the same party, since no other court is en-

dowed with the power to guard against consequences arising from causes appearing at the trial, which may be visible alone to the trial judge. On the first grant of a new trial, even though the verdict be strongly supported by the evidence, or the weight of the evidence be in favor of the prevailing party, the trial judge may nevertheless, where no legal error has been committed in the admission or exclusion of testimony, in the instructions given to the jury, or in the conduct of the trial, grant a new trial solely because he does not believe that justice has been done, or feels that some miscarriage of justice has occurred. As was said by Judge Beck in *Seaboard Air Line Ry. v. Randolph*, supra, the trial judge, in the second grant of a new trial, where the verdict has been both times in favor of the same party, must exercise his discretion with greater caution, since his discretion is not so "ample" then as in the granting of a first new trial; and so, too, the reviewing court must be satisfied that his discretion was exercised with great caution; but nevertheless, if the discretion be exercised on apparently good grounds, his action must be sustained.

[2] 2. We shall now consider whether or not the evidence in behalf of the prevailing party in this case was weak and unsatisfactory, or whether the verdict was strongly against the weight of the entire evidence adduced at the trial; and a mere inspection of the evidence, which is set out with considerable fullness in the statement of facts, must lead to the conclusion on the part of any unbiased mind that, assuming that the witnesses for the defendant in the court below were fairly credible, the decided preponderance of the testimony was against the verdict. The only evidence in behalf of the plaintiff was the evidence of McCrary, who admitted on the stand that he had been previously sworn at the coroner's inquest and at that time neglected to state all he knew as to the manner in which the deceased met his death, though it appeared the oath administered to him on that occasion required him not only to tell the truth but the "whole truth," and his sole excuse for his refusal to give full information at the inquest was that he had been advised by certain personal friends of his that it might be better for him to reveal as little as possible. The conductor, porter, and newsboy on the train, when the fatal occurrence took place, all three disputed the testimony given at the trial by McCrary in every important particular, and their testimony was corroborated by Robinson (apparently a wholly disinterested witness), who was a passenger on the train at the time, and who swore that he was in conversation with the conductor at the very time when McCrary, the sole witness for the plaintiff, testified the deceased had been violently ejected from the train by the conductor and the porter together. To cap all this, several witnesses

men testified at the trial that McCrary was then examined and stated that he did not know what occurred after he saw the deceased, Ira Morgan, go out of the door of the coach in which he was sitting, and that, when asked if he knew anything else (though ample time was given him to add any other fact or detail within his knowledge) he replied that he knew nothing else. The baggageman also testified that while the door of his car may have been closed during part of the short journey between Haywood and Bolen, if any struggle had occurred on the platform, as related by McCrary, he would have heard it, and that nothing of the sort did occur.

While, of course, it was within the province of the jury to believe McCrary notwithstanding the evidence which tended to impeach him (as it was solely for them to say whether or not he had been successfully impeached), and to return a verdict based on his testimony, nevertheless, as the great weight of the evidence appears to have been against the truth of his testimony, the trial judge did not abuse his discretion in setting aside the verdict for the reason set forth in his order. In that order it is recited that the evidence of the sole witness upon whose testimony the verdict depended was in his opinion "so contradictory and wavering in character," until the court was not satisfied to "sustain the finding thereon without further corroboration." The judge, in setting aside the finding of the jury, did not base his ruling on the idea that there was only a preponderance of evidence in behalf of the losing party, or on the ground that the evidence was conflicting; and hence his ruling was in no sense in conflict with the rulings in *Scribner v. Mutual Building Co.*, supra, and *Merchants' & Miners' Co. v. Corcoran*, supra.

It will also be observed that, while both verdicts in this case were in favor of the plaintiff, the first verdict was for \$100 only, whereas the second verdict, based, as the trial judge certifies, on practically the same evidence as that adduced at the first trial, was for \$5,000. The plaintiff moved to set aside the first verdict, and that motion was granted evidently on the idea that, if the plaintiff was entitled to recover anything, he was entitled to recover more than \$100 for the life of his son. The very fact that the jury returned on the first trial a verdict for so trivial an amount as the value of a human life indicates that the jury must have had a grave doubt as to the right of the plaintiff to recover at all under the evidence, and that they rendered this small verdict as a result of a compromise in the juryroom, or by way of charity extended to the plaintiff at the cost of the railroad company. In other words, the original finding was practically a finding in behalf of the defendant. The finding of \$5,000 in favor of the plaintiff on the second trial was entirely out of harmony with the first finding, and was *decidedly* a

finding in favor of the plaintiff. In fact, it was so much a finding in favor of the plaintiff that his counsel voluntarily wrote off the sum of \$1,500, and thereby reduced the amount thereof to \$3,500, in order, apparently, to reduce the verdict to an amount supported by the evidence; and this act of counsel for the plaintiff amounted itself to a concession that the verdict for \$5,000 was not authorized by the evidence, or was decidedly and strongly against the weight of the evidence, and of itself alone affords an additional reason in support of the conclusion, reached by the presiding judge, that the ends of justice would be subserved by setting aside even the diminished verdict and judgment.

In determining whether the evidence in behalf of the plaintiff was weak and unsatisfactory, or wavering and contradictory, and whether the verdict was decidedly and strongly against the weight of the evidence, the trial judge may have considered it in the light of human experience. He may have found that the statement that the conductor and porter, brutally and without regard for the almost certain consequences, forcibly ejected from a train, moving at a speed of 20 miles or more, one who failed or refused to pay the insignificant sum of 10 cents as his fare to the next station, less than 3 miles away, was contrary to human experience, repugnant to all the probabilities, and too monstrously inhuman to be credible, and for this reason felt that the evidence of one witness was not sufficient to establish the fact, especially where that evidence was "contradictory and wavering in character," without the corroboration which could apparently be furnished on another trial, if this witness in fact spoke the truth. According to the testimony, there were other passengers upon the train and in the particular coach from which the witness McCrary testified the deceased had been ejected, and diligence might discover one or more of these persons before the next trial, who must have seen some, if not all, of the same occurrence that McCrary testified that he saw, and who presumably would testify to the truth of the transaction, whatever that might be. It will be remembered that McCrary himself said that, at the time the deceased was ejected from the platform of the car, one Ben Smith was sitting on the same seat with the witness and next to the window, where, from his position, it appeared he could see even better than McCrary what happened outside of the car towards the front of the train. And also, according to McCrary's testimony, there were passengers in the other half of the colored coach, who may have seen something of what occurred and may be able to throw light upon the transaction, and either corroborate or refute what McCrary testified.

Other grounds of the motion for a new trial are not passed upon, since the manner

in which the case comes to us for review precludes the necessity therefor; the new trial being granted by the trial judge entirely in the exercise of his discretion, and not because of any other grounds set forth in the motion. Judgment affirmed.

RUSSELL, C. J. (concurring specially). There are many expressions in the opinion in this case in which I cannot concur, and I agree to the judgment of affirmance solely upon the ground that, so far as the plaintiff in error is concerned, the grant of the new trial of which he complains is in effect the first grant of a new trial, and, under a well-settled rule, the exercise of the discretion of the trial judge in such case is not to be controlled.

(16 Ga. App. 523)

THURMAN v. SMITH. (No. 6011.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR—909—PRESENTATION FOR REVIEW—EVIDENCE—ORDER DISCHARGING DEFENDANT—BAIL TROVER.

Where one is discharged from custody on his petition in a trover and bail case, containing the averments required by statute, and the case is brought to this court on exception to the judge's order discharging the defendant, and the evidence on which the order was based is not set out in the record, the presumption of law is that the lower court had sufficient evidence to warrant the conclusion that the petitioner could neither give the security required by law nor produce the property sued for, and that the reasons for the nonproduction of the property were satisfactory and sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. 909.]

2. ARREST—50—BAIL TROVER—DISCHARGE—RIGHT TO REARREST.

Where the judge of the court in which a bail trover proceeding is pending orders the discharge of the defendant from imprisonment, and at the same time requires that he shall give a bond, and he does execute a bond, which is accepted, and by virtue of which he is released from custody, and at the trial of the main case the defendant fails to put in an appearance, but the case is tried and an alternative verdict returned against him, such judgment may be entered thereon as the verdict authorizes, and as may be warranted by the bond given under the order of the court, but the defendant cannot be rearrested or again incarcerated while the original judgment discharging him from custody remains of force, and has not been set aside by that court or by the reviewing court.

[Ed. Note.—For other cases, see Arrest, Dec. Dig. 50.]

3. REVIEW ON APPEAL.

There was no error requiring a reversal of the judgment of the court below.

Error from City Court of Nashville; C. A. Christian, Judge.

Bail trover by L. P. Thurman against J. C. Smith. Judgment for defendant, and plaintiff brings error. Affirmed.

R. Eve, of Tifton, and Hendricks & Hendricks, of Nashville, for plaintiff in error. W. R. Smith and Wm. Story, both of Nashville, for defendant in error.

WADE, J. Thurman sued out ball trover against Smith, to recover a diamond ring to which he held title under a bill of sale to secure the payment of \$210. Smith was taken into custody by the sheriff upon his failure to surrender the property sued for or to give bond for the eventual condemnation money, and thereupon filed his application for discharge under the provisions of section 5154 of the Civil Code; and at the hearing the evidence disclosed that the defendant did not have the ring in his possession, custody, or control at the time the trover proceeding was filed and the ball affidavit made, and that it was not then or afterwards in his power to produce the property, and from poverty he was unable to give the bond required by law. At the close of the evidence the court announced that he would discharge the defendant from custody; and thereupon, before this judgment was formally signed or entered, the plaintiff presented his exceptions pendente lite, together with a properly executed bond for \$300, payable by the plaintiff and conditioned upon the payment of the eventual condemnation money and all subsequent costs, and asked for a supersedeas. The court passed an order reciting that the plaintiff had in due form filed his exceptions pendente lite and had given bond in the sum of \$300 to supersede the judgment, order, and decree of the court, and to pay the eventual condemnation money in the case, and that the offer to give the said bond and the request for a supersedeas were both made while the defendant was in the custody of the officers of the court, after the judge had orally announced his finding, but before it was written out and reduced to judgment; and the court thereupon ordered that the defendant, Smith, should give "a good and solvent bond in the sum of \$200, to be and appear at the May term, 1914, of this court and remain from term to term and day to day thereto to answer the final judgment, order, and decree of this court," and, "in default thereof, that he be remanded to the common jail of said county and there kept until the further order of this court or until the final determination of this case."

It appears from the record: That the petition for discharge was filed by the defendant on March 24, 1914, and that on April 15, 1914, the court passed the following order:

"Upon satisfactory evidence being adduced that the movant in the foregoing petition cannot produce the goods mentioned therein, nor give the bond and security as required by law, and satisfactory reasons for the nonproduction of said goods being shown to the court, it is hereby ordered and adjudged that the movant, J. C. Smith, be and he is hereby discharged from custody."

That the order above mentioned, which recites the giving of a bond for \$300 by the plaintiff to supersede the judgment of the court, etc., which further required the defendant "to give a good and solvent bond in the sum of \$200, to be and appear at the May term, 1914," of said court, "to answer

the final judgment" of the court, was entered during the April term, 1914, on "this — day of —, 1914." That the exceptions pendente lite complaining that the court erred in entering up the judgment discharging the defendant from custody on April 15, 1914, were certified to by the judge on May 5, 1914, and filed in court on the same day. That on May 11, 1914, the defendant, J. C. Smith, as principal, and W. M. Register, Jr., as security, entered into a bond payable to the Governor of Georgia and his successors in office "in the penal sum of \$250," which declared that the condition of the obligation was:

"That, if the above-bound J. C. Smith shall personally be and appear in the city court of said county on the third Monday in August, 1914, and from day to day, and term to term, then, and there to answer to the offense of mis—, and shall not depart thence without leave of said court, then the above obligation to be null and void, else to remain in full force and virtue."

This bond recites that it is "signed, sealed, and delivered in the presence of," but does not appear to have been attested by any person.

The case came on regularly at the August term, 1914, of the city court of Nashville, and the defendant failed to appear personally, as required in his bond, but by his attorney made an appearance and filed a plea of general issue in the case. The case proceeded, and the plaintiff tendered in evidence, without objection, an instrument which purported to be a bill of sale from the defendant to plaintiff, dated November 15, 1910, and recited that:

"To secure two promissory notes of even date herewith, maturing, respectively, December 15th and January 1st after date, for \$100 and \$110 each, I hereby sell, transfer, and convey one diamond ring, of the value of \$425, being 2-5/8-1/32 and being the property of said J. C. Smith, to L. P. Thurman. In the event said notes are not paid at maturity, the said L. P. Thurman shall have the right, and he is hereby authorized, to seize said property and appropriate the same to his own use." Signed by J. C. Smith.

There was testimony that prior to the filing of the suit the plaintiff made personal demand on the defendant for the return of the diamond ring, and the defendant then stated that he could not pay the plaintiff therefor or return the ring to him, for the reason that he had previously hypothecated it with the Citizens' Bank of Valdosta for a loan of \$225. There was testimony from one Cochran to the effect that he had sold to the defendant the diamond ring described in the defendant's bill of sale to the plaintiff, dated November 15, 1910, and that on April 5, 1915, he repossessed himself of the said ring, as the defendant had not paid him the purchase price thereof, and that, in order to regain possession of the ring, it had been necessary for him to pay \$226.30 in cash to the Citizens' Bank of Valdosta, Ga., which then held possession of the ring. The jury returned the following verdict:

"We, the jury, find for the plaintiff \$425 and the property in dispute, the \$425 to be discharged upon the surrender of the property to the plaintiff."

Thereupon counsel for the plaintiff presented to the court a judgment, which was signed by the court, ordering and adjudging that:

The plaintiff "do have and recover of J. C. Smith, the defendant therein, the sum of \$425, and the further sum of \$— costs of suit, which said judgment may be discharged upon the delivery of the property in controversy to the plaintiff within 20 days from this date. This September 3, 1914."

The judgment as presented to the court also contained the following additional words and provisions:

"It is further ordered, considered, and adjudged by the court that, inasmuch as the plaintiff filed affidavit for bail in the above-entitled case, and the defendant having neglected and refused to give said bond, and the jury having returned a final verdict in the case, it is the further judgment of the court that the sheriff of Berrien county, Ga., arrest the said J. C. Smith and confine him in close and safe custody in the common jail of said county upon his failure or refusal to pay the judgment herein, or to return the property described in the plaintiff's declaration, and to continue to hold the said J. C. Smith as aforesaid until the further and final order of this court. The arrest of the said J. C. Smith is not to be made until after a period of — days from the date of this judgment, order, and precept, and it is so ordered."

But the judge declined to sign this latter part of the judgment, and this is assigned as error, on the following grounds:

(a) That, since the court required a bond of the defendant to be and appear at the trial of the case, "to answer the final judgment, execution, and decree of the court, his failure and refusal to appear and abide the terms and conditions in his bond and the order and judgment of the court entitled plaintiff to a judgment requiring defendant to be held as herein set forth."

(b) "The plaintiff, having obtained a final judgment before the court and jury, was entitled to a judgment of the court requiring the sheriff of Berrien county to take the defendant in custody, as set forth and contained in the judgment presented to the court and by the court refused."

(c) "Because the court, upon the petition of the defendant for bail upon his own recognizance, from the evidence reached the conclusion that the defendant was unable to give the bond required; the result of the bail trover proceeding is to permit the defendant to acquire the property of the plaintiff and thereafter purposefully and designedly dispose of the same to the loss and injury of the plaintiff in the value thereof."

(d) "Because to discharge the defendant on the bond required by the court, which he gave, and after final judgment before the court and jury, for the court in his judgment, order, and decree to refuse to require the defendant to comply with the judgment or the obligations in his said bond is equivalent to holding that the action of bail trover against an insolvent person is incapable of enforcement and is a farce."

[1, 3] 1. Section 5154 of the Civil Code provides that, where a defendant in any action for the recovery of personal property in which bail is required shall be held in imprisonment by reason of his inability to give security, he may present his verified petition in writing to the judge of the court in which

the suit is pending, in which he shall state that he is neither able to give the security required by law nor to produce the property, and can furnish satisfactory reasons for its nonproduction, and traverse the facts stated in the plaintiff's affidavit for bail; and at the hearing, after the notice provided by law, if the judge shall find from the evidence presented that the petitioner can neither give the security nor produce the property, and the reasons for its nonproduction are satisfactory, the petitioner shall be discharged upon his own recognizance, conditioned for his appearance to answer the suit, but otherwise the judge shall commit him to custody. The record in this case discloses that a petition was filed in accordance with the provisions of this section, and at the hearing the defendant was discharged from custody, but upon what evidence the court based his order of discharge does not appear; and hence we must assume that there was at the hearing of the application for discharge ample evidence to establish the facts that the petitioner could neither give the security nor produce the property, and we must further conclude that the reasons presented for the nonproduction of the property were entirely satisfactory to the court.

2. Section 5155 of the Civil Code provides that in any case where a defendant in an action of trover and bail shall present a petition for discharge from imprisonment under the provisions of section 5154, supra, it shall be lawful for either party dissatisfied with the decision rendered to except thereto by writ of error at any time within 20 days from the rendition of the decision complained of.

In *Marks v. Hertz*, 65 Ga. 119, the Supreme Court said that, where a defendant in trover was arrested under bail process and moved for a discharge, an order discharging him on his own recognizance was not such a final judgment as could be brought up by writ of error, but the proper remedy was by exceptions pendente lite, and that, if the ruling would work serious or irreparable injury before the termination of the case to the party against whom it was made, the court, on a bill of exceptions pendente lite, should grant a supersedeas until the final disposition of the main case.

The Supreme Court said in *Gustoso Cigar Manufacturing Co. v. Ray*, 117 Ga. 565, 48 S. E. 984, that:

"Where a defendant in bail trover proceedings has been discharged under Civil Code, § 4608 [Civil Code 1910, § 5154], the order of discharge can only be superseded by the plaintiff giving bond and complying with such other conditions as may be properly imposed."

In that case the Supreme Court said that, when the lower court "found that the defendant was entitled to his discharge, that judgment was conclusive until reversed, and should have been enforced unless superseded"; and, further, it was said that, if the plaintiff "had immediately given notice of

its intention to present a bill of exceptions and ask for time to supersede the order, the court would have allowed time in which to file the same, * * * and the question would then have been raised as to what should be the terms and conditions of a supersedeas in bail trover." It appears from the record in that case that, the trial judge having ordered that the defendant be discharged from custody upon his own recognizance, and the plaintiff having applied for a supersedeas order until that judgment could be reviewed by the Supreme Court, it was ordered that the order for the discharge of the defendant be not executed until the case should be passed upon by the Supreme Court, and that in the meantime the defendant be committed to jail, and that from thence he might be discharged "upon his entering into good and sufficient bond in the sum of \$700, conditioned for his appearance to answer and abide the judgment of the court." The defendant gave the bond required for his appearance in the terms prescribed by the order, and the plaintiff excepted to the order of discharge and to so much of the supersedeas order as allowed the defendant to give a \$700 bond, insisting that the defendant should have remained in custody until the termination of the case. There was no offer on the part of the plaintiff to give bond for damages, as in the case of *Southern Express Co. v. Lynch*, 65 Ga. 240, or even to comply with section 5552 of the Code of 1895 [Code of 1910, § 6165], and the court held that, since there was no notice even of an intention to present a bill of exceptions, and the court was not asked for time to supersede the order, the bond exacted of the defendant was as much as the company had the right to ask. In the *Lynch Case*, supra, it was held that the judge, in granting the supersedeas, could require a proper bond or prescribe "such terms as the nature of the case might require." See, also, *Montgomery v. King*, 125 Ga. 391, 54 S. E. 135. In *Ragan v. Chicago Packing Co.*, 93 Ga. 712, 21 S. E. 143, it was said that:

"Under the act of 1879 (Code, § 3420a) touching the liberty of the citizen in proceedings requiring bail in actions for the recovery of personal property, while no discharge is warranted unless the reasons shown for the nonproduction of the property are satisfactory, it is not requisite that an existing physical impossibility to produce the property should be the result of misadventure or of blameless conduct on the part of the defendant, but, if it existed at all when the process was sued out, and continues to exist without any fault or misconduct committed by the defendant since that time, it should be deemed satisfactory. Inasmuch as by section 3418 of the Code a plaintiff, in order to require bail, must make affidavit 'that the property is in the possession, custody, or control of the defendant,' anything which shows with full certainty that this affidavit was not true in fact should be deemed a satisfactory reason for not producing the property, unless it affirmatively appears that since the plaintiff's affidavit was made the defendant has acquired the power to produce it."

In *Garrett v. Underwood*, 102 Ga. 558, 27 S. E. 665, it was held:

"Where a defendant, imprisoned under an action of trover where bail was required, petitioned the judge of the court in which the suit was pending for his discharge, and it satisfactorily appeared that he was unable to produce the property or to give security for the eventual condemnation money, there was no error in discharging the defendant on his own recognizance and awarding the cost of the proceeding against the plaintiff."

In *Shinholser v. Jordan*, 115 Ga. 462, 41 S. E. 610, it was held:

"It must appear to the judge to whom such petition is addressed that the defendant can neither give the security nor produce the property, and that the reasons for its nonproduction are satisfactory."

In the earlier case of *Harris v. Bridges*, 57 Ga. 407-409, 24 Am. Rep. 495, it was held that the inability of the defendant to produce the property would not authorize his discharge, since the statute then in force did not make this one of the grounds for such discharge.

It will be noted that in the case of *Gustoso Cigar Co. v. Ray*, 117 Ga. 565, 43 S. E. 984, the Supreme Court does not in terms decide how far the judge hearing an application for discharge in a bail trover case may exercise his judgment in determining the nature of the bond to be required of the defendant for the protection of the interest of the plaintiff, where the defendant is discharged from custody on the ground that he can neither give the bond required by law nor produce the property. In the case under consideration the order of the judge required the defendant to give bond in the sum of \$200, conditioned for his appearance at the May term, 1914, of the court in which the proceeding was pending, and to appear from term to term and day to day to answer the final judgment, order, and decree of the court, and in default thereof that he should be remanded to the common jail of the county, and there kept until further order of the court; whereas the bond given, though it requires the appearance of the defendant in the proper court at the proper term and from day to day and from term to term, does not require him to answer the "final judgment, order, and decree of the court," but to answer to "the offense of mis—," and, while requiring that he shall not depart thence without leave of the court, it nowhere binds him to answer to the final judgment, order, and decree of the court in the pending case. It appears that the order or judgment, since it required the defendant to answer to the final judgment in the case, was intended to exact an eventual condemnation bond for \$200; whereas the bond actually given was not payable to the plaintiff in the case for the eventual condemnation money, but was payable to the Governor of the state of Georgia, and seems to have been a criminal bond only, requiring the presence of the accused to answer to the "offense" of a misdemeanor.

[2] In view of the present provision of the statute authorizing the discharge of a defendant in bail trover from the custody of the officer where he fails to produce the property, and is unable to give the bond required by law, and presents to the court satisfactory reasons for the nonproduction of the property, the judge would have been without authority to render the judgment which he declined to sign, requiring the sheriff to arrest the defendant and confine him in close and safe custody in the common jail upon his failure or refusal to pay the judgment rendered on the trial of the main case, or to return the property described in the plaintiff's petition, and to continue to hold the defendant until further order of the court. The court had already passed upon the question whether the defendant should be properly discharged under the showing made at the hearing of his petition; and, while exceptions pendente lite were filed by the plaintiff, and all the rights of the plaintiff were thereby preserved, and the propriety and legality of the order of discharge could be reviewed in this court by bill of exceptions on the final determination of the case, unless it appeared that the lower court was not authorized to discharge the defendant under the evidence adduced at the hearing of his application for discharge, this court would not be authorized to set aside the order of the judge, nor would the trial judge himself thereafter, and while his original order discharging the defendant was still of force and not set aside, be authorized to enter up a further judgment exactly contrary to and altogether nullifying, the judgment previously rendered by him on the application for discharge. The judge therefore did not err in declining to direct the sheriff to seize the defendant and incarcerate him upon his failure or refusal to pay the judgment or return the property described in the plaintiff's declaration until the further order of the court.

Imprisonment for debt has long since been generally abolished, and no further discussion of the proposition here involved is necessary. The plaintiff, of course, could have obtained any judgment on the bond given by the defendant which might have been authorized by its express terms. Had the bond been the condemnation money bond usually required in bail trover cases, judgment for the condemnation money might have been entered up thereon against the defendant and his security; but, since the bond actually given appears simply to have been an appearance bond, no judgment could be entered upon such a bond for the amount of the verdict recovered against the defendant. Whether the defendant violated the order of the court in giving a bond apparently different from that required by the order, or whether the officer who presumably accepted this bond and released the defendant thereon might be liable in any way to the plaintiff, are ques-

tions we need not consider, but it is clear that the original order requiring the \$200 bond, and the bond actually given, for \$250, for the appearance of the defendant to answer to some offense, would not either or both authorize the rendition of the judgment which the court refused to sign. The plaintiff complains that, if a defendant in a bail trover action may release himself from custody by simply showing that he did not have the property in his possession at the time the trover suit was instituted, and that he is unable to give security or to now produce the property, the remedy offered by bail process would practically be nullified. It may be said in answer to this that no plaintiff is entitled to this remedy, unless he makes an affidavit that the property is in the possession, custody, and control of the defendant; and if, in point of fact, this affidavit is untrue when made, and the defendant makes the fact appear when he seeks his discharge from arrest, the plaintiff certainly has no right to complain; for, if he had ascertained the facts before making his bail affidavit, and the affidavit itself spoke the literal truth as to the actual possession of the property by the defendant at the time the affidavit was made, then, on proof of the fact of possession on the hearing of a petition for discharge brought by the defendant, the court should remand the defendant to the custody of the officer, unless he parted with the possession after process was sued out, without any fault or misconduct on his part. Without meaning to apply the remark to this case, it is too often true that bail affidavits are made in trover actions alleging that the defendant is in possession of the property sued for, when the affiant knows that the defendant has already parted with his possession, and the plaintiff nevertheless institutes the bail action in the hope that the defendant will give the eventual condemnation bond, or perhaps pay the value of the property sued for, rather than incur the humiliation of arrest and incarceration in jail until the necessary five days' notice can be given to the plaintiff of his intention to apply for a discharge, and until the petition for discharge can thereafter be heard and determined. Of course, many such actions are instituted where the person making the affidavit knows simply that the defendant was in possession of the property sued for at some time in the recent past, and relies on the presumption that possession once known to exist may be assumed to exist until the contrary is shown; but in such cases, where the affiant has no actual knowledge that the defendant has already parted with the possession of the property, and acts on this presumption in entire good faith, he must nevertheless run the risk of failing to obtain the benefit of the bail proceeding, should it appear at the hearing of an application for discharge made by the plaintiff that he had, in fact, parted with the possession of the property before the suit was in-

stituted, or, in other words, should the defendant rebut the presumption referred to above.

¹ The instrument upon which the plaintiff in this case relied to show his title to the diamond ring sued for is referred to in the record as "a retention of title contract executed from the plaintiff to the defendant"; but an inspection thereof will clearly demonstrate that the instrument was, in fact, a bill of sale conveying a described ring for the purpose of securing two promissory notes "of even date herewith, maturing respectively December 15th and January 1st, after date, for \$100 and \$110 each," and authorizing the plaintiff, to whom the property was so conveyed, "to seize said property and appropriate the same to his own use," in the event the notes sued for were not paid at maturity. It appears, both from this instrument and from the recitals in the record, that the ring was not, in fact, delivered to the plaintiff, but was kept in the possession of the defendant; and from the language of the instrument itself it is clear that the purpose of the parties was to execute what, in legal effect, amounted to a mortgage. The paper certainly is not an absolute conveyance on its face; and, since a mortgage in this state is only security for a debt, and passes no title, and the obvious purpose of this paper is merely to place a lien upon property or to pledge property for the payment of a debt, the instrument must be considered a mortgage only, and not a deed or bill of sale. It is true that, where personal property is conveyed by bill of sale, and the party giving the bill of sale shall take an obligation binding the person to whom the property is conveyed to reconvey the property on payment of the debt thereby intended to be secured, the conveyance passes the actual title to the principal until payment of the debt (Civil Code, § 3306); but in this case there was no obligation to reconvey the property described in the conveyance. In this connection it will be recalled that section 3298 of the Civil Code provides that a bill of sale to personal property to secure a debt, where the principal sum does not exceed \$100, may be foreclosed in the same manner as a mortgage on personal property and in the event the bill of sale is foreclosed in the same manner as mortgages, the after proceedings shall be the same as in proceedings to foreclose such mortgages (Civil Code, § 3299); but nowhere do we find that an instrument conveying property for the purpose of securing certain obligations therein described has been treated under our law as an absolute conveyance of title, where there is no corresponding obligation on the part of the taker of the instrument to reconvey the property on the payment of the debt thereby secured. So, if the question were properly before us, we would hold that the judgment rendered in favor of the plaintiff in this trover action

was not authorized by the evidence adduced at the trial, since the mortgage introduced in evidence furnished the sole basis for a claim of title on the part of the plaintiff to the property for which suit was brought.

Judgment affirmed.

(16 Ga. App. 504)

CHARLESTON & W. O. RY. CO. et al.
v. McELMURRAY. (No. 5814.)

(Court of Appeals of Georgia. June 28, 1915.)

(Syllabus by the Court.)

1. RAILROADS \S 478 — FIRES — ACTION FOR DAMAGES—PETITION—GENERAL DEMURRER.

The petition set forth a cause of action, and was not subject to general demurrer.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1698-1705; Dec. Dig. \S 478.]

2. APPEAL AND ERROR \S 887—PARTIES \S 92—MISJOINDER—CURE BY AMENDMENT—DAMAGES FROM FIRE.

The special demurrer, alleging a misjoinder, should have been sustained. This court held, in Atlantic Coast Line R. Co. v. McElmurray, 12 Ga. App. 233, 77 S. E. 2, that the owner of the track was jointly liable with the owner of the train which started the fire for the latter's negligence. This decision established the joint liability of the two roads for fires caused by the Atlantic Coast Line Railroad Company, and there is no misjoinder as to these fires. The Atlantic Coast Line Railroad Company is not, however, liable for the fires set out by the Charleston & Western Carolina Railway Company, the owner of the track, and here is the misjoinder. Counsel for defendant in error having asked leave (if this should be our judgment) to so amend his petition as to dismiss the Atlantic Coast Line Railroad Company, and thereby to cure this defect, leave to do so is hereby granted under the authority of Civil Code 1910, § 8205. The defendant in error, however, must pay the costs of the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3620; Dec. Dig. \S 887; Parties, Cent. Dig. §§ 150-152; Dec. Dig. \S 92.]

3. DAMAGES \S 91 — PUNITIVE DAMAGES — RIGHT TO RECOVER—FIRES.

The special demurrer as to that part of the petition asking for punitive damages was properly overruled.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. \S 91.]

4. PLEADING \S 8 — RAILROADS \S 478 — FIRES—ACTION FOR DAMAGES—PETITION—SPECIAL DEMURRERS.

The other special grounds of the demurrers were without merit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. \S 8; Railroads, Cent. Dig. §§ 1698-1705; Dec. Dig. \S 478.]

Error from City Court of Richmond; W. F. Eve, Judge.

Action by J. R. McElmurray against the Charleston & Western Carolina Railway Company and another. Judgment for plaintiff, and defendants bring error. Affirmed, with direction.

W. K. Miller, of Augusta, for plaintiffs in error. Jas. C. C. Black, Jr., of Augusta, for defendant in error.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ The balance of the opinion has been stricken out since filing of the same.

BROYLES, J. [1-4] The third headnote only needs elaboration. J. R. McElmurray sued the Atlantic Coast Line Railroad Company and the Charleston & Western Carolina Railway Company jointly for damages, and the essential averments of his petition are as follows:

"(1) That the defendant the Charleston & Western Carolina Railway Company is a railroad corporation owning and operating a line of railway in said county, and having an office, an agent, and a place of business in the city of Augusta in said county; that the defendant the Atlantic Coast Line Railroad Company is a railroad corporation having an office, an agent, and a place of business in the city of Augusta, in said county.

"(2) That the plaintiff, at the time of the injuries hereinafter complained of, was, and is now, the owner of a farm of 795 acres situate in said county and known as 'Goodale Farm.'

"(3) That the defendant the said Charleston & Western Carolina Railway Company's line of railway traverses petitioner's farm from west to east, a distance of a mile and a half, and then crosses the Savannah river on a bridge in which there is a draw.

"(4) That the defendant the said Atlantic Coast Line Railroad Company operates, and did so operate at the times hereinafter stated, its trains over the tracks of the said Charleston & Western Carolina Railway, with the knowledge and consent of said Charleston & Western Carolina Railway Company.

"(5) That the principal crop grown on petitioner's farm is hay.

"(6) That on the 20th day of November, 1911, an engine, being operated by the Charleston & Western Carolina Railway Company on its line of railway, running through said farm, negligently emitted live sparks and cinders, which set fire to the right of way of said Charleston & Western Carolina Railway Company, which said fire was communicated to the farm of petitioner and burned over an area of one acre, on which was growing a native vetch, which reseeded itself, and damaged petitioner \$6, and burned seven large cocks of hay, containing $1\frac{1}{4}$ tons of the value of \$15 per ton; that on the 22d day of November, 1911, an engine, being operated by said Charleston & Western Carolina Railway Company on its line of railway, running through said farm, negligently emitted live sparks and cinders, which set fire to the right of way, which said fire was communicated to the land of petitioner, burning over an area of two acres, on which was growing a native vetch, which reseeded itself, to the damage of petitioner of \$12; that on the 1st day of December, 1911, an engine, being operated by said Charleston & Western Carolina Railway Company on its line of railway, running through said farm, negligently emitted live sparks, which set fire to the right of way, which said fire was communicated to the land of petitioner, and burned over an area of 10 acres, on which was growing a native vetch, which reseeded itself, to the damage of petitioner of \$6 per acre, and consumed six large cocks of hay containing $1\frac{1}{4}$ tons of the value of \$15 per ton, and caused petitioner to expend \$2.40 in payment of men to fight said fire; that on December 3, 1911, an engine being operated by said Charleston & Western Carolina Railway Company on its line of railway, running through said farm, negligently emitted live sparks which set fire to the right of way, which said fire was communicated to the land of petitioner, burning over an area of one acre, on which was growing a native vetch, which reseeded itself, to the damage of \$6.

"(7) That at the time of the fires complained of in said sixth paragraph, the season was dry, and the said Charleston & Western Carolina

Railway Company permitted large quantities of dry grass, weeds, trash, and underbrush to gather upon its said right of way, and negligently allowed said inflammable and combustible material to remain on said right of way, and that the fires complained of in said paragraph sixth were communicated to the fields of petitioner from said right of way.

"(8) That the engines of said Charleston & Western Carolina Railway Company which set out the fire complained of in said paragraph 6 of said petition were defective and dangerous, not being properly equipped with safe and sufficient spark arresters and safe and sufficient devices and appliances for preventing the emission of live sparks and cinders, and that the said engines were negligently operated in that an unnecessary amount of steam was applied to said engines, thereby causing the emission of large and unnecessary quantities of live sparks and cinders, which said sparks and cinders set fire to the said right of way and were communicated to the field of petitioner adjacent to said right of way.

"(9) That the spark arresters of the engines of the said Charleston & Western Carolina Railway Company were insufficiently and improperly constructed to prevent large sparks of fire from issuing from said smokestacks, and the engineers in charge of said engines were negligent in operating said engines, in that they caused said engines to exhaust and emit live sparks of fire and cinders at the place where said combustible and inflammable material had been allowed to accumulate on said right of way.

"(10) That on February 17, 1912, an engine of the defendant, the Atlantic Coast Line Railroad Company, which was being run over the road of the Charleston & Western Carolina Railway Company, negligently emitted live sparks, which set fire to the dry grass, on which was growing a native vetch, which reseeded itself, and burned over an area of $2\frac{3}{4}$ acres, to petitioner's damage of \$8 per acre; that on March 20, 1912, an engine which was being run over the road of the Charleston & Western Carolina Railway Company negligently emitted live sparks which set fire to the dry grass on petitioner's farm, on which was growing a native vetch, which reseeded itself, and burned over one acre, to petitioner's damage \$6.

"(11) That the engines which set out the fire complained of in said tenth paragraph of said petition were defective and dangerous, not being properly equipped with safe and sufficient spark arresters and safe and sufficient devices for preventing the emission of live sparks and cinders, and that said engines were negligently operated, in that an unnecessary amount of steam was applied to said engines, thereby causing the emission of large and unnecessary quantities of live sparks and cinders.

"(12) That the said spark arresters on the engines which set out the fires complained of in said tenth paragraph were insufficiently and improperly constructed to prevent live sparks of fire from issuing from said smokestacks, and the engineers in charge of said engines were negligent in operating said engines, in that they caused said engines to exhaust and emit live sparks and cinders at the place of said dry grass.

"(13) That the engines which set out the fires complained of in the said tenth paragraph were being operated at a dangerous and unnecessary rate of speed, thereby causing the emission of large and unnecessary quantities of live sparks and cinders, which set fire to the farm of petitioner.

"(14) That on January 14, 1913, an engine of the Atlantic Coast Line Railroad Company, which was being run over the road of the Charleston & Western Carolina Railway Company, negligently emitted live sparks, which set fire to the dry grass on petitioner's farm, on

which was growing a native vetch, which reseeded itself, and burned over an area of 10 acres of the value of \$6 per acre, and burned 20 tons of hay of the value of \$17 per ton; that on February 13, 1913, an engine, which was being run over the road of the Charleston & Western Carolina Railway Company, negligently emitted live sparks, which set fire to the dry grass on petitioner's farm, on which was growing a native vetch, which reseeded itself, and burned over an area of three acres, to petitioner's damage \$6 per acre; that on October 16, 1913, an engine, which was being run over the road of the Charleston & Western Carolina Railway Company, negligently emitted live sparks, which set fire to the dry grass on petitioner's farm, on which was growing a native vetch which reseeded itself, and burned over an area of one-half acre, to petitioner's damage \$3; that on November 2, 1913, an engine of the Charleston & Western Carolina Railway Company negligently emitted live sparks, which set fire to the dry grass on petitioner's farm, on which was growing a native vetch, which reseeded itself, and burned over an area of one-half acre, to petitioner's damage \$3; that on November 12, 1913, an engine of the Charleston & Western Carolina Railway Company negligently emitted live sparks, which set fire to the right of way of said Charleston & Western Carolina Railway Company, which said right of way had large quantities of dry grass, weeds, trash, and underbrush upon it; and that said fires were communicated from said right of way to the field of petitioner and burned over an area of one-half acre, to the damage of petitioner of \$3.

"(15) That the engines which set out the fires complained of in the said fourteenth paragraph of said petition were defective and dangerous, not being properly equipped with safe and sufficient spark arresters and safe and sufficient devices and appliances for preventing the emission of live sparks and cinders, and said engines were negligently operated, in that an unnecessary amount of steam was applied to said engines, thereby causing the emission of large and unnecessary quantities of live sparks and cinders, which said sparks and cinders set fire to the dry grass on the farm of petitioner and to the right of way of said Charleston & Western Carolina Railway Company, which said fires were communicated to the field of petitioner adjacent to the said right of way.

"(16) That the engines which set out the fires complained of in the fourteenth paragraph were being operated at an unnecessary and dangerous rate of speed, thereby causing the emission of large and unnecessary quantities of live sparks which set out the fires more fully set forth in paragraph 14 of this petition.

"(17) That the spark arresters on said engines, which set out the fires complained of in said 14th paragraph, were insufficiently and improperly constructed to prevent live sparks of fire from issuing from said smokestacks, and the engineers in charge of said engines were negligent in operating said engines, in that they caused said engines to exhaust at the point of the dry grass on petitioner's farm, and not at some other point, where there was less danger of fire being caused by the emission of the sparks.

"(18) Petitioner further shows, by way of aggravation, that in November, 1910, the Charleston & Western Carolina Railway Company negligently permitted its right of way to get in a foul condition, permitting large quantities of dry grass, weeds, trash, and underbrush to gather upon the same, and that an engine of said Charleston & Western Carolina Railway Company set fire to said right of way, which said fire was communicated to the farm of petitioner and damaged petitioner in the sum of \$1,025, for which said amount said plaintiff received a verdict.

"(19) Petitioner further shows, by way of aggravation, that in December, 1910, an engine of the Atlantic Coast Line Railroad Company, which was being operated over the line of the Charleston & Western Carolina Railway Company, negligently emitted live sparks of fire, which set fire to petitioner's farm and damaged petitioner in the sum of \$1,378.59, and the plaintiff has received a verdict for said amount.

"(20) Your petitioner shows that by reason of the facts aforesaid, he has sustained actual damages of \$671.70, and that by reason of the aggravating circumstances, he is entitled to \$2,000 additional damages to deter said defendants from a repetition of their said negligence."

To this petition the defendants presented the following demurrer:

"(1) Because the allegations of negligence are mere conclusions of the pleader, and are not accompanied by the facts so as to enable the court to determine whether or not negligence existed, as claimed.

"(2) Because there is a misjoinder of causes of action. * * *

"(3) Defendants demur specially to paragraphs 6 and 7 of the petition, because the plaintiff fails to allege how the fire in question was communicated to the farm of petitioner.

"(4) Defendants demur specially to paragraphs 8 and 9 because the plaintiff fails to allege facts on which it may or may not appear to the court that the spark arrester complained of was not safe and sufficient to prevent the issuing of sparks, and what was the defect in said spark arrester.

"(5) Defendants demur specially to paragraphs 10 and 11 because plaintiff fails to allege facts showing wherein the engines of the Atlantic Coast Line negligently emitted live sparks, and facts showing wherein the spark arrester was insufficiently and improperly constructed, or what was the unnecessary and dangerous rate of speed in question.

"(6) To paragraph 14, because the facts showing the negligence complained of on the occasion in question, mentioned in paragraph 14, is not set out.

"(7) To paragraph 15, because plaintiff fails to allege facts showing how the engines referred to were defective and dangerous, or what was the character of the spark arrester used, and what would have been a safe spark arrester, and the facts showing what amount of steam was supplied, and under what circumstances, and how the fire was communicated to the field of petitioner.

"(8) To paragraph 16, because plaintiff fails to allege what was the rate of speed under which the operations took place, whereby the sparks complained of were emitted. Because plaintiff fails to allege what part of his farm was not covered with dry grass, or what notice it gave the railroad company in operating its trains.

"(9) To paragraphs 18 and 19, because plaintiff fails to allege how the fire in question was communicated to the farm of petitioner, and what the negligence consisted of.

"(10) To paragraph 20, because it is the conclusion as a pleader, and without sufficient facts to warrant the conclusions, what other facts to which plaintiff may be entitled to recover."

The court overruled the demurrer and the defendants excepted. The learned counsel for plaintiffs in error strongly and ably contends that the petition presents no cause of action for punitive damages. The cases which he cites, however, do not convince us of the soundness of his position. In *Chattanooga Railroad Co. v. Iddell*, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169, which was an action against the railroad company for in-

juries to a passenger from the derailing of a coach on a defective track, it was held that it was error to charge that:

"If the evidence disclosed * * * that the company was grossly negligent, the plaintiff would be entitled to recover 'what we call punitive damages to punish them for that negligence,' the evidence of negligence not being sufficient to authorize a charge on punitive damages, or, if so, such damages being [should be] given, not as a punishment, but to deter the wrongdoer from repeating the trespass."

And in the decision in that case (85 Ga. 495, 11 S. E. 855, 21 Am. St. Rep. 169) it is said:

"Exemplary damages should not be awarded for such injury, unless it is the result of the willful misconduct of the employees of the company, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. * * * The act must have been done under such circumstances as show a disregard for the rights of others, or an intention to set at defiance the legal rights of others, or the ordinary obligations of society.' Under these rules, which seem to us to be sound, we do not think the evidence of negligence in this case was sufficient to authorize the court to charge the jury that they might find punitive damages. Even if it was, we would still hold, under the rulings of this court, that the charge of the trial judge was erroneous. Code [1882] § 3066 says: 'In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, *either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff.*' In the case of *Ratteree v. Chapman*, 79 Ga. 574 [4 S. E. 684], this court held that it was error to charge the jury that they 'may give exemplary damages, not only as compensation for the wounded feelings of the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses.' The judge in the present case charged that exemplary damages might be given as a punishment of the railroad company, while the Code says they may be given 'to deter the wrongdoer from repeating the trespass.' As we said in the *Ratteree* Case, 'it is best that the law of the case, when expressed in the Code, be given as expressed, in charge to the jury.' Under the Code, the damages are not given as a punishment, but are given to deter the wrongdoer from repeating the trespass."

In *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000, the first headnote is as follows:

"To authorize the imposition of punitive or exemplary damages there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Under the facts disclosed by the record, it was error to charge upon the subject of such damages."

And in that case (119 Ga. 149, 45 S. E. 1000) Justice Cobb said:

"There was nothing shown by the evidence in the present case which warranted the imposition of punitive damages. The negligent act of the company in carrying the plaintiff beyond her station was not sufficient. * * * It is doubtful if the evidence warranted a finding that the conductor knew of the improper conduct of the soldiers. But, granting that he did, one of the plaintiff's witnesses testified that 'the conductor did all he could with them; he couldn't do anything with them.' * * * The evidence discloses nothing which would indicate any wanton

or willful disregard of the rights of the plaintiff."

In *Southern Ry. Co. v. Davis*, 132 Ga. 812, 65 S. E. 131, the third headnote is as follows:

"In an action for damages for a personal injury, based on negligence alone, and in which, under the pleadings and evidence, no question of willfulness, wantonness, malice, oppression, or conscious indifference to consequences is involved, it is error to charge that: 'In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.'"

In that case the plaintiff was injured on a crossing, in a collision between two railroad trains; and, as stated by Mr. Justice Lumpkin:

"The sole act of negligence on which the plaintiff's right of action rested was a violation, by the defendant's engineer, of Civil Code [1895] § 2234, which declares that: 'Whenever the tracks of separate and independent railroads cross each other in this state, all engine drivers and conductors must cause the trains which they respectively drive and conduct to come to a full stop within fifty feet of the place of crossing, and then to move forward slowly. The train of the road first constructed and put in operation shall have the privilege of crossing first.'"

And in the opinion (132 Ga. 817, 65 S. E. 133) it was said:

"A failure to comply with a statutory requirement as to the giving of a signal or the taking of some precaution in connection with railway crossings, and which merely raises the standard of diligence, is different from disobedience of a statute in regard to something which is malum in se. Whether the terms 'willful or wanton negligence,' which are sometimes employed, be accurately used or not, they do not mean that mere negligence alone, as a rule, authorizes charges on the subject of exemplary and punitive damages. * * * There must be something more than the mere proof of failure to give a statutory signal or make a stop required by a statute in approaching a crossing. There must be affirmative evidence of facts tending to show willfulness, wantonness, or the existence of particular circumstances from which an inference of a conscious indifference to consequences might legitimately be drawn. And these facts must be shown in addition to the mere omission to give statutory signals or take statutory precautions in approaching crossings. * * * There was no evidence here which authorized a charge on the subject of exemplary or punitive damages, and the charge on that subject was error."

In *Southern Ry. Co. v. Nappler*, 138 Ga. 31, 74 S. E. 778, the fifth headnote is as follows:

"Where, in a suit for a personal injury to a passenger on a railroad train, resulting from his falling or being thrown from the platform of a car on which he was riding, the only act of negligence alleged was the failure to provide him with suitable accommodations inside the car, thus compelling him to ride on the platform, and there was no evidence of willful misconduct, malice, fraud, wantonness, or oppression, or of such entire want of care as would raise a presumption of conscious indifference to consequences, it was error to charge: 'In every tort there may be aggravating circumstances, either in the act or in the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as

compensation for the wounded feelings of the plaintiff."

This headnote shows that the facts in that case were quite different from those in the instant case. In *Georgia Railroad v. Gardner*, 115 Ga. 954, 42 S. E. 250, the decision in full is as follows:

"1. One who enters upon and injures another's land is not, though a trespasser, liable for punitive damages, when the acts causing the injury were done in good faith under an honest belief that the land belonged to the former, and there was nothing in the manner of doing such acts as to indicate an intention to wantonly disregard the rights of the true owner.

"2. It was in the present case erroneous to give in charge to the jury section 3906 of the Civil Code [1895], which authorizes the giving of such damages in cases of tort where there are aggravating circumstances."

In *Americus v. Ansley*, 14 Ga. App. 707, 82 S. E. 159, the question was whether a municipal corporation could be held liable in exemplary damages, and this court, without positively deciding that question, held that the evidence in that case did not authorize the charge on exemplary damages. There was no allegation of any special damage in that case, but Ansley sued the city of Americus—

"because of alleged negligence on the part of a contractor of the city in piling up and leaving for an unreasonable time dirt and clay on the sidewalk in front of plaintiff's house from a ditch that was being dug in the street, thereby causing him and his family great inconvenience and annoyance."

All of these cases which hold that, before punitive damages can be recovered, either the element of malice, fraud, wantonness, or oppression must be present recognize that if the act is done under circumstances which show a wanton disregard for the rights of others, or from which an inference of a conscious indifference to consequences, and to the legal rights of others, or to the ordinary obligations of society, might legitimately be drawn, then punitive damages may be recovered. In each of those cases also the injuries complained of resulted from a single act. In the case at bar punitive damages are not asked because the railroads were negligent, or even grossly negligent, in setting out any one fire, but the aggravating circumstances which the plaintiff claims entitle him to punitive damages are the great number of fires negligently set out by the defendants upon different occasions. Exemplary damages may be recovered for injuries to real estate and to personal property, where the act is done with a reckless disregard of the rights of others, or of the consequences of the act. While perhaps no aggravating circumstances would be inferred from the negligent setting out of 2 or 3 fires within a period of two years, yet, where the petition alleges, and the railroad by its demurrer admits, the negligent setting out of 15 fires, at different times, upon the farm of the petitioner, within that period, it seems to us that these repeated and continued tres-

passes might be sufficient for the jury to infer such a reckless disregard by the defendant of the legal rights of the plaintiff, and such a wanton indifference to consequences, as to entitle the plaintiff to recover punitive damages. See 1 *Sedgwick on Damages*, §§ 363, 366, 373; Civil Code 1910, § 4503; *Holman v. Brown*, 8 Ga. App. 551, 69 S. E. 1084; *Batson v. Higginbotham*, 7 Ga. App. 835 (2), 68 S. E. 455. In the last-mentioned case (7 Ga. App. 839, 68 S. E. 457) Chief Judge Hill said:

"In every tort there may be aggravating circumstances, either in the act or the intention, and in that event, the jury may find additional damages, either to deter the wrongdoer, or as compensation for the wounded feelings of the plaintiff." Civil Code (1895), § 3906. This character of damages is called 'punitive,' and, if aggravating circumstances are proved, may be given, even where the actual injury is small. *It is always exclusively a question for the jury to determine when such additional damages should be allowed*, (Italics ours), as well as the amount of such damages. The jury in this case found punitive damages in addition to general damages, and it is earnestly insisted that there was no evidence authorizing a finding of punitive damages. As there will be another trial, we do not care to consider and decide that question. We leave it for the determination of the jury, under the evidence that may be submitted on the subject at the second trial."

In *National Folding Box & Paper Co. v. Robertson* (C. C.) 125 Fed. 524, it is said that:

"A person may be regarded as acting 'wantonly' who acts without regard to propriety or the rights of others, or is careless of consequences, and yet without settled malice."

And in *Birmingham Ry. v. Powell*, 136 Ala. 232, 33 South. 875, it is said:

"This degree of recklessness, with a conscious knowledge of its probable harmful consequences, constitutes that wantonness which, in law, finds its equivalent * * * to willful or intentional wrong."

In *Western Union Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283, it is said:

"Wantonness as authorizing exemplary damages does not necessarily mean malice, but a reckless disregard of the rights of others."

In the language of the learned counsel for the defendant in error in the case at bar:

"If the defendant railroad company had negligently inflicted injury on the plaintiff by shooting him on 15 different occasions, or had 15 times destroyed his barn by negligent blasting, on separate occasions, or had 15 times negligently destroyed his dam, on different occasions, or had negligently broken his inclosure 15 times, on separate occasions, would not this show such a careless indifference to consequences as to amount to malice, wantonness, and aggravation? And, if so, is it any defense to say the injury inflicted on plaintiff was not occasioned in any one of the modes set out above, but by fires negligently set out? The result to the plaintiff is the same in whichever way the damages were inflicted, and the aggravation consists, not so much in the circumstances surrounding the act, but in the negligent repetition of the same act."

We can suppose other negligent acts by a defendant for a single tort, which, while not subjecting him to punitive damages might, by frequent repetition, show such care-

less indifference to consequences and to the rights of others as to make him liable for punitive damages. For instance, if A. and B. pass each other daily, and A. negligently stumbles against B. and injures him, A. would only be liable to B. for B.'s actual damages. But if, every time they met, or every other time, or once a week, or once a month, A. should negligently stumble against B. and injure him, would not this constant repetition of A.'s tort raise a jury question as to whether B. was entitled to punitive damages to deter A. from continuing his negligence? Suppose, again, that A., when passing on his regular daily route by B.'s premises, should carelessly and negligently throw a lighted cigarette, or cigar stump, on B.'s lawn, and thereby injure and burn B.'s grass and flowers; A. would be liable for actual damages only; but if this occurred 15 times within two years should not B. be allowed punitive damages to deter A. from continuing his careless and tortious conduct? And in the instant case, where (according to the petition) the defendant railroad company had its engines equipped with such defective spark arresters, that quantities of large sparks of fire issued from the smoke stacks of the engines and set out numerous fires, on different and separate occasions, upon the plaintiff's premises, and where the plaintiff has not only complained to the defendant of its tortious acts, but has actually recovered a money verdict because of them, and the railroad company continues to use its defective spark arresters and continues to set fire to and destroy the plaintiff's property, can this court hold, as a matter of law, that the defendant's tort has in it no such aggravating circumstances as would authorize a jury, if the allegations of the petition were sustained by evidence, to give exemplary damages against the company, to deter it from continuing to harass and annoy the plaintiff, and to destroy his property?

It is contended by the learned counsel for plaintiff in error that as McElmurray bought a farm adjacent to the railroad and raised a hay crop thereon, he took upon himself the risk of his hay being destroyed by fire from the engines of the railroad, but as said by this court in *Albany R. Co. v. Wheeler*, 6 Ga. App. 270 (7), 64 S. E. 1114:

"One who owns property adjacent to a railroad, and builds his houses or otherwise locates his property near to the right of way, takes upon himself the risk of injury through fires occasioned by the running of the locomotives with ordinary care and diligence, but he does not take upon himself the risk of fires caused by negligence of the company or its servants."

It may be that upon the trial of the case the evidence submitted will not authorize a recovery for punitive damages, but we are now discussing the petition only, and the demurrer thereto, and in our judgment the petition in this particular is not subject to the demurrer attacking it.

The petition not being subject to demurrer, except as to the misjoinder, the judgment overruling the demurrer is affirmed, with direction that the petition be amended by dismissing the Atlantic Coast Line Railroad Company.

Judgment affirmed, with direction.

(16 Ga. App. 551)

SOUTHERN RY. CO. v. PUCKETT.

(No. 5885.)

(Court of Appeals of Georgia. July 3, 1915.
Writ of Error to the Supreme Court of the United States Allowed July 7, 1915.)

(Syllabus by the Court.)

1. REMOVAL OF CAUSES — FEDERAL EMPLOYERS' LIABILITY ACT.

Since the passage by Congress of the amendment of 1910 (Act April 5, 1910, c. 143, 36 Stat. 291) to Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), generally known as the federal "Employers' Liability Act," a suit brought in a state court by any person who has a cause of action under this act cannot for any reason be removed to the United States courts. *Strauser v. Chicago Ry. Co.* (D. C.) 193 Fed. 293; *Symonds v. St. Louis R. Co.* (C. C.) 192 Fed. 353; *Ullrich v. New York R. Co.* (D. C.) 193 Fed. 768; *Kansas City R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579; *Lee v. Toledo, St. L. & S. W. R. Co.* (D. C.) 193 Fed. 685; *McChesney v. Ill. Cent. R. Co.* (D. C.) 197 Fed. 85; *Hulac v. Chicago & N. W. R. Co.* (D. C.) 194 Fed. 747.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. —3.]

2. AMENDMENT — PETITION — INJURIES TO SERVANT.

The court did not err in allowing, over the defendant's objections, the amendment to the petition.

3. EMPLOYERS' LIABILITY ACT—PETITION.

The petition as finally amended set forth a cause of action under the federal Employers' Liability Act; and the demurrers thereto, both general and special, were properly overruled.

4. MASTER AND SERVANT — INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE—RULES OF MASTER.

The admission of certain printed rules of the defendant company was not error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 725; Dec. Dig. —270.]

5. APPEAL AND ERROR — 750 — QUESTIONS PRESENTED FOR REVIEW—REFUSING NON-SUIT.

Under repeated rulings of this court and of the Supreme Court, an assignment of error upon the ground that the court erred in refusing to grant a nonsuit will not be considered, when the case proceeds to a verdict, and exception is taken to the refusal to grant a new trial on the ground that the verdict was not supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. —750.]

6. INSTRUCTIONS—FEDERAL EMPLOYERS' LIABILITY ACT.

The instructions complained of contained no error requiring the grant of a new trial.

7. INSTRUCTIONS—FEDERAL EMPLOYERS' LIABILITY ACT—NECESSITY OF REQUESTS.

The failure to give certain instructions to the jury, in the absence of timely written requests therefor, was not error.

8. MASTER AND SERVANT — 278—INJURIES TO SERVANT—NEGLIGENCE.

Under the pleadings and the evidence, the jury were authorized to find that the plaintiff's injury was caused by the negligence of the defendant company, and that this negligence was also the negligence of one or more of the three individual agents of the company against whom negligence was alleged in the petition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 734-738, 744; Dec. Dig. 278.]

9. COMMERCE — 27—REGULATION—EMPLOYER'S LIABILITY — EMPLOYMENT IN INTERSTATE COMMERCE.

Under the facts of this case, both the defendant company and the plaintiff, at the time of the infliction of the injury sued for, were engaged in interstate commerce within the meaning of the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. 27.]

10. VERDICT—SUFFICIENCY OF EVIDENCE—INJURIES TO SERVANT.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by H. E. Puckett against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McDaniel & Black, of Atlanta, for plaintiff in error. Atkinson & Born, of Atlanta, for defendant in error.

BROYLES, J. H. E. Puckett sued the Southern Railway Company for damages, based on injuries alleged to have been sustained by him in August, 1911, while at work for the defendant company in its Atlanta yard, as car inspector. On the night of the alleged injuries and prior thereto he had been engaged in inspecting cars which had been put into an interstate train, to wit, train No. 75, which ran between Atlanta, Ga., and Birmingham, Ala. At the time he was injured he had inspected some 23 to 25 cars in this train, and there remained to be inspected 12 or 14 cars which were to be placed in the same train. While waiting for these remaining cars to be placed in the train, and while making the entries and necessary data of the inspection of the cars in his inspection book, a collision between other cars of the defendant occurred in the yard near by, and several tracks of the defendant were thereby obstructed and blocked by the wreckage. An employé of the defendant, one O'Berry, was caught in the collision and pinned beneath a car and the engine. In obedience to the printed rules of the company the plaintiff immediately went to the scene of the wreck, to render what assistance he could, and was there instructed by an employé of the company superior to him in authority to go and get a "jack" to assist in raising the wrecked car, so as to extricate O'Berry and clear the tracks of the wreck. The remaining cars which had not been placed in train No. 75 were to have been

transported over some of the tracks obstructed by the wreck, and on account of these tracks being so obstructed it became necessary to detour these cars for some distance over other tracks, and thereby train No. 75 was delayed about an hour. While the plaintiff was assisting in clearing up the wreck, and while carrying blocks on his shoulder for the purpose of "jacking up" the wrecked car and replacing it on the track, so that O'Berry could be released and the tracks freed from their obstruction, he stumbled over three large clinkers about six or eight inches in diameter, on the roadway near the track, which started him falling, and in stumbling he struck his foot against two old cross-ties overgrown with grass, which were on the roadway near one of the tracks, about five feet from the clinkers, and fell and was seriously and permanently injured.

[8] The eighth and ninth headnotes alone need elaboration. It is earnestly argued by learned counsel for plaintiff in error that the evidence in this case did not show any actionable negligence by the railroad company. The allegations of negligence in the petition were: (1) That three large clinkers were on the roadbed; (2) that two old cross-ties, overgrown with grass, were lying alongside and near the track; and (3) that grass had grown upon the roadbed. It is the duty of the master to furnish his servant with a safe place in which to work, and he is charged with the exercise of ordinary care in the selection and maintenance of such a place. Counsel cites the case of *Lee v. Central Railroad*, 86 Ga. 231, 12 S. E. 307, where it was held that the presence of one clinker of unusual size on the margin of a railway track, where switching is done, and upon which a brakeman accidentally steps in descending from a moving engine, will not render the company liable for a personal injury which the brakeman sustained. In *Georgia Railroad v. Hunter*, 9 Ga. App. 384, 71 S. E. 681, it was held that the railroad was negligent in having a pile of clinkers near its railroad track. The ruling in *Zipperer v. Seaboard Air Line Railway*, 129 Ga. 387, 58 S. E. 872, is not in conflict with the holding in the *Hunter Case*, or with our holding in the instant case. There the defendant, a track hand, while walking along the side of the railroad track, struck his foot against a steel rail which lay in his path, and was injured, and the court held that he could not recover, for the reason that the presence of the rail was not negligence on the part of the railroad company. In that case there was no allegation that it was not necessary for the railroad company to have the steel rail where it was, or that it was placed there in an improper manner. Moreover, in that case the rail was placed on the roadbed, near the defendant's track, and was in full view of every passer-by; it was not overgrown with and concealed by grass, as were the cross-

ties in the case at bar. We are not disposed to extend the ruling of the Supreme Court in the Lee Case, *supra*, so as to hold that, as a matter of law, the presence of three or more large clinkers near a track in a railroad yard is not negligence on the part of the railroad company. In our opinion, under the circumstances of the instant case, it was for the jury to say whether or not the presence of these large clinkers in its yard and near its tracks was negligence. We think also that it was for the jury to say whether or not the presence of the cross-ties over which the plaintiff fell, and the presence of the grass on the roadway of the defendant company, was negligence. As to the cross-ties and grass, the rules of the defendant, as introduced in evidence, specifically provide that old cross-ties be burned, and not left near the tracks, and that the grass shall be kept cut along the roadbed. In our opinion, it was also for the jury to say what was the proximate cause of the plaintiff's injury; whether it was the clinkers over which he first stumbled, or the cross-ties upon which he next stumbled and fell. While he testified that the clinkers started him falling, he distinctly swore also that if it had not been for the cross-ties he would not have fallen.

The petition alleges that certain individual agents of the defendant company, to wit, R. L. Cowan, Samuel Smith, and J. N. Bid- dy, were guilty of the negligence that caused plaintiff's injury. The defendant introduced in evidence a printed rule of the company, addressed to yardmasters, which required its yardmaster to keep the yards of the railroad clear of all obstructions, and it is insisted that, if any particular agent of the defendant was negligent in this case, it was the yardmaster, against whom no negligence was alleged in the petition. The evidence showed that R. L. Cowan was track foreman, Samuel Smith, track supervisor, and J. N. Bid- dy, roadmaster, for the defendant. The company's rules introduced in evidence, however, addressed to track supervisors and track foreman, require them also to see that there are no obstructions on or near the railroad tracks, and require that grass and weeds shall be cut, that brush, weeds, worn-out ties, timber, and other rubbish shall be collected and promptly burned, and that they shall not allow lumber, timber, ties, rails, or other material to be placed within ten feet of the main track or within seven feet of any side track. It is insisted by the plaintiff in error that these rules addressed to track supervisors and foremen refer only to their duties upon the main line of the road and sidings between terminals, and not to the terminal yards of the company. These three named agents of the company, however, testified during the trial for the defendant company, and none of them swore that such rules referred only to the main track of the railroad and to sidings, and not to the tracks and roadbeds in the terminal yard; and

there was testimony both for the plaintiff and the defendant that it was the duty of these particular agents of the defendant to discover and to remove all dangerous obstructions, including old cross-ties, in this railroad yard where the plaintiff's injury occurred, and that the duty to dispose of old cross-ties there was not the duty of the yardmaster. The evidence showed that the cross-ties upon which the plaintiff fell were within seven feet of one of the tracks of the defendant company, in violation of the defendant's printed rules duly introduced in evidence. So, in our opinion, under the pleadings and the evidence, the jury were authorized to find that the plaintiff's injury was caused by the negligence of the three individual employes of the company named in the petition, and that the defendant company was responsible for this negligence.

[9] There is no contention in this case that at the time the plaintiff was injured the railroad company was not engaged in interstate commerce; the sole contention on that point being that the plaintiff was not so engaged. It is not denied that, while the plaintiff was inspecting the cars in the interstate train, and while he was making entries of that inspection in his car inspection book, he was engaged in interstate commerce, but the contention of learned counsel for the plaintiff in error is that, when the collision between the other cars occurred, and when the plaintiff went to the wreck, to assist in jacking up the train to release O'Berry, he was not then so engaged. We cannot agree with this contention. The plaintiff had not completed his work of inspecting the interstate cars, and while so engaged a sudden emergency, caused by the wreck, arose, and, in obedience to the rules of the company, he hastened to the scene of the wreck to render assistance, and was then expressly instructed by an employe of the company superior to him in authority to assist in "jacking up" the wrecked car; and we think that, when so engaged, under the ruling of the Supreme Court of the United States in *North Carolina Railroad Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, he was still engaged in interstate commerce. In the *Zachary* Case, where a fireman left an interstate train, after inspecting, oiling, firing, and preparing his engine for the trip, and while crossing a railroad track in the yard of the defendant company for the purpose of going to his boarding house on a personal errand, he was injured, the United States Supreme Court held that he was still engaged in interstate commerce. In that decision the court said:

"He had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, not-

withstanding his temporary absence from the locomotive engine."

It is insisted that the intention of the plaintiff, at the time of his injury, in "jacking up" the wrecked car, was to release O'Berry from his perilous position, and not to free the tracks from the obstruction so that the remaining cars to be placed in train No. 75 could be transported over the obstructed tracks. We think it immaterial that the primary object of the plaintiff may have been the rescue of his fellow employé, O'Berry. If the plaintiff helped to "jack up" the wrecked car and engine, though primarily done for the purpose of releasing O'Berry, it was nevertheless the first step to be taken in clearing the obstruction from the tracks so that over these tracks could be transported the remaining cars to be placed in train No. 75. In our opinion, his work facilitated the interstate commerce of the railroad, and, consequently, he was engaged in interstate commerce when injured. It is immaterial that the tracks were not cleared in time for the remaining cars (that went into train 75) to be switched over them, and that these cars were detoured over other tracks.

In *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, the defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an ironworker employed by the defendant to repair its bridges and tracks. At the time of his injury he and another employé, under the direction of their foreman, were carrying from a tool car to a bridge some bolts which were to be used by them in repairing the bridge; the repairing to consist in taking out a girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge. Both of these bridges were being used regularly in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts over the temporary bridge, on his way to the bridge he was to repair, he was run down and injured by an intrastate train. On this statement of facts the Supreme Court of the United States (three of the Justices dissenting) held that the plaintiff was engaged in interstate commerce at the time of his injury, and entitled to the benefit of the federal act. And the majority of the court said:

"Tracks and bridges are as indispensable to interstate commerce * * * as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But, independently of the statute,

we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to the others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

And again in that case the court says:

"True, a track or bridge may be used in both interstate and intrastate commerce, but, when it is so used, it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

The court in that case, answering the contention that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where work was to be done some of the materials to be used therein, said:

"We think there is no merit in this. It was necessary to the repair to the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

In view of the decision in the *Pedersen Case*, supra, the decision of the Circuit Court of the Northern District of Georgia in *Taylor v. Southern Railway Co.* (C. C.) 178 Fed. 330, in which it was held that a member of a railroad bridge gang, whose duties required repair of bridges in different cities, and who, while engaged within the scope of his employment in repairing a bridge on the defendant company's line, was injured by an alleged defective scaffold, was not employed in interstate commerce, was erroneous.

We think that, under the ruling in the *Pedersen Case*, the plaintiff in the instant case, when he was engaged in helping to remove obstructions from the railroad tracks of the defendant company, where these tracks were being constantly used to transport cars in both interstate and intrastate commerce, was clearly engaged in interstate commerce. The tracks obstructed by the wreck were "instrumentalities" used indiscriminately for both interstate and intrastate commerce; in other words, cars going into both interstate and intrastate trains were constantly switched and transported over these identical tracks; and, when these tracks became obstructed, the clearing of the obstruction certainly facilitated both the interstate and intrastate commerce of the railroad. In railroad yards both "lead" and "switch" tracks are indispensable to interstate commerce. Such tracks are just as important to carry on the business of the railroad as are the main tracks, or tracks outside of the

yard. These yard tracks are necessary in making up trains and in switching, and in classifying and distributing the different cars that make up the completed interstate or intrastate train. See also, in this connection, *Central Railroad v. Colasurdo*, 192 Fed. 901, 113 C. C. A. 379.

The case of *Ill. Cent. R. Co. v. Behrens*, 233 U. S. 473, 84 Sup. Ct. 648, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, cited by counsel for plaintiff in error, does not control the instant case, as contended. The decision in that case holds only that the plaintiff at the time of his injury must be engaged in interstate commerce.

Judgment affirmed.

(15 Ga. App. 315)

HARRIS v. STATE. (No. 5322.)†

(Court of Appeals of Georgia. Jan. 20, 1914.)

(*Syllabus by the Court.*)

1. WEAPONS — 3 — CARRYING WEAPONS — CONSTRUCTION OF STATUTES.

The act approved August 12, 1910 (Laws 1910, p. 134), which prohibits any person from having or carrying a pistol without first obtaining a license, should receive a reasonable construction in accord with the legislative purpose in enacting it.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 3; Dec. Dig. 3.]

2. WEAPONS — 13 — CARRYING WEAPONS — CRIMINAL OFFENSE.

It would be unreasonable to suppose that the Legislature ever intended to prohibit the use of a pistol where its use is really necessary by one who knows, or has good and ample reason to apprehend, that an act of adultery is impending or actually in progress between his wife and a despoiler of his home (or to prohibit a person's use of a pistol in any similar case where the use of a pistol as a weapon of defense may be necessary and thus by law be justifiable), by requiring such a one to wait until he can go to the ordinary's office of the county of his residence and obtain a license, before he is permitted to use a pistol for the protection of his family, or to prevent an adultery with his wife, or even to take a pistol into his manual possession.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 16, 17; Dec. Dig. 13.]

3. WEAPONS — 13 — CARRYING WEAPONS — CRIMINAL OFFENSE.

When, in a sudden emergency, the use of a pistol is absolutely necessary for the defense of one's person, his family, or his property, the temporary manual possession of a pistol for the purpose of defense, or the defense of one's family or property, and the momentary carrying of the pistol on that occasion, and for that purpose only, is not unlawful.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 16, 17; Dec. Dig. 13.]

4. DENIAL OF NEW TRIAL — ERROR.

The court erred in excluding testimony as complained of in the motion for a new trial, and in refusing to charge the jury as requested; and a new trial should have been granted.

Pottle, J., dissenting.

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Tom Harris was convicted of carrying a

pistol without a license, and brings error. Reversed.

R. Earl Camp, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

RUSSELL, C. J. [4] The writ of error in the present case challenges the correctness of the lower court's rulings in excluding certain testimony tending to show the existence of an emergency which might justify the immediate use of a pistol by the defendant, and in refusing to charge that, if the jury believed from the evidence that the defendant took the pistol from the place where it was lawfully located, for the immediate and sole purpose of its use to prevent a person from consummating an act of sexual intercourse with his wife, which he knew to be in progress or about to be consummated, the jury could not convict him. The trial judge restricted the defense of the accused literally to the procurement of the license required by law, and charged the jury that, if they found he had a pistol in his manual possession at a place other than his home or place of business, the burden was upon him to show that he had complied with the law by registering and giving bond and procuring a license, and that upon failure of such proof he should be convicted. The judge excluded all testimony tending to show that the only purpose for which the defendant obtained the pistol, or carried it, was to prevent the consummation of an act of adultery with his wife, although the defendant, in his statement at the trial, asserted that this was the case. According to the defendant's statement, he was searching for his wife at night. He inquired at a house where he suspected her to be in company with one Will Reece. Some of the occupants of the house informed him that his wife was not there, but about that time he recognized her voice in a rear room of the house, and also detected a man's voice in the same location. He ran as quickly as possible to a house near by and procured the pistol, and, crossing the street to the house where he suspected his wife to be, shoved open the door and discovered her in bed with her paramour, Will Reece, whom he shot.

[1, 2] The judge's rulings upon the evidence, and his instructions to the jury, even under the circumstances narrated by the defendant, excluded any possibility of a defense, because the defendant admitted that he had not registered or procured the statutory license which is required to legalize the carrying of a pistol. The question presented, therefore, is whether there are any circumstances under which a pistol can be used when the person who is in manual possession of the pistol has not obtained a license, or whether the act of the General Assembly prohibiting the carrying of pistols without a license (Acts 1910, p. 134) is to be given an

absolutely literal construction. The majority of the court are of the opinion that the facts of this case bring it squarely within the rule announced by the Supreme Court in *Strickland v. State*, 137 Ga. 1, 72 S. E. 260, 36 L. R. A. (N. S.) 115, Ann. Cas. 1913B, 323, and that the trial judge should have admitted the evidence which he repelled, and should have instructed the jury as requested. If not directly asserted, it is at least pointedly intimated, in the opinion in *Strickland's Case*, supra, that if one should drop his pistol out of the window of his home, he would not violate the law by going out on the street and picking it up, and returning with it along the street and back into his house. It was said:

"A narrow and literal construction of the act might make it penal for him to pick it up and carry it into his house. It is lawful to sell pistols, but a similar construction might make it impossible for the carrier to deliver them to the dealer, or the dealer to deliver them to the customer. We will not anticipate that any such construction will be given." "The act should receive a reasonable construction."

The question presented in this case is not, as our Brother POTTLE seems to think, an issue between the law and a mawkish sympathy for an outraged husband. The question really presented is whether the law shall be given what the Supreme Court denominates "a narrow and literal construction," which might tend to render this wise legislation unconstitutional, or whether that "reasonable construction" which is commended by the Supreme Court shall be applied in aid of the manifest intention of the General Assembly to pass an act which would prohibit the useless, dangerous, cowardly, and criminal practice of habitually carrying weapons of death, without depriving any citizen of his rights of self-defense, or without so abridging those rights as to render their possession a mere hollow pretense.

[3] Our holding in this case is not confined in its effect to the facts of this particular case, but we are brought face to face with the question whether the Supreme Court, when it said (in answer to our inquiry as to whether the act was constitutional) that "the act should receive a reasonable construction," contemplated any exception whatsoever to its strict letter, under which proof that a license was obtained would be the only defense left open to one shown to have been in possession of a pistol at a place other than his home or place of business, if he does not belong to one of the classes which the law expressly excepts from its operation. Clearly, the statement that the law is to be given a reasonable construction (when we bear in mind the instances referred to in illustration of what is meant by the term) cannot be otherwise construed than as a statement that some instances may be imagined and some

circumstances may rise in which it would be unreasonable to hold to an absolutely literal construction of the language of the act. If so, we should undoubtedly be compelled to hold that one whose life had been threatened, and whose very existence was in imminent peril, not from the fact that threats had been made, but from the undeniable evidence that these were to be made immediately effective, would not be required to take even 15 minutes to get a license, when perhaps it was perfectly apparent to himself and to every bystander that, unless he got a pistol within 5 minutes, or less time, the license would be entirely useless, for the reason that it could serve no possible office for a dead man. The license is intended only for the living. It will not be accepted for ferriage on the river Styx. In an observance of this law according to a strict and literal construction, a good citizen might prefer to die rather than to use his neighbor's pistol without having obtained a license which would entitle him to the manual possession of a pistol, even though under the circumstances the law of the land would justify the use of a pistol in committing a homicide. But we hardly think that the General Assembly had any citizen of that type in mind at the time of the passage of the legislation in question. The prevention by a husband or father of an impending act of adultery is justified upon the principle which permits to one who is assailed the use of a deadly weapon to prevent a felonious assault or a homicide. And for that reason we do not think that the question of sympathy in the slightest degree affects us. The judgment of the majority is controlled solely by the application of the same rules of reasonable construction which have heretofore been applied by this court in *Jackson v. State*, 12 Ga. App. 427, 77 S. E. 371, *Cosper v. State*, 13 Ga. App. 301, 79 S. E. 94, *Amos v. State*, 13 Ga. App. 140, 78 S. E. 866, and other cases.

POTTLE, J. (dissenting). This is a case where I must draw a distinction between the man and the judge. As a man, my sympathy is entirely with the outraged husband, if his statement of the transaction be true, and I wish that the law might be as announced by the majority. As a judge, I have nothing to do with what the law ought to be, but only with what it is. There is no such exception in the statute as the one declared by the court, and I do not think we have any authority to read it into the statute. If the logic of the ruling thus announced be followed, every trial for a violation of this statute will develop into a determination of the issue whether or not the accused was carrying the pistol for a lawful purpose. The law does not permit such an inquiry.

(16 Ga. App. 577)

GREEN v. CITY OF ATLANTA. (No. 5855.)
(Court of Appeals of Georgia. July 3, 1915.)*(Syllabus by the Court.)***INTOXICATING LIQUORS — 172—VIOLATION OF ORDINANCE—MANAGER OF CLUB.**

This case is controlled by the decisions of this court in *Wright v. State*, 14 Ga. App. 185 (2), 80 S. E. 544, and in *Pitts v. City of Atlanta*, 14 Ga. App. 399, 81 S. E. 249, and the judge of the superior court erred in refusing to sanction the petition for certiorari.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 186; Dec. Dig. —172.]

Wade, J., dissenting.

Error from Superior Court, Fulton County;
J. T. Pendleton, Judge.

S. R. Green was convicted in the recorder's court of violating a city ordinance prohibiting the keeping of spirituous, fermented, or malt liquors for unlawful sale. His petition for certiorari was refused by the judge of the superior court, and he brings error. Reversed.

Daley, Chambers & Daley, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

BELL, J. Judgment reversed.

Hon. GEO. L. BELL, Judge of the Superior Courts of the Atlanta Circuit, was designated by the Governor and presided in this case in place of BROYLES, J., disqualified.

WADE, J. (dissenting). I cannot agree with the conclusion reached by the majority of the court that this case is controlled by the cases of *Wright v. State*, and *Pitts v. Atlanta*, and, since the question is one of no little importance, and the opinion of the court in the last-named case was delivered by me, I think it proper to review the facts in this case and give the reasons for my dissent. To my mind, the evidence disclosed in the petition for certiorari makes out a case which comes precisely under the ruling of this court in *Deal v. State*, 14 Ga. App. 121, 80 S. E. 537, and I think that the judge of the superior court properly refused to sanction the petition for certiorari.

Green was convicted in the recorder's court of Atlanta of the violation of an ordinance of that city prohibiting the keeping of spirituous, fermented, or malt liquors for unlawful sale. The evidence set out in the petition for certiorari was as follows: Moon, a city detective, testified that he knew the defendant, and when asked, "Where is his place of business?" said, "I have always seen him at the Eagles' Club," which he described as being in Atlanta. He said that Jones and Brandon went into this club in December, 1913, and Jones brought back and gave to him a half pint of whisky, which the witness carried to the office of Chief Detective Lang-

ford, where it had since remained; that on the 13th of December, 1913, he talked with the defendant as to the latter's connection with that club, and the defendant then stated that he was manager of the Eagles' Club. On cross-examination, when the witness was asked if it was not true that he met the defendant for the first time on the 15th of December, in the detective's office, he replied that he did not remember, but he would say:

"Probably he [the defendant] might have been there and came down later. I know I saw him in the chief's office, since you recall the occasion. I have a faint recollection that probably he wasn't there, and a copy was left for him, and he came down later in the afternoon."

He further admitted on cross-examination, that he saw Jones "go into the club, the entrance to the club"; that he saw him go up in the elevator, but did not know of his own knowledge whether Jones actually went into the club itself.

W. J. Jones testified that he did not know the defendant, but he knew where the Eagles' Club was, and that he visited the club on December 11, 1913, together with Mr. Brandon; that he met Mr. Brandon, whom he had known previously, and together they went to the club, of which Brandon was a member; that Brandon had a key with which he opened the door, and they entered "some serving rooms, inclosed rooms, rooms that are partitioned off by curtains," which they passed through, and went into another room "where the cashier stays, and got an order." The witness said that he gave Brandon the money, and Brandon "signed the paper, and we got a half pint of whisky and two drinks"; that they drank the drinks, but he gave the bottle of whisky to Detective Moon; that he paid 40 cents for this half pint of whisky, and the drinks and the bottle cost 65 cents altogether, he thought; that he could not say where the liquor came from that was brought to Brandon and himself, but "it was brought on a tray by a waiter"; that he gave Brandon the money, and Brandon gave it to the cashier; that he was not a member of the Eagles' Club, and had never been a member of that club, nor had he ever been there before or since; that Brandon said that he (Brandon) was a member of the club, though he said he was in arrears with his dues; that he thought the cashier recognized Brandon as a member; and that both he and Brandon signed a register book when they went in, and Brandon registered him from Los Angeles, Cal. The bottle of whisky alleged to have been purchased at the club was admitted in evidence without objection.

A. W. Brandon testified, in response to a question as to what connection he had with the Eagles' Club in Atlanta on December 11, 1913:

"I don't know what it was. I met Mr. Jones and I carried him up there to the Eagles' Club

and registered him from Los Angeles, Cal., and I told him I would carry him up there."

He said further, answering a question as to what right he had to buy a drink at this club:

"I am a member of the Eagles, and I bought two drinks for 30 cents, and I bought a half pint, which was 40 cents, and we came back and went into the Fourth National Bank and drank it up."

He testified that he himself paid for the drinks and the half pint of whisky, and the whisky was taken out of his locker; that orders were always given to supply lockers ahead of time; that he gave an order to supply his locker with liquor to the defendant, the manager of the club, but he did not remember how much the order was for or when it was, though since he gave the order he had "gotten several drinks" of whisky, which he did not pay for when he ordered them, but paid when he got the whisky; that the Eagles' Club had about 400 members, who paid \$1 per month as dues and an initiation fee of \$10, he thought; that he ordered "Kentucky Taylor" whisky for his locker, ordering so many quarts, but he did not recall how many. The witness further explained how members of the club got liquor from their lockers, and said a member would go to the cashier's stand and get an order and the waiter would bring the liquor to him; that the member would go in and sign a ticket, and the liquor would be brought to him, and he would pay for it as it was brought to him; that a member would not pay for whisky when it was ordered, but would pay for it when he signed a ticket. The witness further said that his order to supply his locker was given by him before he and Jones went into the club on December 11, 1913; that he had ordered whisky put in his locker, and this order (on December 11th) was for service from that locker; that Jones gave him no money, but he himself paid for the drinks and half pint; that he drank the half pint himself; and that neither he nor Jones saw Detective Moon. In response to a question whether Green, the defendant, was an officer of the club at the time the witness gave to Green the order to stock his locker, referred to by him, he said Green "is manager of the club; he is manager of the Eagles' Club."

1. It was insisted that the evidence for the city failed to show that Green, the defendant, was the manager of the Eagles' Club on December 11, 1913, when Brandon and Jones visited the club and obtained two drinks and a half pint of whisky, for which 65 or 70 cents was paid, either by Jones or Brandon. The evidence of Moon was that he knew Green, and, when asked where Green's place of business was, he replied that he had always seen him at the Eagles' Club. Moon further testified that Green admitted to him on December 13, 1913, that he was then manager of the Eagles' Club. At the trial, on April 17, 1914, Brandon testified, in response

to the question, "Why did you give that order to Mr. Green; is he an officer of the club?" "Yes, sir; he is manager of the club." To the question, "He is manager of the Eagles' Club?" the witness replied, "Yes, sir." At the trial Green made no statement as to whether he was manager of the club at that time or was manager on December 11, 1913, when Brandon and Jones visited the club. Brandon further testified that previous to the visit made by Jones and himself on December 11, 1913, he had given to the defendant, as manager of the club, an order to supply his locker with liquor, though he did not remember how much the order was for or when it was. So it appears that before Brandon and Jones obtained the whisky at the Eagles' Club Green was the manager in charge of the club (or of the locker feature thereof), to whom Brandon gave an order to stock his locker with liquor; that two days after the purchase of the whisky by Jones and Brandon, Green himself stated to Moon that he was *then* manager of the Eagles' Club, and that on the day of the trial, April 17, 1914, Brandon, who stated he was a member of the club, testified that Green was *still* the manager of the club. We think, from all these circumstances, that the recorder was authorized to infer, to the exclusion of every other reasonable hypothesis, that Green was the manager on December 11, 1913, in the absence of anything whatsoever to the contrary.

Our Code recognizes various presumptions of law, such as innocence, and in some cases of guilt, of continuance of life for seven years, of a mental state once proved to exist, and "all similar presumptions," and provides that such presumptions may be rebutted by proof. Penal Code, § 1016. It is said in 1 Wigmore on Evidence, 514, par. 437:

"When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. * * * So far, then, as the interval of time is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control."

In 1 Greenleaf on Evidence (16th Ed.) 138, § 41, it is said:

"Other presumptions are founded on the experienced continuance or permanency of longer and shorter duration in human affairs. When, therefore, the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question. In this way, continuance of ownership of property may be presumed; of possession of property; of residence; of an agent's authority; and the like."

Again, in the same book (page 140, § 42), it is said:

"On the same ground, a partnership or other *similar relation* [italics ours], once shown to exist, is presumed to continue, until it is proved to have been dissolved."

See, also, 2 Stark. Ev. 590, 688.

2. As already stated, I do not agree with the majority of the court in the opinion that the case made out in the petition for certiorari is exactly covered by the case of *Pitts v. Atlanta*, 14 Ga. App. 399, 81 S. E. 249, and I think that an examination and analysis of the facts recited in that case will show that there is a very marked difference between the proof connecting Pitts with the alleged sale of whisky in, near, or about the Beavers' Club, of which he was admittedly the manager, and the facts connecting Green in the case under consideration with the purchase of whisky by Jones or Brandon in the Eagles' Club. In the Pitts Case it is expressly stated that:

It did not appear "that the alleged sale of liquor was made by permission or in conformity with the rules and regulations of the club, or by the actual or implied consent of any of its officers or members; nor (what is more important) does it appear that either of the sales testified to by the sole witness for the prosecution was made in the presence, or by consent, or with the knowledge, of the defendant, or that he ratified or approved the sale in any way; and, so far as the record discloses, the sales were made by parties unconnected with the club."

In the present case it appears that the particular sale relied upon to show the unlawful purpose for which liquor was stored in the Eagles' Club by the manager of that club, the defendant, Green, was made in conformity with the rules and regulations of that club, and therefore by the consent of its officers and members. Though the evidence does not disclose that the sale shown by the testimony was made in the presence of the defendant, he was manager of the club, and purchased whisky for the use of the members thereof, and must have had full knowledge of the manner in which the club was conducted, and the sale must therefore have been by his consent, and must have been ratified and approved by him, especially as it appears it was made by means of an order signed by the cashier of the club, who was presumably under his control as manager, and the whisky itself was served by a waiter in the employ of the club, who was thus connected therewith and was likewise presumably under the control of the manager. Green's connection with the sale of whisky at the Eagles' Club was clearly shown by Brandon, who testified not only that he gave an order to Green, as manager, to stock his locker with whisky, but also that he had thereafter "gotten several drinks" from that particular locker, stocked by virtue of this order to Green, and that on December 11, 1913 (after the order was given), he obtained two drinks and a bottle of whisky from his locker at the club; thus showing that Green had complied with his request to order whisky of a certain brand for his consump-

tion. It can readily be seen, therefore, that absolutely no reasonable parallel exists between the Pitts Case and the case under consideration.

3. In the able opinion delivered by Judge Pottle for this court in the case of *Deal v. State*, 14 Ga. App. 121 (1), 80 S. E. 537, it is said:

"All who procure, counsel, command, aid, or abet the commission of a misdemeanor are regarded by the law as principal offenders, and may be indicted as such." The manager of a social club who orders intoxicating liquors for the use of its members, and who either directly or indirectly procures, counsels, commands, aids, or abets in the making of a sale of such liquors, is guilty as a principal. This is true even though he may not have been present when the particular sale was made, and had no knowledge of it until after it was consummated."

In the same case it is further held:

"Where a number of persons each contribute money to an agent, who purchases a stock of intoxicating liquor, and thereafter dispenses, upon the order of one of them, a quantity of the liquor in exchange for a book of coupons purchased either by person or by the person to whom the liquor is delivered, the transaction is a sale in violation of the prohibition law, notwithstanding the persons for whose benefit the liquor was purchased compose a bona fide club, organized for social and intellectual welfare, and the use of the liquor is only an incident to the main purpose of the club, and although no profit is made on the sale. And this is true whether they have become incorporated as a social club or whether they constitute a voluntary association of persons for mutual pleasure and benefit."

In the decision it is said (14 Ga. App. 129, 80 S. E. 541):

"Before the separation from the common stock and the delivery of the quart of whisky to Register, some person other than himself was vested with the title; in other words, he bought a quart of whisky from somebody and paid \$1.25 for it. Counsel for the accused insist that, if there was a sale, Register bought it from the member who introduced him. This cannot be so, for the member never had any title to it which he could transmit to Register. But suppose even this should be conceded; every person who aided or abetted the sale to Register would be equally guilty with the member. If the club was incorporated, the title to the whisky was in the corporation. It was ordered by the manager, its employee, acting under its direction, and, when delivered, the whisky became assets of the corporation."

It is further said in the same decision (14 Ga. App. 130, 80 S. E. 542) that the transaction would not be regarded as any the less a sale should the club be unincorporated and a mere voluntary association of persons. And it is said:

"If one hundred people should order a barrel of whisky and each contribute an equal amount and pay for the whisky, the title would pass into all of them, and they would own the liquor in common. In such a case there would be no objection to a plan of distribution which did not involve the elements of a sale; but, if each of these persons should be allowed to withdraw a drink at the time and pay therefor a price which had been agreed upon by all of them, the transaction would be a sale. It would be a sale because title to the drink had been in all of the persons in common; and, when it was transmitted to the individual who

paid therefor a price agreed upon, there was a sale by the ninety-nine to the one of all their interest in the whisky purchased. The infinitesimal interest of the one person in the drink thus obtained would not prevent the transaction from being a sale."

It is further said (14 Ga. App. 131, 80 S. E. 542) that:

"Unless there be, in advance of the purchase, payment in good faith of a specified amount of money by each person, or unless there is an agreement among them stipulating the quantity for which each shall pay, and each person receives the quantity for which he has agreed to pay or has paid, the transaction would be a sale, and therefore obnoxious to the law."

And, speaking as to the construction of the prohibition act, Judge Pottle said in the same case (14 Ga. App. 134, 80 S. E. 543) that the statute authorizing the operation of social clubs dispensing intoxicating liquors "did not intend to authorize the sale of such liquors, either to a member or to any one else." It seems clear to me that, where a member of a club directed the manager to order for him some whisky of a certain brand and place it in his locker, and thereafter obtains an order from the cashier of the club, upon which a waiter serves him with intoxicating liquor, for which he pays at the time he receives the liquor, this is a sale in violation of the prohibition law, under the decision in the Deal Case, *supra*. Certainly nothing appears in the record in the case under consideration from which it may be determined that any definite amount of whisky was ordered by Brandon as a member of the Eagles' Club, for which he was to pay the actual cost, together with the expense of transporting it and of actually serving it whenever the whisky so ordered was requested by him; but it appears that he simply paid what was demanded whenever and as he applied for the whisky for consumption, and clearly there was no "payment in good faith of a specified amount of money" by Brandon in advance of the purchase of the whisky for his locker by the defendant, nor does it appear that there was any agreement among the members of the Eagles' Club stipulating the quantity of liquor for which each member should pay, or that each person received the precise quantity only for which he had agreed to pay or had paid; and hence "the transaction would be a sale, and therefore obnoxious to the law." *Deal v. State, supra*.

Evidently, the whisky was ordered by the manager of the club and placed in the common stock, from which it was drawn out on tickets or orders issued by the cashier of the club to the members thereof, who paid for whatever they consumed when or at the time they actually obtained it. It cannot be supposed, from anything in the testimony of Brandon, that he was under contract to pay to the club or to Green a definite amount for any precise quantity of whisky, or that Green or the club could have called upon him to pay

for more than whatever amount he might elect to use and pay for as used. The title to the whisky ordered by Green must have been in the club or in Green, and certainly was not in Brandon; and, this being true, when Brandon asked for and obtained a certain quantity of that whisky, and paid therefor at the time, even though he could only obtain it on an order signed by the cashier, it was nevertheless a sale to him, for at that time the title to the whisky then delivered passed, in consideration of the money then paid. The requirement that an order should first be given by the cashier amounted apparently to no more than a certificate to the effect that Brandon was a member of the club, entitled, under its rules, to buy the whisky of the club, and was a mere device by which a sale was effected.

To contrast briefly the facts in the Pitts Case with the facts in this case as I see them, it may be said that in the Pitts Case there was no evidence that the sales which were proved to have been made in, near or around the Beavers' Club were made by an officer, agent, or employé of that club, or by any person connected therewith, or in accordance with the by-laws, rules, and regulations of the club, or by the consent of its officers or members, or that these sales were ratified thereafter by Pitts. The sales may have been made by an outsider without any authority from Pitts or from the club; and, since there was nothing to show that the manager, Pitts, was present and participating in or thereafter ratified these sales in any way, this court properly held that the evidence was not sufficient to warrant his conviction. In the present case the manager, Green, himself ordered for the members of the club the whisky, which was afterwards served to them in a room of the club, which was provided with "serving rooms, inclosed rooms, rooms that are partitioned off by curtains," adapted to the convenience of parties desiring to partake of intoxicants with some degree of privacy, and intoxicants were served to members of the club as applied for by them on a check or order signed by the cashier in the employ of the club, and conveyed to the consumer by a waiter also in the employ of the club, and such intoxicants were paid for as obtained, and Green's knowledge as manager of the club and his connection with the system and plan by which the sales were so made was thus absolutely established, and his ratification thereby sufficiently shown; so that, in my opinion, under the decision in the Deal Case, *supra*, Green participated in the unlawful sale and aided and abetted in effecting the same.

In the Wright Case, 14 Ga. App. 185 (3), 80 S. E. 544, it was said:

"One employed by such a club as secretary and treasurer, and whose only duties are to collect the dues and fees from the members, keep the books, and look after correspondence for the club, and who does not in any other way participate in the illegal sale of intoxicat-

ing liquors by the club, is not guilty either of selling intoxicating liquors or of keeping them on hand at his place of business."

In this case it appears that Green had other duties than those discharged by the manager in the Wright Case, supra, for, according to the testimony of Brandon, he was charged with the duty of ordering the liquors consumed in the club, and did, in fact, order liquor to be thereafter purchased, and which was actually purchased by Brandon, one of the members of the club, in accordance with the rules and regulations of the club, and under the particular scheme or device adopted by this particular club to effect sales of intoxicating liquors.

If the Deal Case, supra, is to be adhered to by this court, and if the rulings of this court as therein set forth mean anything, the transaction as set out by the evidence of Brandon himself was plainly in violation of law, and the liquor at the Eagles' Club, which was under the control of the manager Green, was stored and kept for the purpose of unlawful sale, since such a purpose may be inferred from one unlawful sale alone, and the proof was clear that the sale to either Brandon or Jones was unlawful.

I think, therefore, that the judge of the superior court correctly refused to sanction the petition for certiorari.

(16 Ga. App. 574)

FRANK ADAM ELECTRIC CO. v. WITMAN et al. (No. 5820.)

(Court of Appeals of Georgia. July 3, 1915.)

(*Syllabus by the Court.*)

1. PROCESS —160—SERVICE—ATTACK—VOID PROCESS.

The fact of service not being denied, it was not necessary for the defendant to file a traverse of the officer's return, as a condition precedent to being allowed to introduce evidence to substantiate the facts alleged as the grounds of his affidavit of illegality.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 223; Dec. Dig. —160.]

2. JUDGMENT —17—PROCESS TO SUSTAIN—NAME OF PARTY.

To bind a party by a judgment, irrespective of what other portions of the record may show, it must appear that he has been served with process directed to him, or else that he has, by some express or implied waiver, dispensed with the necessity for process.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. —17.]

3. AFFIDAVIT OF ILLEGALITY—VOID PROCESS.

There was no error in the judgment sustaining the affidavit of illegality nor in overruling the motion for a new trial.

(*Additional Syllabus by Editorial Staff.*)

4. PROCESS —163—AMENDMENT—VOID PROCESS.

A process, void because omitting the defendant's name therefrom, cannot be amended, under Civ. Code 1910, § 5693, especially by the clerk on his own motion.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 224-238; Dec. Dig. —163.]

Error from Municipal Court of Macon; Augustin Daly, Judge.

Action by the Frank Adam Electric Company against D. Witman and others. Judgment sustaining the affidavit of illegality filed by the named defendant, and plaintiff brings error. Affirmed.

Mallory & Wimberly and P. O. Holliday, all of Macon, for plaintiff in error. Harris & Harris, of Macon, for defendant in error.

RUSSELL, C. J. Frank Adam Electric Company instituted suit in the municipal court of the city of Macon upon certain promissory notes made by Witman & Mountford, a partnership composed of J. M. Witman and W. J. Mountford, Jr., and indorsed by D. Witman. The petition prayed for process directed to Witman & Mountford and D. Witman. The process stated the case as "Frank Adam Electric Company v. Witman & Mountford." In the body the process read:

"The defendant Witman & Mountford is hereby required personally or by attorney to be and appear," etc.

Copies of the petition and process were served on J. M. Witman, D. Witman, and W. J. Mountford, Jr. The suit was undefended, and judgment was entered against the partnership and the individual members thereof, and also against D. Witman. On this judgment execution was issued, and a levy was made thereunder upon certain property of D. Witman. To this levy D. Witman filed an affidavit of illegality, alleging:

"Deponent has never had his day in court, was never served with any process directed to him to defend the suit whereon said execution was based, nor did he waive service, nor did he appear in or defend said suit."

The case was heard by the judge without the intervention of a jury. The evidence on the trial showed substantially the foregoing facts, and, in addition, C. R. Wright, the clerk of the municipal court of Macon, testified that after judgment had been entered in the original suit, and just prior to issuing the execution thereon, his attention was called to the fact that the process was directed only to Witman & Mountford, while the petition showed that D. Witman was also a party defendant. He thereupon changed the original process on file in his office by inserting the following names after the words "Witman & Mountford" in the body of the process: "J. M. Witman, W. J. Mountford, Jr., and D. Witman." It was also undisputed that D. Witman was not a member of the firm or partnership of Witman & Mountford, nor connected therewith in any way; his name simply appearing on the back of the notes as an accommodation indorser. The judge sustained the affidavit of illegality, and after having made a motion for new trial, which was overruled, the plaintiff excepted.

The brief for the plaintiff in error sets forth two contentions: (1) That the court

erred in allowing evidence relative to the changes made in the process and as to the names of the persons originally contained therein; and (2) that the service of the process as originally served was sufficient to require the defendant D. Witman to appear and answer the suit. We see no merit in either contention.

[1] It was not contended that the return of the sheriff was untrue as originally made. The only contention of the defendant was that the actual service, as made, was insufficient to require him to answer. The fact of service and the truthfulness of the return of service were not denied. The sole contention of the defendant was that the process, as to him, was void, and that there had been an unauthorized change in the process by the clerk after the service was made. No act of the sheriff was challenged, nor was the truth of any statement or certificate made by him denied. We do not think he was a necessary party to the proceeding.

[2] It is undisputed that the process issued by the clerk and the copy thereof which was served on D. Witman were directed only to Witman & Mountford, and commanded only them to be and appear and defend the suit. Judge Powell, speaking for this court in *John Holland Gold Pen Co. v. Williams & Co.*, 7 Ga. App. 173, 174, 66 S. E. 540, 541, said:

"To bind a party by the judgment in a suit, irrespective of what other portions of the record may show, it must appear that he has been served with process directed to him, or else that he has, by some express or implied waiver, dispensed with the necessity of process."

It is not contended in the present case that there was any waiver of process, and it is clear, from a mere reading of this quotation, that there is no merit in the contention of plaintiff in error that the process was a valid process merely because the petition, which was attached thereto, named D. Witman as a party defendant and prayed process as against him. In the case of *Neal-Millard Co. v. Owens*, 115 Ga. 959-961, 42 S. E. 266, 267, the Supreme Court said:

"Process is a means whereby a court compels the appearance of a defendant before it or a compliance with its demands." 20 Enc. P. & P. 1101. To every petition there must be annexed a process, unless the same be waived. Civil Code, § 4974 [Civil Code of 1910, § 5552]. Where no process is attached to the petition, and process is not waived by the defendant, service of the petition upon him does not give the court jurisdiction to render a judgment against him. In such a case process cannot be supplied by amendment at the trial term and service be perfected. * * * A void process is equivalent to no process, and the same result would follow from attaching a void process as from a failure to attach any process whatever."

The petition in the case last cited was against two different parties, while the process was issued in the name of one of the parties named in the petition and in the name of some person not named in or con-

nected with the suit. Service was made upon both of the parties named in the petition and whose names appeared on the backing of the petition as the defendants therein. The court said:

"Where a defendant in a pending suit is served with a process in which an entirely different person is named as defendant, such process is, as to the person served therewith, no process at all."

[3] It is clear to us, therefore, that in the present case the process as to D. Witman was no process at all, and that the court correctly sustained the affidavit of illegality.

[4] The process, being void, could not be amended (Civil Code, § 5693); and, even if it could be amended, the amendment could not be made by the clerk upon his own motion. It is grossly improper for a clerk to alter any document of file in the clerk's office, and such an act is forbidden by law. *Matthews v. Reid*, 94 Ga. 461 (4), 19 S. E. 247.

There was no error in overruling the motion for a new trial.

Judgment affirmed.

(16 Ga. App. 587)

PERRETT v. STATE. (No. 5958.)

(Court of Appeals of Georgia. July 3, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 923—JURY § 90—NEW TRIAL—QUALIFICATION OF JURORS—RELATIONSHIP TO PROSECUTING WITNESS.

Where one is tried under a presentment of a grand jury for the offense of using of, to, and in the presence of a named person, who was a witness for the prosecution, certain abusive language tending to cause a breach of the peace, another, who is related to this person within the ninth degree, is disqualified to sit as a juror on the trial; and this is true, even though the aggrieved person is not named as prosecutor, and though there is no evidence that he acted as such. Where such relationship is shown to be true without dispute, and it is unquestioned that the relationship was unknown to the defendant or his counsel until after verdict, it is error for the court to refuse the defendant a new trial upon his motion. *McElhannon v. State*, 99 Ga. 672 (1), 680, 26 S. E. 501. See, also, *Smith v. State*, 2 Ga. App. 574, 59 S. E. 311; *Ledford v. State*, 75 Ga. 856, 857; *Lyons v. State*, 133 Ga. 600, 66 S. E. 792; *Georgia Railroad v. Cole*, 73 Ga. 713; *Temple v. Central Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. § 923; Jury, Cent. Dig. §§ 413-418, 422; Dec. Dig. § 90.]

2. CRIMINAL LAW § 1181—DISPOSITION OF CASE—RULINGS ON ASSIGNMENTS.

Since the original trial was void, and the errors alleged in the remaining assignments are not likely to recur upon a subsequent trial, no rulings will be made thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3192-3194, 3202; Dec. Dig. § 1181.]

Error from City Court of Blackshear; R. G. Mitchell, Jr., Judge.

G. P. Perrett was convicted of using abusive language tending to cause a breach of the peace, and he brings error. Reversed.

Walter A. Milton, of Blackshear, for plaintiff in error. S. F. Memory, Sol., of Blackshear, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 545)

PERRY v. KENNON. (No. 5792.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. INSTRUCTIONS.

The charge of the court in this case was both full and fair, and the excerpts therefrom, to which exception is taken, are not materially erroneous.

2. NOTARIES \Leftrightarrow 2—APPOINTMENT—PROOF.

Since the authority of a commercial notary public depends upon an order of the judge of the superior court appointing him, proof that no such order appears upon the minutes of the superior court of the county in which an alleged commercial notary public purported to act may establish, prima facie at least, the fact that he was without authority in that county. Where a writing has been admitted to record upon the probate of such an alleged officer, and it is proved that the minutes fail to show an order appointing him, the burden is upon the party offering the writing to show that the alleged officer was legally appointed.

(b) Even though no special issue was submitted, and the paper in question had been admitted in evidence, it was proper to permit proof that the person upon whose probate it had been admitted to record was in fact not qualified officially to attest the writing, since such proof would tend to show that the paper had been improperly admitted to record. The instruction of the trial judge on this subject was not erroneous.

[Ed. Note.—For other cases, see Notaries, Cent. Dig. §§ 1½-6, 8-10; Dec. Dig. \Leftrightarrow 2.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the jury to find for the plaintiff, and the court did not err in overruling the motion for a new trial.

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by Susie Kennon against Jack Perry. Judgment for plaintiff, and defendant brings error. Affirmed.

Davis & Sturgis, of Dublin, for plaintiff in error. Burch & Burch, of Dublin, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 538)

HEIMER v. STATE. (No. 6096.)

(Court of Appeals of Georgia. July 3, 1915.)

Writ of Error to United States Supreme Court Allowed July 12, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \Leftrightarrow 394 — INCRIMINATING EVIDENCE—SEARCH.

"Evidence obtained by the illegal seizure and search of a defendant's person, which compels him to incriminate himself, is inadmissible against him. But incriminating facts discov-

ered by another from an illegal search of the property or premises of the defendant are admissible against him." Warren v. State, 6 Ga. App. 18, 64 S. E. 111; Hughes v. State, 2 Ga. App. 29, 58 S. E. 390; Glover v. State, 4 Ga. App. 455, 61 S. E. 862; Croy v. State, 4 Ga. App. 456, 61 S. E. 848; Rogers v. State, 4 Ga. App. 691, 62 S. E. 96; Williams v. State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; Duren v. Thomasville, 125 Ga. 1, 53 S. E. 814. In the present case the defendant was not even present at the time of the alleged illegal search and at the time the facts testified about were discovered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 875, 876; Dec. Dig. \Leftrightarrow 394.]

2. CRIMINAL LAW \Leftrightarrow 394 — EVIDENCE — SEARCH.

The exception taken to the admission of testimony as to facts discovered in an upstairs room of the building occupied by the defendant is not meritorious. From the fact that the defendant's employé, who was in charge of his business, produced and voluntarily surrendered to the searchers a key to the upstairs room, connected by a stairway with the lower floor of the building occupied by defendant, the jury would have been authorized to find that this room was a place wherein a part of his business was conducted, and therefore was a part of his place of business.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 875, 876; Dec. Dig. \Leftrightarrow 394.]

3. ARGUMENT OF COUNSEL—CURE OF ERROR.

The instructions given the jury relative to the alleged improper argument by state's counsel fully cured whatever improper effect, if any, it might have had upon the jury.

4. INTOXICATING LIQUORS \Leftrightarrow 239—PROSECUTION—CAUTIONARY INSTRUCTIONS.

The court charged the jury as follows: "You, as jurors, and myself as judge, are not concerned in any way with the wisdom or policy of the General Assembly in passing what is known as the 'prohibition law.' You and I belong to a separate branch of the government; we belong to the judicial branch, whose duty it is to enforce the law as we find it written in the books, and by 'enforcing the law' I mean, not only is it the duty of the court and jury to convict the guilty when legally accused, but just as well to acquit the innocent when improperly and illegally accused." This charge is not subject to the exception that it put too much stress upon the wisdom of the prohibition law of Georgia, or tended to impress the jury with the importance of the case. Special reference to the importance or policy of the criminal statute for a violation of which one is being prosecuted may sometimes tend to prejudice the rights of the accused, and the practice is not to be commended, but in the present case it is not made to appear that the charge was not called for and necessary on account of improper argument of counsel, or for some other reason not appearing in the record. But whether it was or was not, when considered in the light of the charge as a whole, it was not legally erroneous.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331-347; Dec. Dig. \Leftrightarrow 239.]

5. INTOXICATING LIQUORS \Leftrightarrow 239—PROSECUTION—INSTRUCTIONS—INFERENCE OF GUILT.

The charge of the court in regard to the prima facie inference of guilt, raised by the showing that the defendant had in his possession an internal revenue special tax receipt, as required by section 3239 of the Revised Statutes of the United States, was in accord with the act of the General Assembly approved Au-

gust 21, 1911 (Acts 1911, p. 181), and was not erroneous.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331-347; Dec. Dig. § 239.]

6. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

After a careful study of the record in this case, this court is of the opinion that there is no substantial merit in any of the exceptions taken to the charge of the court, nor in the admission of the testimony to which objections were interposed. The evidence fully warranted the verdict, and the court did not err in overruling the motion for a new trial.

Error from City Court of Macon; Robert Hodges, Judge.

M. Helmer was convicted of violating the prohibition law, and brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J. (concurring specially). I join in the affirmance of the judgment in this case, but I cannot agree with the assumption in the first headnote that the admission of evidence obtained by an illegal search and seizure of a defendant's person is compelling him to give evidence tending to criminate himself. Neither can I agree that there is, or should be, any distinction between the sacredness of the constitutional inhibitions against an illegal search and seizure of one's person and an unlawful invasion and illegal search of his premises. Both of these rights are equally inviolable, but, in my opinion, neither of them, directly or indirectly, prevents the admission of material evidence in a criminal case, although it is obtained through an illegal search and seizure by an individual, whether a private citizen or an officer of the law. In *Drake v. State*, 75 Ga. 413, where the shirt and drawers of the accused were taken off his person and admitted in evidence against him, over his objection that it was compelling him to give evidence against himself, it was held:

"Article 1, § 1, par. 6, of the Constitution (Code, § 6362), which declares that 'no person shall be compelled to give testimony tending in any manner to criminate himself,' means that, where a person is sworn as a witness in a case, he shall not be compelled to testify to facts that may tend to criminate him. It does not prevent the introduction in evidence or the exhibition to the jury of clothing or any other article taken from a person accused of crime, where they tend to show his guilt."

Justice Blandford, in the opinion, said:

"It would be a forced construction of this paragraph of the Constitution to hold that clothing or any other article taken from a person accused of crime could not be given in evidence or exhibited to the jury, where the same tended to show his guilt. This clause of the Constitution means that, when a person is sworn as a witness in a case, he shall not be compelled to testify to facts that may tend to criminate him."

And in the *Williams Case*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269, Presiding Justice Lumpkin said:

"That evidence pertinent and material to the issue is admissible, notwithstanding it may have been illegally procured by the party producing it, was early settled by the English courts."

And, in a very learned and exhaustive opinion, he shows that this ruling has been followed by the great majority of our states, and goes on to say:

"It may here be remarked that no distinction is, or should be, observed between an unauthorized search of the person and one which merely involves an invasion of the citizen's * * * rights to be secure in his 'houses, papers and effects'; for none is recognized, either by the federal or by our state Constitution; the right to be secure in the lawful possession and enjoyment of property evidently being regarded as no less sacred than the citizen's right to immunity from an unreasonable search of his person. * * * As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the Constitution of the United States and of this and other states merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful, upon executives, so that no law violative of this constitutional inhibition should ever be enforced, and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the state, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the state, but for himself only; and therefore he alone, and not the state, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of the government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct. The office of the federal and state Constitutions is simply to create and declare these rights. To the legislative branch of government is confided the power, and upon that branch alone devolves the duty, of framing such remedial laws as are best calculated to protect the citizen in the enjoyment of such rights, and as will render the same a real, and not an empty, blessing. With faithfully enforcing such laws as are thus provided, the responsibility devolving upon the executive and judicial branches must necessarily end. We know of no law in Georgia which renders inadmissible in evidence the fruits of an illegal and wrongful search and seizure; nor are we aware of any statute from which it could be logically gathered that the admission of such evidence violates any recognized principle of public policy. Whether or not prohibiting the courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's consti-

tutional rights to immunity therefrom, is a matter for legislative determination."

In my humble opinion, the ruling in the Williams Case, *supra*, having been made by a full bench, and never having been overruled or modified, but, on the contrary, having been cited approvingly, many times, by the Supreme Court and by this court, should control this court, rather than subsequent decisions of its own or of the Supreme Court, which may be, in some material respects, in conflict therewith; the law being well settled that the older adjudication, unless overruled or modified, is superior and must control. As was said in *State v. Turner*, 82 Kan. 787, 109 Pac. 654, 32 L. R. A. (N. S.) 772, 136 Am. St. Rep. 129:

"True, in receiving as evidence information unlawfully obtained, the court may seem by judicial sanction to encourage wrongdoing. But such is not the real aspect of the matter. The sole question under investigation in a criminal trial is the guilt or innocence of the defendant. Nothing not pertinent to that subject can be considered. Everything throwing light upon it should be admitted, unless forbidden by some rule of law. Extorted confessions are not excluded as a rebuke to those who have obtained them, but because they are regarded as of doubtful credibility. * * * The courts do not approve a resort to illegal means to obtain evidence. They are not indifferent to a violation of the letter or spirit of the law designed for the protection of one accused of crime. But a far-reaching miscarriage of justice would result if the public were to be denied the right to use convincing evidence of a defendant's guilt because it had been brought to light through the excessive zeal of an individual, whether an officer or not, whose misconduct must be deemed his own act, and not that of the state."

(16 Ga. App. 550)

PARR & WOOD FURNITURE CO. v. BARNETT. (No. 5881.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

REPLEVIN \S 72—**CHattel Mortgages** \S 286—**Execution—Sale—Irregularities—TroveR—Evidence.**

Where the plaintiff in an action of trover introduced in evidence a mortgage *fi. fa.* together with the entry of a levy thereon, and also an entry thereon of a sale by the sheriff to him of the property in question, each of which appeared to be regular in every respect, and showed possession in himself thereafter under the sale (and while this evidence as to possession was not the highest no objection was made to it), he made out a *prima facie* case, and was entitled to recover as against the defendant who relied solely upon the fact that at the time of the bringing of the action of trover he was in possession of the property claimed by the plaintiff. And this is true even though the plaintiff admitted, when sworn as a witness, that the property (certain cows) was not at the place of sale at the time of the purchase from the sheriff. Omissions or irregularities on the part of the sheriff are not chargeable to the buyer. The only questions with which a purchaser is concerned are the judgment, the levy, and the delivery of the property. All other questions are between the parties to the judgment and the sheriff. *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 430; Over-

by *v. Hart*, 68 Ga. 495; *Fitzgerald Granitoid Co. v. Alpha Portland Cement Co.*, 15 Ga. App. 174, 82 S. E. 774.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. \S 292-295; Dec. Dig. \S 72; *Chattel Mortgages*, Cent. Dig. \S 576; Dec. Dig. \S 286.]

2. OVERRULING OF CERTIORARI APPROVED.

There was no error in overruling the petition for certiorari.

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Action between the Parr & Wood Furniture Company and others and T. T. Barnett. Certiorari overruled, and the parties first mentioned bring error. Affirmed.

Williams & Flynt, of Dublin, for plaintiffs in error. M. H. Blackshear, of Dublin, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 572)

WRIGHT v. STATE. (No. 6506.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. HOMICIDE \S 309—**INSTRUCTIONS—MAN-SLAUGHTER—EVIDENCE.**

Apparently the weight of the evidence in this case would have authorized the jury to convict the defendant of murder. There was also evidence tending to show that he was in a passion against the deceased, and ordered the deceased to leave his house, and when the deceased came back in the direction of the house a few minutes later the defendant advanced to meet him and began to fire upon him. The defendant himself said, in his statement to the jury, that when the deceased came back by his yard gate the deceased "had his hand in his pocket, and he was talking, and he said, 'Come here!' looking at me," and thereupon the defendant left his house and advanced towards the deceased through the gate, and when the deceased in turn advanced towards him and said, "God damn you, you cannot bluff me," he shot. This was enough to disclose an intention on the part of the defendant to engage in mutual combat with the deceased, and the acceptance of the invitation to enter into a combat with him, which, coupled with the evidence showing provocation offered by the deceased a few minutes before, was sufficient to authorize a charge as to the law of manslaughter. *Young v. State*, 10 Ga. App. 116, 72 S. E. 935; *Faison v. State*, 13 Ga. App. 180, 79 S. E. 39; *Franklin v. State*, 15 Ga. App. 349 (1), 83 S. E. 196.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 649, 650, 652-655; Dec. Dig. \S 309.]

2. CRIMINAL LAW \S 825—**REQUESTS FOR INSTRUCTIONS—NECESSITY.**

There is no substantial merit in any of the other assignments of error, and, if any fuller charge was desired than that given, a written request therefor should have been made.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2005; Dec. Dig. \S 825.]

3. CONVICTION—EVIDENCE—NEW TRIAL.

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Lee Wright was convicted in a prosecution on a charge of murder, and he brings error. Affirmed.

J. C. Smith and Wm. Story, both of Nashville, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, and Jas. M. Johnson, of Valdosta, for the State.

WADE, J. Judgment affirmed.

(15 Ga. App. 560)

WARE v. LAMAR et al. (No. 6145.)
(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

1. COURTS \S 189—MUNICIPAL COURT—COPY PROCESS—SUFFICIENCY—MISTAKE.

Where a petition in the city court of Atlanta prayed for process requiring the defendant to be and appear at the "next term" of that court, and the original process required him to be and appear at the city court of Atlanta "to be held in and for said county on the first Monday in July, 1914," but by mistake the copy process required the defendant to appear at the city court of Atlanta to be held in and for said county on the first Monday in May, 1914, and it further appeared that the original suit was filed on May 7, 1914, and the original process was issued on that day, and that the copy process, dated May 7, 1914, was served on the defendant on May 8, 1914, and that the next term of the city court of Atlanta convened on the first Monday in July, 1914, *held*, that the service of the petition and the copy process were sufficient to put the defendant on notice of the case; and his traverse to the officer's return of service was properly overruled.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 409, 412, 413, 429, 458; Dec. Dig. \S 189.]

2. DAMAGES \S 149 — MUNICIPAL CORPORATIONS \S 705, 706—PLEADING \S 18—DAMAGES—STREETS — COLLISION WITH AUTOMOBILE.

The petition was not subject to general demurrer, and there was no merit in the special grounds of the demurrer.

[Ed. Note.—For other cases, see Damages, Dec. Dig. \S 149; Municipal Corporations, Cent. Dig. \S 1515-1518; Dec. Dig. \S 705, 706; Pleading, Cent. Dig. \S 39, 64; Dec. Dig. \S 18.]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR \S 681—PRESENTATION FOR REVIEW—BILL OF EXCEPTIONS—PLEADING3.

The allowance of an amendment to a petition and the overruling of a demurrer to the amendment could not be considered on appeal, where the bill of exceptions, though reciting that defendant excepted to the overruling of a demurrer to the petition, did not include the rulings on the amendment and demurrer thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2833, 2884; Dec. Dig. \S 681.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Cato Lamar and others against J. W. Ware. Judgment for plaintiffs, and defendant brings error. Affirmed.

Moore & Pomeroy, of Atlanta, for plaintiff in error. W. A. Sims and Daley, Chambers & Daley, all of Atlanta, for defendants in error.

WADE, J. Cato Lamar brought suit against J. W. Ware for damages for injuries to his person, which he alleged resulted from a collision with an automobile belonging to the defendant and driven by his servant and employé at a high and negligent rate of speed, greater than six miles per hour, at the intersection of two public highways. The petition was filed in the office of the clerk of the city court of Atlanta on May 7, 1914, and the original process attached thereto and issued by the clerk on the same day required the defendant to be and appear at the city court of Atlanta, "to be held in and for said county on the first Monday in July, 1914." In the petition the plaintiff "prays that process issue requiring the defendant to be and appear at the next term" of said city court of Atlanta to answer his complaint. The entry of the deputy sheriff showed that the defendant was served personally with a copy of the original petition and process on May 8, 1914. The only process served upon the defendant required him to be and appear on the first Monday in May, 1914, and was dated May 7, 1914. The defendant filed a traverse to the return of the deputy sheriff on May 22, 1914, and the sheriff and the deputy sheriff were made parties thereto, and duly acknowledged service of the traverse and of the order making them parties. By consent of counsel the issues of fact raised upon the traverse were submitted to the judge for trial without the intervention of a jury on October 31, 1914, and after hearing evidence the court rendered the following judgment: "The original process is correct, and, defendant having appeared and filed demurrer and plea, this traverse is overruled." To this judgment the defendant then and there excepted. Thereafter on the same day, the court considered a demurrer to the plaintiff's petition, both general and special, and overruled each of the grounds of the demurrer, and to this ruling the defendant excepted.

[1] 1. Section 5572 of the Civil Code declares that:

"No technical or formal objections shall invalidate any petition or process; but if the same substantially conforms to the requisitions of this Code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded: Provided, there is a legal cause of action set forth as required by this Code.

In the case of Neal-Millard Co. v. Owens, 115 Ga. 959, 42 S. E. 266, relied upon by plaintiff in error, it appears that the original process annexed to the petition stated the case as "Neal-Millard Company v. Hampton J. Herb and Ed L. Prince," and in the body of the process "the defendants Hampton J. Herb and Ed L. Prince" were required to appear at the next term of court to answer the plaintiff's petition. The suit was actually

proceeding in favor of the Neal-Millard Company against Hampton J. Herb and Mrs. Owens, and Mrs. Owens was served personally with a copy of the petition and process, which copy process, like the original, required Hampton J. Herb and Ed L. Prince to be and appear at the term of the court therein named. The court held that the process served on the defendant was, so far as she was concerned, no process at all, as "it did not contain any demand upon her to do anything." As was said further in the same case, the defect was in the original process, and not in the copy.

In *Richmond & Danville Railroad Co. v. Benson*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446, it was held that where the declaration prayed for process requiring the defendant to appear at the August term of the court, that being the next regular term, and the process attached by the clerk commanded the defendant to appear at the next term to be held "on the first Monday in July," and the defendant appeared by counsel at the August term and moved to dismiss the case because the process was void, the court having jurisdiction of the case could allow the process to be amended, and, furthermore, that since the defendant was chargeable with knowledge of the law which fixed the time for holding the next regular term of the court in August, he must have known that the date stated in the process was a clerical error, and, knowing that, it was his duty to disregard the date named in the process. See, also, *Neal-Millard Co. v. Owens*, 115 Ga. 963, 42 S. E. 266.

In the case under consideration the plaintiff prayed in his petition that process issue requiring the defendant to be and appear at the next term of the city court of Atlanta. The original process attached to the petition made the case returnable to the July term of the city court, but the copy of the process served upon the defendant on May 8, 1914, which was dated May 7, 1914, required the defendant to appear on the first Monday in May, 1914. The calendar for the year 1914 discloses that the first Monday in May was the 4th day of that month; and since the defendant must be presumed to have been acquainted with that fact when the process dated May 7, 1914, was served upon him on the following day, he was necessarily thereby apprised of the fact that the process itself had been issued after the first Monday in May, and therefore required him to do an impossible thing, to wit, to appear in the city court of Atlanta on a day already numbered with the past before the original suit had been filed. The law provides for six terms annually of the city court of Atlanta, to be held on the first Mondays in January, March, May, July, September, and November of each year (Acts 1892, p. 219); and since the first Monday in May was already gone before the suit was even filed or the defendant served with pro-

cess annexed thereto, requiring him to appear on the first Monday in May, he must necessarily have known that the process referred to the next term of the city court of Atlanta to be thereafter held, and this term being fixed by law for the first Monday in July, he was apprised of the fact that the case was returnable to the said July term, notwithstanding the clerical error in the process. In addition to this the petition itself contained, as already said, a prayer for process requiring the defendant "to be and appear at the next term of this court to answer this complaint," which term he knew as a matter of law would be held on the first Monday in July, 1914.

In *Richmond & Danville Railroad Co. v. Benson*, supra, the process attached to the declaration commanded the defendant "to be and appear at the city court of Richmond county, next to be holden in and for the county aforesaid, on the first Monday in July, 1889," and was dated July 16, 1889, and signed by the clerk of the city court. The regular term of that court was the first Monday in August, and the defendant appeared by counsel at the regular term and moved to dismiss the case because the process was void. This motion was overruled, and the Supreme Court held that the court could allow the process to be amended, as it was not void. It will be remembered that the original process in that case itself required amendment.

In *Covington v. Cothrans*, 35 Ga. 156, it was said:

"The defendant was not ignorant of the court to which the process was returned, for he appeared at the proper term, and objected to the proceedings, because a single word 'inferior' had been used by the mistake of a ministerial officer for the word 'county.' The time for such trifling is past."

In *Williams v. Buchanan*, 75 Ga. 789, the original process required the defendant to appear "on the second Monday in April next," but by mistake the copy process required him to appear "on the second Monday in December next." The process was dated December 28, 1883. The following April was the time of the regular term, and no term of the court was to meet in December. It was held that service of this declaration and copy process was sufficient to put the defendant on notice of the case. The original process was in that case correct, and there was no effort to amend the copy process served upon the defendant. In the decision Chief Justice Jackson said:

"The defendant is notified by the prayer for process in the copy declaration served upon him 'to be and appear at the next superior court of said county,' and the law notified him that the next superior court would be held on the second Monday in April; and therefore when he looked at the copy process, which the clerk annexed to the copy declaration, he must have known that it was a clerical mistake of the clerk to require him to be and appear on the second Monday in December next. * * * The traverse of the sheriff's return is not consid-

ered, because, conceding that the copy process was erroneous, it made no difference in the law of the case. The copy declaration was right, and that with the term of court fixed by law gave notice of suit, in what court, and when to be answered."

That case appears to be exactly in point and to cover the facts under consideration in the present case. So far as is shown by the record, the copy petition served upon the defendant in this case was right, and the plaintiff prayed therein for process requiring the defendant to appear at the "next term" of the city court of Atlanta; the terms of the city court of Atlanta are fixed by law, and therefore the defendant had notice of the court in which the suit was pending, and when it was to be answered. Especially is this true, when the fact, already commented upon, is recalled that the first Monday in May, on which the copy process erroneously required him to be and appear at the said court, had passed before the petition was filed and before service on the defendant.

If the defendant, when served with the faulty process which apprised him of the fact that a suit had been instituted against him in the city court of Atlanta, which he was required to answer at the next ensuing regular term thereof, had gone to the office of the clerk of that court and inspected the original process, he would have had confirmation of the information imparted to him by the copy petition and the copy process served upon him (when taken together), and would have learned that the case was returnable to the July term, 1914. It is evident that the defendant must have understood that he was required to answer at the July term, or else he would not have filed his demurrer and plea at that term, as he did. No amendment of the process served upon the defendant would have benefited him, since he duly appeared and filed his plea and demurrer, thus evidencing that the defective process sufficiently advised him where and when the suit was pending.

We do not understand that the learned trial judge, in his order stating that "the original process is correct, and, defendant having appeared and filed demurrer and plea, this traverse is overruled," meant to hold that the appearance and pleading in writing by the defendant amounted to a waiver of service, where want of service was pleaded at the same time (*Western & Atlantic R. Co. v. Pitts*, 79 Ga. 532, 4 S. E. 921; *Cox v. Potts*, 67 Ga. 521); for matters in abatement and in bar may even be mixed in the same action, and one defense alone will not defeat another. We understand the order to mean rather, that, since the original process was correct and the defendant had appeared and filed a demurrer and plea, and it was evident that the petition and process actually served upon him had sufficiently apprised him of the term of the court at which he was expected to enter such appearance, the copy process, taken in connection with the petition, had ac-

complished the purpose for which it was intended, and there was no meritorious reason why the traverse should be sustained.

[2] 2. The petition set out enough to withstand a general demurrer. It alleged injury which the plaintiff claimed resulted from the negligent driving of an automobile belonging to the defendant by the defendant's agent and employé in charge of the machine, whereby the plaintiff was struck and thrown from a bicycle at the intersection of two public highways. It alleged that the defendant was negligent, in that the machine was being driven at a "high and negligent" rate of speed at a public highway crossing where one street which was a public highway crossed or intersected another street which was a public highway. That the machine was being driven at the public highway crossing at a greater rate of speed than 6 miles per hour, in violation of the act of 1910 (*Acts 1910*, p. 90, § 5). That the defendant was negligent, in that the automobile approached the said crossing without any warning, and without any horn being blown or bell rung, and that the automobile struck the plaintiff without any warning of its approach. That the automobile was being driven at a "high and reckless rate of speed," and the chauffeur in charge of the automobile was negligent, in that he was not on the lookout for people in the street, although the street was much traveled and congested at the time. The petition set out the age and earning capacity of the plaintiff, and alleged that his capacity to labor and earn money had been diminished at least one-third by reason of his injuries, and also alleged that he was in the exercise of all care and diligence at the time he was injured. We think the petition set forth a cause of action, and there were sufficient allegations of negligence.

3. The defendant demurred specially to the allegation in paragraph 5 of the petition, that West Hunter street was a public highway, and that South Broad street, which intersected West Hunter street, was likewise a public highway, and insisted that this allegation was "immaterial and irrelevant and set forth an erroneous conception of the law." The act of 1910 (*Acts 1910*, p. 90) regulates the running of automobiles and conveyances of like character propelled by steam, gas, gasoline, electricity, or any power other than muscular power, "upon or along any public road, street, alley, highway, avenue, turnpike, or any private road or way generally used by the public of this state," etc. See section 1. In section 5 of that act it is provided that:

No person shall operate a machine "on any of the highways of this state as described in this act, * * * so as to endanger the life or limb of any person or the safety of any property, and upon approaching a bridge, dam, high embankment, sharp curve, descent or crossing of intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than six miles per hour."

The "highways of this state as described in this act" include all public roads, streets, alleys, etc.; and since the petition in the case under consideration distinctly alleges that Broad street crosses Hunter street, it is obvious that the provisions of section 5, limiting the speed of an automobile at a "crossing of intersecting highways," would apply to the crossing of intersecting streets, as a street is by the terms of the act included as one of the "highways" of this state. We think, therefore, that the judge properly overruled the special demurrer directed to that part of the petition which recited that West Hunter street was a public highway, and South Broad street, which intersected it, was likewise a public highway.

4. The objection, raised by the special demurrer, that the allegations in the last two lines of paragraph 11 of the petition were "immaterial and irrelevant, and too general, vague, and indefinite to constitute proper allegations," is without merit. The lines objected to are as follows:

"And that his said injuries are the direct result of negligence and carelessness upon the part of the defendant, his agent, and employe in charge of said automobile."

It is true, the allegations herein contained may be vague and indefinite, but they obviously relate to the more precise allegations of negligence made elsewhere in the petition, and of course the plaintiff, in any recovery, would be limited to such negligence only as is specifically set forth in the petition. We construe these general terms to mean simply that the injuries complained of were the direct result of that particular negligence on the part of the defendant and his agent which is set forth specifically in the petition, and to proof of which the plaintiff would of course be confined.

5. The defendant demurs to the fourteenth paragraph of the petition on the ground that it is "illegal, immaterial, and irrelevant." This paragraph alleges that, because of the plaintiff's being disfigured as alleged in the petition, he would suffer "mortification" in addition to the pain and suffering and in addition to the impairment of his earning capacity. We cannot see that this allegation is subject to the objection made.

[3] 6. An amendment to the petition was allowed by the court, subject to demurrer, and a demurrer to the amendment was overruled by the court. In the brief for the plaintiff in error it is insisted that the court erred in overruling the demurrer to the amendment, and in allowing the amendment; but nowhere in the bill of exceptions is there any assignment of error because of the allowance of the amendment or because of the overruling of the demurrer thereto. In the bill of exceptions it is recited that "a demurrer filed to plaintiff's petition, containing both general and special grounds," was heard

by the court and overruled on each and all of the grounds thereof—

"to which ruling and judgment of the court defendant then and there excepted, and now excepts and assigns the same as error, and says that the court erred as a matter of law in overruling each and every one of his grounds of demurrer as set forth and contained therein, that the court should have sustained said demurrer and dismissed the petition."

This exception does not include the rulings of the court in allowing the amendment and in overruling the demurrer thereto, but includes only the overruling of the demurrer, general and special, to the original petition. So we cannot enter into the question raised by the allowance of the amendment.

Judgment affirmed.

(16 Ga. App. 559)

MORGAN v. STATE. (No. 6035.)

(Court of Appeals of Georgia. July 2, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW §942 — NEW TRIAL — FALSE TESTIMONY.

The credibility of the witnesses whose testimony (alleged to be newly discovered) constitutes the basis of an extraordinary motion for a new trial is a matter addressed exclusively to the trial judge; and it cannot be said that in refusing a new trial in the present case the trial judge abused his discretion, since the strongest evidence adduced consisted of an affidavit of the prosecuting witness in which he asserted that his testimony on the trial was false. *Jordan v. State*, 124 Ga. 417, 52 S. E. 768, and cases there cited. A new trial should not be granted solely upon the ground that the accused was convicted upon false testimony, unless the falsity of the testimony has been established by a conviction for perjury of the witness delivering such testimony. Civil Code 1910, § 5961.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. §942.]

Error from Superior Court, Pike County; R. T. Daniel, Judge.

J. H. Morgan was convicted of crime, and he brings error. Affirmed.

T. E. Patterson, of Griffin, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, for the State.

RUSSELL, C. J. Judgment affirmed.

(143 Ga. 559)

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. SHAW et al.

(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

1. INSURANCE §755, 756—MUTUAL BENEFIT INSURANCE—SUSPENSION FOR NONPAYMENT OF DUES—WAIVER OF FORFEITURE.

Where, on the trial of the issue made by plea and answer to a suit upon an insurance certificate against a fraternal beneficiary association that issued the same (the contention of the defendant being that the insured had forfeited his right under the certificate, by reason of his nonpayment of dues while in good health), it appeared from the evidence introduced that there was a provision in the by-laws

of the association, which was made a part of the contract of insurance, that upon failure to pay the specified dues and assessments for any particular month on or before the first day of the month following, the insured "shall stand suspended," and it further appeared from the evidence that the insured had failed to pay such dues at the time specified, such insured, by operation of the terms of the contract, was actually suspended without affirmative or judicial act upon the part of the association issuing the certificate. *Beeman v. Supreme Lodge*, 29 Pa. Super. Ct. 387, and cases there cited.

(a) It appearing that the certificate or contract of insurance contained the provision that within 10 days from the date of his suspension the delinquent member might be reinstated by paying the assessment due, upon proof that he was, at that time, in good health, but that it also contained the further provisions that no officer, employé, or agent of any camp had the power or authority to waive any of the conditions upon which the beneficiary certificate was issued, the notice to the officer of the local camp, who received payment of the dues after the member was suspended, that the delinquent member was, at that time, not in good health could not operate to change the terms of the contract or relieve the forfeiture. *Rome Industrial Insurance Co. v. Eidson*, 138 Ga. 592, 75 S. E. 657.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1907-1918; Dec. Dig. ¶ 755, 756.]

2. INSURANCE ¶ 818—MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURE—ADMISSIBILITY OF EVIDENCE.

It appearing from the testimony of a witness introduced by the plaintiff, for the purpose of showing the payment of the dues for the nonpayment of which the insured had been suspended, that the witness had been requested by the brother of the insured to investigate and see how the insured stood with the association, as his brother was very sick and had not been able to see about his business, and that the brother of the insured requested the witness if insured was behind to pay the dues, which the witness promised to do and did do, it was competent, after proving payment under the circumstances detailed, to show by the witness that he paid them voluntarily out of his own money; and, upon the issue as to whether or not the defendant had kept the dues thus paid and thereby waived any estoppel or waiver of the forfeiture, it was also competent to show that the defendant had tendered back this money to the witness who had paid it to the local officer of the association under the circumstances detailed; and it was error for the court to rule otherwise.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 2003-2005; Dec. Dig. ¶ 818.]

3. FRATERNAL ORDER—EVIDENCE—ACTION OF LOCAL CAMP.

The action taken by the local camp of the association at the time of the death of the insured was immaterial and irrelevant, and should have been excluded on objection.

4. NEW TRIAL ¶ 97—GROUNDS—ERRONEOUS ADMISSION OF EVIDENCE—MOTION TO EXCLUDE.

Where evidence, which was objectionable at the time it was offered, because secondary in character, being evidence of the contents of a certain writing, was admitted by the court provisionally upon a statement of the attorney for the party offering it that the writing would be accounted for, it is not ground for the grant of a new trial that the evidence was allowed to remain in the record without any further proof of the loss of the writing, it not appear-

ing that any further motion was made to exclude the writing, or that the court's attention was subsequently called to it.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 195-198; Dec. Dig. ¶ 97.]

5. ADMISSION OF EVIDENCE—RULINGS.

Except as indicated in the foregoing headings, rulings of the court in reference to the evidence were not erroneous.

6. INSURANCE ¶ 825—MUTUAL BENEFIT INSURANCE—SUFFICIENCY OF EVIDENCE—FORFEITURE.

Under the evidence in the case, it was error for the court to direct a verdict for the plaintiff. The issue of the liability of the association should have been submitted to the jury, so that they might pass upon the question whether or not there was a forfeiture under the provisions of the contract of insurance, or a waiver of that forfeiture by the association by a retention of the payment of the dues in question after notice of the forfeiture, suspension of the member, and the payment under the circumstances existing at the time of payment.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 2009; Dec. Dig. ¶ 825.]

Error from Superior Court, Berrien County; *W. E. Thomas*, Judge.

Action by Minnie Shaw and others against the Sovereign Camp, Woodmen of the World. Judgment for plaintiffs, and defendant brings error. Reversed.

Arthur H. Burnett, of Omaha, Neb., and *W. D. Bule* and *D. M. Bule*, both of Nashville, for plaintiff in error. *Knight*, *Chastain* & *Gaskins*, of Nashville, and *E. K. Wilkcox*, of Valdosta, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

LA FOLLETTE IRON CO. v. WILEY. (No. 381.)

(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

1. TRIAL ¶ 260—REQUESTED CHARGES—REPETITION OF GIVEN CHARGE.

The requests to charge, so far as pertinent, were covered by the general charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. ¶ 260.]

2. INSTRUCTIONS—PREJUDICIAL ERROR—INACCURACIES.

While certain portions of the charges complained of were not entirely accurate, they furnish no ground for a new trial.

3. VERDICT—EVIDENCE—NEW TRIAL.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Bartow County; *A. W. Fite*, Judge.

Action between the *La Follette Iron Company* and *Erwin Wiley*. Judgment for the latter, and the former brings error. Affirmed.

Neel & Neel, of Cartersville, for plaintiff in error. *R. R. Arnold* and *Colquitt & Conyers*, all of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 709)

PRATER et al. v. CRAWFORD et al.
(No. 454.)

(Supreme Court of Georgia. July 16, 1915.)

*(Syllabus by the Court.)***1. RIGHT TO REVIEW—FINAL DISPOSITION OF CAUSE.**

By section 6138 of the Civil Code (1910) it is declared: "No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause, or final as to some material party thereto."

2. APPEAL AND ERROR ⇐267, 719—RULING PENDENTE LITE—DIRECT EXCEPTIONS.

It has been held that a direct bill of exceptions to a ruling made pendente lite, which does not assign error upon any final judgment, or a judgment which would have been final if rendered as claimed by the plaintiff in error, will not be entertained by this court. *Lyndon v. Georgia Ry. & El. Co.*, 129 Ga. 353, 58 S. E. 1047, and cases cited; *Morris v. Dougherty*, 132 Ga. 346, 63 S. E. 1114; *Taylor v. Wright*, 132 Ga. 583, 64 S. E. 658; *Rorie v. Rorie*, 138 Ga. 335, 75 S. E. 138; *Hester v. Mallary Machinery Co.*, 142 Ga. 320, 82 S. E. 884.

(a) Section 6144 of the Civil Code, which provides that, "In any case where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree, or verdict, and to assign error on the ruling, order, decision, or charge of the court," it may be done in a certain manner, does not authorize a direct exception to an interlocutory ruling (not final in its nature, and which would not have been final if rendered as claimed by the plaintiff in error) without excepting to the "judgment, decree, or verdict."

(b) The question of the right to except to the overruling of a motion for a new trial, or whether there is any difference between a general verdict and a special one, is not here involved. There was no motion for a new trial in the present case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1447, 1460, 1572-1578, 1581, 2968-2952, 3490; Dec. Dig. ⇐267, 719.]

3. APPEAL AND ERROR ⇐78, 267—DECISION APPEALABLE—FINAL JUDGMENT—EXCEPTIONS TO AUDITOR'S REPORT—DISMISSAL.

Where exceptions of law and fact to an auditor's report in an equitable case were filed, and were overruled by the presiding judge, this was not a final judgment. Nor was the overruling of the motion to recommit the case, or a part of it, to the auditor a final judgment. Civil Code 1910, § 5147; *Woods v. Woods*, 5 Ind. Ter. 475, 82 S. W. 878.

(a) In *Parker v. Waycross & Fla. Ry. Co.*, 81 Ga. 387, 8 S. E. 871, exceptions to the report of an auditor were filed. A consent order was taken, by which the case was submitted to the court without the intervention of a jury, with provisions that the judge should pass upon the case under the evidence reported by the auditor, giving to the auditor's report the effect to which it was by law entitled; that if he should overrule all of the plaintiff's exceptions, he might file a judgment for the defendant; that if he should sustain any such exceptions, he should determine what, if anything, should be recovered by the plaintiff, and should file his judgment accordingly; that any judgment so rendered should be as valid and binding as a judgment entered on the verdict of a jury; and that either party dissatisfied with such judgment

might except to the same within 30 days of the filing thereof and take the case to the Supreme Court in the manner provided by law. (This order is partly reported in the printed volume, but is here more fully stated from the record on file in the office of the clerk of this court.) The presiding judge filed a decision, discussing the various issues in the case. He overruled the exceptions to the auditor's report, except in one particular, holding that as to a certain item the plaintiff was entitled to recover, and accordingly entered judgment for the plaintiff for the amount involved in that item alone, in effect adjudging against the plaintiff's claims with that exception. The plaintiff excepted to certain parts of the opinion or decision which were adverse to him, including the overruling of the exceptions filed by the plaintiff to the auditor's report (with the exceptions mentioned). Under the facts stated, the decision and judgment filed by the presiding judge constituted a final judgment, and the plaintiff, not being allowed to recover except as to a fractional part of his claim, could except thereto. The defendant excepted to the judgment against it for any amount, and thus the case was before this court, both as to that portion of the judgment which held against the plaintiff and as to that portion which held against the defendant. The difference between this judgment and the ruling now sought to be brought up by direct exceptions is obvious.

(c) There was no exception to any final judgment in this case, but only to interlocutory rulings; and on motion the writ of error must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481, 1447, 1460, 1572-1578, 1581; Dec. Dig. ⇐78, 267.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between V. A. Prater and others and Mrs. M. B. Crawford, administratrix, and others. From the judgment, the parties first mentioned bring error. Writ of error dismissed.

Jas. S. James, of Douglasville, Albert Kemper, of Atlanta, and J. R. Bedgood, of Fairburn, for plaintiffs in error. Dorsey, Brewster, Howell & Heyman, Rosser & Brandon, Burton Smith, and R. R. Arnold, all of Atlanta, for defendants in error.

PER CURIAM. Writ of error dismissed. All the Justices concur.

(143 Ga. 709)

WHITAKER v. WARE & HARPER.

(No. 453.)

(Supreme Court of Georgia. July 14, 1915.)

*(Syllabus by the Court.)***TRIAL ⇐139—DIRECTION OF VERDICT—EVIDENCE.**

Under the evidence, no verdict other than that directed by the court could properly have been returned in this case. The evidence demanding a verdict for the plaintiffs, the court's direction of a finding in their favor will not be disturbed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇐139.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Ware & Harper against J. D. Whitaker. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hewlett, Dennis & Whitman, of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(143 Ga. 703)

HUMPHREY et al. v. JOHNSON et al.
(No. 448.)

(Supreme Court of Georgia. July 13, 1915.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE ⇨ 176, 179—APPEAL—VERDICT—VALIDITY—"CONFIRM THE JUDGMENT IN THE ABOVE-STATED CASE."

Where, in a suit in a justice's court, the justice entered upon the docket a judgment in favor of the plaintiff against the defendant for the principal, interest, attorney's fees, and costs, stated in detail, from which an appeal was taken to a jury in that court, and the jury returned a verdict stating, "We, the jury, confirm the judgment in the above-stated case, and costs of this appeal, also 10 per cent. attorney's fees," dated and signed by the foreman, such verdict was not so uncertain as to be void. Giving to it a reasonable intendment, the expression "confirm the judgment in the above-stated case" meant that the jury found in favor of the plaintiff against the defendant the same amount as had been found by the justice.

(a) Although it may not be proper practice, on the trial of an appeal, to let the jury know what judgment was rendered by the magistrate, doing so is no more than an error in procedure, and does not render the verdict void. If it were desired to take advantage of such error, it should have been done by proper proceedings for that purpose.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 699, 700, 702; Dec. Dig. ⇨176, 179.]

2. JUSTICES OF THE PEACE ⇨125—EXECUTION—JUDGMENT—VERDICT.

Where, in a justice's court, a judgment was entered upon the docket in favor of the plaintiff against the defendant, who appealed to a jury in that court, and the jury found a verdict for the same amount of principal, interest, and attorney's fees, as stated in the judgment of the justice, together with the costs of the case, and a judgment was entered on said verdict, the execution issued thereon and a levy and sale thereunder were not rendered void because the judgment entered upon the verdict had not been first entered on the docket of the justice. *Dodd v. Glover*, 102 Ga. 82, 29 S. E. 155; *Scott v. Bedell*, 108 Ga. 205, 33 S. E. 903.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 390-392, 395-399; Dec. Dig. ⇨125.]

3. JUSTICES OF THE PEACE ⇨125, 183—APPEAL—PRESUMPTIONS—LOST OFFICE PAPERS.

If office papers in a justice's court are lost, they may be established in that court. Civ. Code 1910, § 5322.

(a) If an appeal was taken from the judgment of a justice, and the verdict found by the jury and the judgment entered thereon were lost before having been entered on the docket, they could be established in the justice's court upon due proceedings and notice to parties interested, even after a sale under the execution issued upon such judgment. It does not appear

what evidence was introduced in the justice's court in establishing such paper; and the presumption arises, from the proceedings and the judgment thereon, that sufficient evidence was produced.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 390-392, 395-399, 705-714; Dec. Dig. ⇨125, 183.]

4. EXECUTION ⇨140, 312—SALE—ENTRY OF LEVY—SHERIFF'S DEED—SUFFICIENCY OF DESCRIPTION.

An execution issued from the 722d district, G. M., Fulton county, and headed, "State of Georgia, Fulton County," was levied on certain land. The entry of levy was as follows: "Levied the within fl. fa. on one lot fronting on Pace's Ferry road known as No. 28, fronting on said road 262 feet and running north to Chattahoochee Ave. 535 ft., thence west along Chattahoochee Ave. 200 ft., thence south to Pace's Ferry road 350 ft., thence east along Pace's Ferry road 262 ft., the same being a fractional part of land lot No. 99 in Buckhead district, levied on as the property of W. P. Humphrey, deceased." *Held*, that such entry of levy was not so indefinite as to be necessarily void and incapable of being applied to the subject-matter by extrinsic evidence.

(a) The same is true of a sheriff's deed made by virtue of a sale under such levy, which was headed, "State of Georgia, Fulton County," and which described the land in the same manner as in the entry of levy. *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786; *Brice v. Sheffield*, 118 Ga. 128, 44 S. E. 843; *Sizemore v. Willis*, 130 Ga. 666, 61 S. E. 536; *Hancock v. King*, 133 Ga. 734, 66 S. E. 949.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 334-341, 921-924; Dec. Dig. ⇨140, 312.]

5. EXECUTORS AND ADMINISTRATORS ⇨430. 453 — ACTION AGAINST ADMINISTRATRIX — JUDGMENT—VALIDITY.

Where suit was brought in a justice's court by summons, against an administratrix, upon a promissory note given by her intestate, of which a copy was attached to the summons, the suit was substantially against her in her representative capacity; and, where judgment was entered against such administratrix without providing for collection out of the property of the intestate, it was irregular but not void, and was amendable, the rights of third parties not being affected. *Pryor v. Leonard*, 57 Ga. 136.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1683-1688, 1884-1908; Dec. Dig. ⇨430, 453.]

6. REVIEW ON APPEAL.

There was no error requiring a reversal; and the case is substantially controlled by former decisions of this court. In addition to those above cited, see *Williams v. Merritt*, 109 Ga. 217, 219, 34 S. E. 1012; *Wadley v. Oertel*, 140 Ga. 326, 78 S. E. 912; *Humphrey v. Smith*, 142 Ga. 291, 82 S. E. 885.

7. COSTS ⇨12—TAXATION—DISCRETION.

The awarding of costs against the plaintiffs, under the defendant's equitable cross-petition, was a matter within the discretion of the court. Civ. Code 1910, § 5423.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 20, 22, 23; Dec. Dig. ⇨12.]

Error from Superior Court, Fulton County: Geo. L. Bell, Judge.

Action by Charley Johnson and others against W. T. Humphrey and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Lavender R. Ray and R. O. Lovett, both of Atlanta, for plaintiffs in error. C. J. Simmons, C. L. Pettigrew, and E. V. Carter, all of Atlanta, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 705)

MORELAND et al. v. WALKER et al.
(No. 450.)

(Supreme Court of Georgia. July 13, 1915.)

(Syllabus by the Court.)

PETITION—DEMURRERS.

Under the allegations of the petition, the court did not err in sustaining the demurrers filed by certain of the defendants and in dismissing the case as to them.

Error from Superior Court, Campbell County; C. S. Reid, Judge.

Action between W. E. Moreland and others and J. D. Walker and others. From the judgment, the parties first mentioned bring error. Affirmed.

See, also, 141 Ga. 541, 81 S. E. 854.

J. F. Gollightly and J. A. Drake, both of Atlanta, and J. H. Longino, of Fairburn, for plaintiffs in error. W. H. Burwell, of Sparta, and Claude C. Smith, of Atlanta, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 696)

ALEXANDER v. COYNE. (No. 443.)

(Supreme Court of Georgia. July 13, 1915.)

(Syllabus by the Court.)

CORPORATIONS — 306 — OFFICERS — LIABILITY—MONEY WRONGFULLY RECEIVED.

An action for money had and received is maintainable against one who, as a president and general manager of a corporation, received money to which the plaintiff was entitled, and to which the corporation had no right, where the officer knew of the plaintiff's right to the money.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. —306.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Mrs. C. M. Coyne against Edgar Alexander. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. C. M. Coyne brought a petition against Edgar Alexander to recover the sum of \$606 as money had and received by the defendant for the plaintiff's use. As amended, the petition alleged that on May 2, 1911, petitioner loaned to the Electric Construction Company, a corporation, \$606, and to secure the loan the Electric Construction Company in writing assigned to her an open account for \$861.95 due that company by the S. H. Kress Company, another corporation. That transfer was signed, "Electric Construction Company, by Edgar Alexander, President." At the

time of making the assignment the Construction Company was insolvent, and this fact was known by the defendant. After the assignment the defendant, who was the president and general manager of the Construction Company, continued to act as such until about May 20, 1911, and was interested in receiving a salary therefor, when a check was received from the Kress Company for the amount of the open account. The check was delivered in the mail box to the Electric Construction Company, and was received and cashed by the defendant. Petitioner has never seen the check, but is informed that the same was payable to the Electric Construction Company, was signed by the Kress Company, and was for the full amount of the open account; that the check was "cashed by the act and deed of the defendant, and by that of no other person; he then signing himself, 'Electric Construction Company, by Edgar Alexander, Its President.'" At that time Alexander had the exclusive control and management of the Electric Construction Company, and in order to further the interests of that corporation, and of himself, he thereafter passed the amount of the account to the credit of the corporation, of which he was president and general manager. At the time the defendant knew that the chose in action was the property of the plaintiff, and that the check he received in payment of the same, and the money he received in cashing the check, and the money he gave to the Electric Construction Company, was also the property of the plaintiff; and at the time the defendant gave the money to the Electric Construction Company he knew it was insolvent, and knew that by his act he was depriving the plaintiff of her right to the account. The act of the defendant in depriving the plaintiff of her property was a conversion on his part, which she has never ratified or approved. The Construction Company has been adjudicated a bankrupt, and she is unable to obtain her money from it. "Petitioner waives the tort, and sues for money had and received in the sum of \$606 principal and interest from May 21, 1911." The defendant's general demurrer was overruled, and he excepted.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error. Dillon, Burruss & Kobak, of Atlanta, for defendant in error.

EVANS, P. J. (after stating the facts as above). The difficulty in the question presented by this record arises out of the form of action which the plaintiff has elected to pursue. It is well settled that whoever meddles with another's property, whether as principal or agent, does so at his peril. If an agent takes the property of another without his consent, and delivers it to his principal, it is a conversion, and both the principal and the agent will be liable in dam-

ages. *Miller v. Wilson*, 98 Ga. 567, 25 S. E. 578, 58 Am. St. Rep. 319. The plaintiff could have prosecuted her action for damages for the unlawful conversion of her property, both against the Electric Construction Company and its president, who aided in the diversion of her funds. An owner of money which has been tortiously converted by a person acting for his own benefit may waive the tort and bring assumpsit for the money received. This is upon the equitable principle that an action for money received lies when money received by one person equitably belongs to another. In order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. Keener on Quasi Contracts, 160. If the action be in tort, every one who participated in the tort is liable as a joint tort-feasor, on the principle that the act of one is the act of all. But where the plaintiff waives the tort, and does not sue for damages, but sues in assumpsit to recover the money, such action can only be maintained against the person who has actually received the money. *Cowart v. Fender*, 137 Ga. 586, 73 S. E. 822, 26 Ann. Cas. 1913A, 932. The action of assumpsit for money had and received will not lie, unless the money was actually received by the defendant or his agent. *Lary v. Hart*, 12 Ga. 422. Where one receives money to which a third person, whose agent he professes to be, has no right, and he has notice not to pay it over to him, an action for money had and received lies against such agent. *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86; *Houston v. Frazier*, 8 Ala. 81; *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179. In the latter case *Spencer, J.*, observes that:

"The law is, I believe, well settled that an action may be sustained against an agent, who has received money to which the principal had no right, if the agent has had notice not to pay it over."

In the case at bar the chose in action of the Kress Company was assigned to the plaintiff by the Electric Construction Company. The written assignment was made by the defendant as the president of that corporation, and hence he knew, when the check from the Kress Company came into his possession, that it belonged to the plaintiff. If, instead of receiving a check, the defendant, as agent or an officer of the Construction Company, had collected the money from the Kress Company, and not accounted to the plaintiff for her interest in the same, clearly he would have been liable to her, at her election, in an action for money had and received to her use. Do the pleaded facts present a case equivalent to that supposed? It is alleged that the defendant cashed the draft and received the money and gave it to the Construction Company. This is a distinct averment that the defendant had the physical possession of money belonging to the plaintiff. Having the plaintiff's money in his possession, he was under a duty to account to

her for it, and, under the cited authorities, the law implies a debt, and gives to the plaintiff an action in assumpsit to recover so much as would be sufficient to discharge her debt. Judgment affirmed. All the Justices concur.

(143 Ga. 699)

LANGLEY v. SIMMONS. (No. 444.)

(Supreme Court of Georgia. July 13, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1174—MECHANICS' LIENS \S 304—GENERAL VERDICT AND JUDGMENT—REMITTITUR.

Where a materialman seeks to foreclose his lien against real estate which has been improved with material furnished by him to a contractor for such purpose, he cannot recover a general verdict and judgment against the owner of the land for the value of the material furnished.

(a) Where on the trial of such a case the jury returned a verdict "for the plaintiff against [the defendant real estate owner] in the sum of [amount stated], and the same shall be a lien against the property described in the petition," such verdict is a general one against the owner, and is erroneous as against him. But a new trial will not be ordered if the plaintiff will, within 30 days from the filing of the remittitur in the court below, write off from the verdict and judgment the general finding against the owner of the premises, so as to make them special, instead of general, as against the owner; otherwise a new trial is ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4525; Dec. Dig. \S 1174; Mechanics' Liens, Cent. Dig. \S 632-635; Dec. Dig. \S 304.]

2. NEW TRIAL \S 81—GROUNDS—CORRECTION OF VERDICT.

Where in such case the name of the contractor was omitted from the verdict, after the return of which the same jury (who had not left the box or dispersed) rendered a verdict by default in another case wherein a witness was sworn, and after this the plaintiff's attorney in the instant case discovered the omission of a finding therein against the contractor, and on motion the court instructed the jury to again retire to their room to render a verdict against the contractor, which they did, such practice, though irregular, will not require a new trial, where it appears that counsel for the complaining party was present when the jury were thus sent out, knew of what had transpired, and made no objection at the time.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 131; Dec. Dig. \S 81.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by O. C. Simmons against W. B. Langley and another. Judgment for plaintiff, and the defendant named brings error. Affirmed on condition.

Albert Kemper and J. W. Weaver, both of Atlanta, for plaintiff in error. J. A. Hunt and Etheridge & Etheridge, all of Atlanta, for defendant in error.

HILL, J. [1] The verdict in this case was as follows:

"We, the jury, find for the plaintiff against W. H. Mitchell Company and W. B. Langley in the sum of three hundred fifty-four dollars and

thirty-three cents, and the same shall be a lien against the property described in the petition."

It is insisted that this is a general judgment against W. B. Langley, one of the defendants and the owner of the land on which the lien is sought to be foreclosed. A materialman cannot recover a general judgment against the owner of the land for the material furnished, for the simple reason that he is no party to the contract for the purchase of the material. *Mauck v. Rosser*, 126 Ga. 268, 271, 55 S. E. 32. The owner is brought into the case and made a party for the purpose of foreclosing the lien on his property, where the plaintiff has complied with the statute regarding the record and foreclosure of his lien. There is no prayer in the petition for a general judgment against the defendant Langley, but the verdict is general in its terms, and is against W. B. Langley as well as the W. H. Mitchell Company, the contractor; and we hold that it is a general verdict against the contractor and the owner of the premises. And, this being so, we think the verdict is erroneous as against the defendant W. B. Langley. But a new trial will not be ordered if the defendant in error will, within 30 days from the filing of the remittitur in the court below, write off from the verdict and judgment the general finding against W. B. Langley, leaving as to him only a verdict and judgment establishing a special lien against the premises; otherwise a new trial is ordered.

[2] 2. Error is assigned because the court, as it was alleged, directed the jury to return a verdict against W. H. Mitchell Company, one of the defendants, after the jury was discharged from the consideration of the case, and after another case had been tried and a verdict rendered by the same jury. After the jury had retired to their room in this case and returned a verdict, another case was tried before the same jury, and a default verdict was taken; and after the two previous verdicts had been published the plaintiff's attorney discovered that there was no verdict rendered against W. H. Mitchell Company. Upon motion the court instructed the jury to retire again to their room and render a verdict as to W. H. Mitchell Company. It is insisted that the facts set out above rendered the verdict in this case void, and therefore that a new trial should be granted. The trial judge certified that:

"The jury had not dispersed, but was still sitting in the box, a default verdict was rendered by it, and a witness sworn. Counsel was present when the jury was sent out, and made no objection. They knew the default verdict had been reached."

The trial judge treated the case as still being with the jury, and instructed them with reference to amending the verdict, and they retired and brought in a verdict in accordance with his instructions. A court should not try two cases at the same time,

or try part of a case, suspend, try another case, and then return to the first case and complete it, without the consent of parties or their counsel. When a case is begun it should be completed before the jury in that case is called upon to render a verdict in another case. But, in view of the trial judge's certificate, we think the plaintiff in error waived whatever right of objection he might have had to the proceedings with respect to the jury. His counsel was present in court and made no objection; and he cannot, after verdict, be heard to say that this action on the part of the court and jury will be cause for a new trial. He should have objected at the time; and, not having done so, his complaint comes too late. *Eberhart v. State*, 47 Ga. 598 (5); *Shropshire v. Johnson*, 62 Ga. 359, 360.

Judgment affirmed, on condition. All the Justices concur.

(143 Ga. 702)

JOHNSON v. VASSAR.

(Supreme Court of Georgia. July 13, 1915.)

(Syllabus by the Court.)

PLEADING ~~§~~225—DEMURRER—AMENDMENT—ALLOWANCE.

From the bill of exceptions in the present case the following appears: Upon a demurrer filed to a petition in a bail trover action the court entered the following judgment: "This demurrer coming on to be heard, and after argument, the same is sustained on each and every ground, with 20 days' leave given plaintiff to amend his petition. This January 22, 1914. [Signed] W. D. Ellis, Judge of Superior Court, Atlanta Circuit." The plaintiff, in compliance with this judgment, filed in the clerk's office a paper purporting to be an amendment to the petition, on the back of which appeared the following entry: "Filed in office this 10th day of February, 1914. W. W. Clark, Deputy Clerk." On the 20th day of June, 1914, the defendant made a motion to dismiss the plaintiff's petition, "for that no amendment was had and allowed in compliance with the order" of January 22d; and at the hearing of this motion, on June 24th, the court passed the following judgment: "This motion coming on to be heard, after argument of counsel, same is denied. George L. Bell, Judge of the Superior Court, Atlanta Circuit." To this judgment the defendant excepted. *Held*, that this was error. A proposed amendment cannot properly be so filed as to become a part of the record, until it has been allowed. Merely having it filed will not suffice. It is not a sufficient compliance with an order allowing a party 20 days to amend his pleading to file a proposed amendment without any allowance thereof. *Richards v. Shields*, 138 Ga. 583, 75 S. E. 602, and citations.

(a) In *Olds Motor Works v. Olds Oakland Co.*, 140 Ga. 400, 78 S. E. 902, no motion to dismiss, like that in the present case, was involved.

(b) If notice to the adverse party of the proposed amendment, and opportunity on his part to object, has not been had before it is presented and allowed to be filed, the rights of the parties might perhaps be preserved by an order allowing an amendment to be filed subject to objection or to demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575-583; Dec. Dig. ~~§~~225.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Bessie Vassar against W. A. Johnson. Judgment for plaintiff, and defendant brings error. Reversed.

Gober & Jackson, of Atlanta, for plaintiff in error. John W. Cox, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(148 Ga. 701)

ADAMS v. FOSTER et al. (two cases).
(No. 445.)

(Supreme Court of Georgia. July 13, 1915.)

(Syllabus by the Court.)

1. LAW OF THE CASE.

In an action of complaint for land, the defendant pleaded an equitable defense. On a former trial the court adjudged that the plaintiff recover the premises, provided the defendant failed to pay to the plaintiff a stated amount, with interest. On review that judgment was reversed, because of error in the allowance of interest. *Adams v. Foster*, 141 Ga. 438, 81 S. E. 201. By consent, the case was retried on the same record, by the court without a jury. The judgment is in accord with the ruling formerly made in the case, and is supported by the evidence.

2. RECEIVERS §14 — APPOINTMENT — GROUNDS—DISCRETION.

An auxiliary petition was filed for the appointment of a receiver to protect the property and impound the rents, on the ground of the defendant's insolvency and the insufficiency of the property to discharge the balance due on the purchase price. There was no abuse of discretion in making such appointment.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 21-23; Dec. Dig. §14.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Actions between Mrs. L. D. Adams and W. A. Foster and others. From the judgments, Mrs. Adams brings error. Affirmed.

J. B. Stewart, of Atlanta, for plaintiff in error. Etheridge & Etheridge, of Atlanta, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(148 Ga. 654)

MARBUT v. EMPIRE LIFE INS. CO.
(No. 431.)

(Supreme Court of Georgia. July 10, 1915.)

(Syllabus by the Court.)

INSURANCE §146, 290 — GUARANTEED DOUBLE INDEMNITY INSURANCE—CONSTRUCTION OF POLICY—DEATH OF BENEFICIARY—PETITION.

Where a contract of "guaranteed double indemnity" insurance provided that the company agreed to pay the insured "one thousand (\$1,000.00) dollars" on the "death of beneficiary," and, by a subsequent clause of the contract, that "if the name of a person over 21 and under 60 years of age is stated as the beneficiary hereunder, then in the event of the

death of said beneficiary during the life of the insured, while this policy is of force, being caused" by accident as provided in the policy, the company would pay the insured the sum of \$1,000, and where, after the death of the beneficiary, it appeared from a petition filed by the insured against the company, to recover the sum of \$1,000 on account of his death, that the beneficiary was 67 years of age at the date of issuance of the policy, a demurrer to the petition was properly sustained.

(a) This is so regardless of the cause of death of the beneficiary.

(b) The contract is to be considered in its entirety, so as to give force and effect to each material clause.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298, 671; Dec. Dig. §146, 290.]

Error from Superior Court, Fulton County; George L. Bell, Judge.

Action by M. B. Marbut against the Empire Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hewlett, Dennis & Whitman, of Atlanta, for plaintiff in error. Little, Powell, Smith & Goldstein, of Atlanta, for defendant in error.

HILL, J. Milton B. Marbut procured a policy of insurance from the Empire Life Insurance Company, known as "double indemnity insurance." The policy, so far as considered material, is as follows:

"Empire Life Insurance Company, Atlanta, Georgia, by this policy of insurance agrees to pay one thousand (\$1,000.00) dollars at the home office of the company in Atlanta, Georgia, as follows: [The beneficiary] to John Isaac Marbut (father), or, if the insured survives the aforesaid beneficiary, to the executors, administrators, or assigns of the insured, immediately on approval of proofs of the death of the insured during the continuance of this contract. [The insured] Milton B. Marbut of Ithonia, county of De Kalb, state of Georgia. Guaranteed double indemnity. The company guarantees to pay under this policy: (1) Two thousand (\$2,000.00) dollars death by accident. (2) One thousand (\$1,000.00) dollars death by other cause. (3) One thousand (\$1,000.00) dollars total disability, payable in ten equal annual installments. (4) One thousand (\$1,000.00) dollars death of beneficiary."

(B) During the premium-payment period, subject to the limitations hereinafter stated, if the principal contract is in force, if the name of a person over 21 and under 60 years of age is stated as the beneficiary hereunder, then in the event of the death of said beneficiary during the life of the insured, while this policy is in force, being caused, independently of any and all other causes, by bodily injury effected exclusively and directly by external and violent and accidental means, and occurring within ninety days of the event causing such injury, and provided such injury is sustained while riding as a passenger in or on a place provided for the regular occupancy of passengers in a railway train or street car propelled by cable or compressed air or electricity or gasoline or naphtha or steam and provided by a common carrier for the regular transportation of passengers only, or while riding on an elevator provided for passenger service, immediately upon the receipt and approval of proofs of death of said beneficiary, the com-

pany will pay to the insured Milton B. Marbut the sum of one thousand (\$1,000.00) dollars."

The plaintiff, Milton B. Marbut, brought suit against the insurer, and alleged, so far as material to be set out here, substantially as follows: The beneficiary named in the policy, John Isaac Marbut, died on July 20, 1913, of paralysis, and immediately after his death the plaintiff notified the defendant of the fact, and offered to make proof of the death and otherwise to comply with the terms and conditions of the policy with respect to proof of death and loss; but defendant refused to accept the proof, insisting that the death was not covered by the terms of the policy, and that there was no liability on its part to pay plaintiff any amount on account of such death. Plaintiff made demand on defendant for the payment of the \$1,000, as agreed and guaranteed to be paid to him, and defendant failed and refused to pay plaintiff; and plaintiff alleges that the refusal to pay was in bad faith. He sued to recover \$1,000, and \$250 as reasonable attorney's fees for prosecuting the case. It was alleged that the policy was executed by the defendant to the plaintiff on September 16, 1908, by the terms of which defendant, among other things, agreed to pay to plaintiff \$1,000 upon the death of the above-named beneficiary, the father of petitioner; "said John Isaac Marbut being of the age of sixty-seven (67) years at the date of the execution and issuance of the policy." The defendant demurred to the petition, on the grounds, among others:

"That the policy sued on does not obligate the defendant to pay to the plaintiff any sum whatever upon the death of John Isaac Marbut, because at the time of the issuance of the policy he was sixty-seven (67) years of age, and that under the terms of the policy the beneficiary whose death might create any liability on the part of the defendant must be between the ages of twenty-one (21) and sixty (60) years; and because it appears that the death of the beneficiary was caused by paralysis, which is not covered by the policy."

The court sustained the demurrer, and the plaintiff excepted.

So the case is here on petition and demurrer, and the facts alleged must be taken as true. From the above allegations it will be seen that the beneficiary was 67 years old when the policy was issued, one condition of which is that the beneficiary must be between the ages of 21 and 60 years. But it is insisted that the policy on its face guaranteed unconditionally the payment by the insurer to the insured of \$1,000 in the event of the death of the beneficiary, without any qualification or condition whatever; and that as the subsequent clause of the policy, which referred to the age of the beneficiary, did not refer by its terms to the face of the policy, or vice versa, it could not relate to the beneficiary, and therefore the former un-

conditional clause prevailed. We cannot agree to this contention. The whole contract must be construed together, so as to give effect to each material and valid clause thereof. It would be contrary to all rules of construction to select one clause in a contract and construe it to the exclusion of other clauses bearing on and affecting the same subject-matter, and at variance with it. It is not a question of ambiguity, as argued, for both clauses are perfectly clear, when standing alone. It is a question of the meaning of both clauses of the contract, when construed together. They both refer to the death of the beneficiary; and, construing them together, we think the meaning is that in case of the death of the beneficiary, who must be between the ages of 21 and 60 years at the time of the taking out of the policy by the insured, the latter would be entitled to the sum of \$1,000, provided the death of the beneficiary was caused in the manner stated in the contract. But, if the beneficiary was more than 60 years at the date of the issuance of the policy, then, under the contract, the insured could not recover. It appearing from the petition that the beneficiary was 67 years of age at the time of the issuance of the policy, the insured cannot, under the contract, recover for his death. And this is so regardless of the cause of his death. The court did not err in sustaining the demurrer.

Judgment affirmed. All the Justices concur.

(143 Ga. 688)

TOWALIGA FALLS POWER CO. v. FOSTER. (No. 440.)

(Supreme Court of Georgia. July 10, 1915.)

(Syllabus by the Court.)

1. DEMURRER—AMENDMENT OF PETITION.

The special demurrers were met by amendment, and the petition as amended was sufficient to withstand a general demurrer.

(a) A number of the questions raised by the petition and demurrer are controlled by the decision in the case of *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636, which was published subsequently to the trial in the court below. Only such questions will be determined now as have not been formerly ruled.

2. STATUTES §117—TITLE OF ACT—VENUE.

The act of 1912 (Acts 1912, p. 66), which fixes the venue of suits against electric companies, etc., is not unconstitutional, as being in violation of article 3, § 7, par. 8, of the Constitution of the state of Georgia (Civ. Code 1910, § 6437), which provides that "no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." Service is incident and germane to the venue of suits, and in fixing venue provision must also be made for the service of suits. That the act of 1912 provides for service in cases where the venue is also fixed by the act and is comprehended in the caption does not render the act repugnant to the constitutional inhibition quoted above.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 154-157; Dec. Dig. §117.]

3. STATUTES \Leftrightarrow 138—AMENDMENT — REPEAL BY IMPLICATION.

Nor is it in violation of article 3, § 7, par. 17, of the Constitution (Civ. Code 1910, § 6445), which provides that "no law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending * * * act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made." This provision of the Constitution has no application to repeals by implication (Nolan v. Central Georgia Power Co., 134 Ga. 201 [3], 67 S. E. 856; City of Cartersville v. McGinnis, 142 Ga. 71, 82 S. E. 487), and it is only by implication that the act of 1912, *supra*, amends or repeals Civ. Code 1910, § 2798, in so far as that section conflicts with the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. \Leftrightarrow 138.]

4. STATUTES \Leftrightarrow 85 — GENERAL LAWS—REGULATION OF ELECTRIC COMPANIES.

The act of 1912 (Acts 1912, p. 66) is not repugnant to the provision of the Constitution of this state which declares that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law." Const. art. 1, § 4, par. 1. The act of 1912 is a general law operating through the state, and does no violence to the provisions of the Constitution just quoted. Jefferson Fire Insurance Co. v. Brackin, 140 Ga. 637, 79 S. E. 467.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. \Leftrightarrow 85.]

Error from Superior Court, Butts County; Robt. T. Daniel, Judge.

Action between the Towaliga Falls Power Company and W. H. Foster. Judgment for the latter, and the former brings error. Affirmed.

Cleveland & Goodrich, of Griffin, and W. E. Watkins, of Jackson, for plaintiff in error. C. L. Redman, of Jackson, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 644)

FLETCHER et al. v. BOOTH. (No. 427.) (Supreme Court of Georgia. July 3, 1915.)

(Syllabus by the Court.)

HABEAS CORPUS \Leftrightarrow 114—CUSTODY OF CHILD — AWARD.

Under the undisputed evidence contained in the record, the judge of the superior court, upon the hearing of the certiorari brought to review a judgment of the ordinary sitting as a habeas corpus court, properly sustained the certiorari and rendered final judgment directing the ordinary to enter judgment awarding the custody of an infant child to the petitioner.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 116; Dec. Dig. \Leftrightarrow 114.]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by H. O. Booth against G. W. Fletcher and another. Judgment for plaintiff on certiorari, and defendants bring error. Affirmed.

On the 19th day of October, 1912, there came on to be tried, before the ordinary of Tift county, the case of H. O. Booth against G. W. Fletcher and Mrs. G. W. Fletcher; the same being a petition for habeas corpus, brought to recover the possession of one Jessie Fletcher, a child about ten years of age. Upon the hearing the ordinary granted an order awarding the custody of the child to the defendants. The plaintiff presented to the judge of the superior court his petition for a writ of certiorari, which was sanctioned; and, when it came on for hearing, the judge passed the following order:

"This matter having been submitted to me in open court at the December term, 1912, upon consideration it is very evident that the honorable ordinary committed error in failing, under the testimony, to award the custody of the child to the plaintiff in the case. It would be reversible error in me now to hold otherwise. Accordingly it is ordered that a new trial be granted in the case; and that the matter be sent back to the ordinary, with instructions."

On the 15th day of November, 1913, the petition for habeas corpus came on to be heard before the ordinary, who, after hearing the evidence on both sides, passed an order in which the custody of the child was again awarded to the defendants. The plaintiff again sued out a writ of certiorari to have reviewed this latter judgment. On the 11th day of July, 1914, after hearing the petition for certiorari, the court passed an order sustaining the petition, and further adjudging that the custody of the child be awarded to the petitioner, and making final disposition of the cause by ordering that the ordinary enter up judgment awarding the custody of the child to the petitioner, without further hearing. To this order the defendants excepted.

J. S. Ridgill and Fulwood & Skeen, all of Tifton, for plaintiffs in error. R. Eve and R. D. Smith, both of Tifton, for defendant in error.

BECK, J. (after stating the facts as above). We are of the opinion that the court, under the evidence in the case, was authorized to enter the judgment complained of. The undisputed evidence shows that the mother of the child in question was a widow at the time when the illness, which resulted in her death, came upon her. A few days before her death, and during her last sickness, she said to the petitioner that she wanted him to take the child back home with him; that he had been like a father to her; that she knew she (the mother) was going to die, and she wanted petitioner to take the child and rear her like one of his own children. And petitioner, who was the brother of this mother of the infant child, agreed to the proposition then made. He did take the child home with him, and treated her as one of his own children. The mother died shortly after the

conversation referred to. Petitioner sent the child to school from January until July, and then allowed her to visit her grandparents, the defendants in the habeas corpus proceeding; the latter having made a request of petitioner to allow the child to visit them. When the child had been with the grandparents for some time, they refused to allow her to return to petitioner, and insisted that they had the right to keep her.

It appears from the evidence that Mr. Booth and his wife, as well as Mr. Fletcher and his wife, are anxious to have the child in their family. The uncontroverted evidence shows that there is no question as to the fitness of either Booth or Fletcher to have the custody of this child. They are both amply able to take care of her, rear her properly, and to send her to school. In either home the child would be under good influences and well provided for. It is not, therefore, a question of taking the child from the home of one in whose custody the dying mother, the sole surviving parent, left her, and giving the custody to one better prepared to properly rear and educate the child, and thereby enhance the child's welfare. And it would seem that any other order that might have been passed in this case would have been contrary to law and evidence. The mother had the right (the father being dead) to give the possession of this child of tender years to the brother, that he might rear and educate her. The brother had accepted the request and offer of the sister, and had complied faithfully with his obligation. Under such circumstances, it would have been a clear miscarriage of justice for a court to have awarded the custody of the child to the grandparents.

Judgment affirmed. All the Justices concur.

(143 Ga. 677)

PLANE et al. v. WALKER. (No. 436.)
(Supreme Court of Georgia. July 8, 1915.)

(Syllabus by the Court.)

1. INSTRUCTIONS—NEW TRIAL.

When considered in the light of the pleadings and the evidence and the entire charge, the excerpts from the charge which are complained of show no error requiring the grant of a new trial.

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between W. F. Plane and others and J. M. Walker. From the judgment, the parties first mentioned bring error. Affirmed.

W. O. Wilson, of Atlanta, for plaintiffs in error. Edgar Latham, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(143 Ga. 664)

YOUMANS et al. v. MORGAN. (No. 430.)
(Supreme Court of Georgia. July 3, 1915.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No complaint having been made of any ruling of the court made during the trial, and the evidence being sufficient to authorize the verdict, there was no error in overruling the motion for a new trial.

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action between J. E. Youmans and others and Matilda Morgan. From the judgment, the parties first mentioned bring error. Affirmed.

S. D. Dell, J. C. Bennett, and J. M. Swain, Jr., all of Hazlehurst, for plaintiffs in error. Grant & Rogers, of Hazlehurst, and W. W. Bennett, of Baxley, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 667)

RODGERS v. McCUNE et al. (No. 432.)
(Supreme Court of Georgia. July 3, 1915.)

(Syllabus by the Court.)

JUDGMENT —518 — DECREE PROTECTING HOMESTEAD—COLLATERAL ATTACK.

Where an equitable petition was brought by one who purchased a lot of land, during the existence of a homestead thereon, at a sheriff's sale under the levy of a fi. fa., against the surviving beneficiaries of the homestead estate, alleging that the legal title was in the plaintiff, that the homestead estate had terminated by reason of the fact that the head of the family was dead, that his alleged widow (who in reality was never his legal wife) had abandoned the property, that the children were of legal age, that the homestead property was unoccupied and the houses thereon were falling into decay, and that the defendants were attempting to sell the property, and praying that the homestead be declared at an end, that the title to the land and the right of possession be decreed to be in the plaintiff, that he be put in possession, and that the defendants be enjoined from taking possession of or selling or attempting to sell the land in controversy, and where the petition showed that in a former suit against him a decree had been rendered, enjoining the plaintiff from taking possession of the property in question until the termination of the homestead, "and then the injunction be dissolved," and where the recitals in the petition were not sufficient to show that the homestead had terminated, and only collaterally sought to attack its validity, it was not error to dismiss such petition on motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. —518.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Robt. L. Rodgers against Sarah McCune and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Robt. L. Rodgers, of Beaumont, Tex., for plaintiff in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 647)

WOOD et al. v. RICE. (No. 429.)

(Supreme Court of Georgia. July 3, 1915.)

*(Syllabus by the Court.)*TRUSTS \S 17, 18, 371—ENFORCEMENT—PETITION—SUFFICIENCY AGAINST DEMURRER.

The allegations of the petition failed to show a valid express trust, or an implied trust, or a parol contract enforceable by the plaintiffs. Accordingly there was no error in dismissing the petition on demurrer.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 15-24, 588-599; Dec. Dig. \S 17, 18, 371.]

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Action by Mrs. E. E. Wood and others against W. B. Rice. Judgment for defendant, and plaintiffs bring error. Affirmed.

An equitable petition was filed by Mrs. E. E. Wood, R. B. Wood, J. N. Wood, Mildred Wood, and Evelyn Wood (the last two named being minors and appearing by their next friend, J. N. Wood, Sr.) against W. B. Rice. The petition alleged, in substance, as follows: Mrs. E. E. Wood is the wife of J. N. Wood, Sr., and the other plaintiffs are their children. Prior to 1901 J. N. Wood, Sr., had been doing business for a number of years with Peacock, Hunt & West Company and their predecessors, naval stores factors. Peter Peacock was a member of this firm, and was the uncle of J. N. Wood, Sr. In 1901 J. N. Wood, Sr., was engaged in managing the business in which he had, for a number of years, been engaged under the firm name of E. E. Wood & Co., said E. E. Wood being one of the plaintiffs in this case, and the wife of J. N. Wood, Sr. E. E. Wood & Co. became heavily indebted to Peacock, Hunt & West Company, the latter holding a mortgage on all the property of the former. This mortgage was foreclosed, and at the sale John E. Harris, a member of the firm of Peacock, Hunt & West Company, purchased the mortgaged property in his own name and received deeds to it. The property at that time was worth, upon a fair market valuation, \$10,000. After the sale it was agreed between John E. Harris and J. N. Wood, Sr., acting for the plaintiffs, that for the benefit of Wood's family, and on account of the relationship of Wood to Peacock, and in view of his long business dealings with the Peacock firm, J. N. Wood, Sr., should have the property back, for his wife and children, for the sum of \$4,500, which was approximately one-half of the mortgage debt for which it was sold. Upon this agreement being made, Wood, Sr., acting for the plaintiffs, "arranged to procure" the money necessary for the purchase, except \$500. For the loan of this \$500 he applied to the defendant W. B. Rice, who was the brother of Mrs. E. E. Wood, offering him 7 per cent. interest. After going over the situation with Wood, Rice declined to make the loan, but finally agreed to see Harris, the purchaser at the sale of

the mortgaged property, and "try to save the property * * * to the said Mrs. E. E. Wood * * * and her children." The next day after this agreement, Rice appeared at the home of Wood, Sr., and told him that he had arranged to pay the entire amount of the \$4,500, and "would save the property for petitioners." Thereupon, on September 26, 1902, Harris executed a legal title to the property in question to Rice for the consideration of \$4,500. At the time stated J. E. Harris—

"understood that it was the intention of petitioners, through the said J. N. Wood, Sr., to get the said W. B. Rice to advance the necessary money to save the said property for petitioners if he would do so, and the said J. E. Harris understood and was under the impression, at the time he made the deed to the said W. B. Rice, that the said W. B. Rice was advancing the money in order to save the said property for petitioners. * * * It was the understanding and agreement between the said W. B. Rice * * * and J. N. Wood, Sr., acting for petitioners, that the said amount of \$4,500, so advanced as above mentioned by the said Rice, should be repaid to the said Rice with interest at 7 per cent., and that when said sum had been so paid * * * the said Rice was to have no further interest in said property, and was to relinquish all claim thereto in favor of your petitioners. There was no restriction in the agreement aforesaid that the said Rice should not sell off any part of the property so deeded to him by the said Harris, but it was understood and agreed that he should account to petitioners for all money so received by him in the sale of said property, and petitioners, who were living on said property at the time of the execution of the deed from the said Harris to the said Rice, remained in possession of said property, paying no rent therefor, upon the understanding and agreement, had as aforesaid between the said J. N. Wood, Sr., for their benefit, and the said Rice, that the said Rice should be paid back; and your petitioners remained in possession of the property described in the said deed from the said Harris to the said Wood for the said term of four years, on the agreement and understanding with the said Rice aforesaid that he was to be paid back his said loan of \$4,500, with 7 per cent. interest, and that if he sold off any part of the land described in said deed, or any property described in said deed, the purchase money paid for said property should be applied by him on the said \$4,500 loan, and that any excess which he received over and above the \$4,500 should be paid to your petitioners."

In pursuance of the understanding and agreement between J. N. Wood, Sr., and Rice above referred to, about November 17, 1902, Rice began to sell off the property to which he had secured title from Harris, with the knowledge and consent of the plaintiffs, and continued to sell from time to time until he had sold the entire property and received the purchase money therefor. The petition contains a detailed statement of each sale, with the consideration thereof, during a period extending from 1902 to 1910. J. N. Wood, Sr., acting for the plaintiffs, acquiesced in these sales by Rice, relying upon the understanding and agreement, above referred to, that the sales were to be made for the purpose of paying back to Rice the \$4,500, with interest.

Plaintiffs believed, relying upon the understanding and agreement had with Rice, that any amount over and above the \$4,500, with interest arising from said sales, was received by Rice for their benefit, and would be paid to them by him. Plaintiffs allege that Rice has collected the sum of \$13,000 over and above the amount necessary to pay back the \$4,500, with interest, and continues to hold the same, and declines and refuses to pay to the plaintiffs this overplus, in violation of his trust and agreement. Plaintiffs prayed for a judgment against the defendant for \$13,000, for an accounting, and a decree for whatever amount a complete investigation might disclose to be due them. The defendant demurred to the petition. The court sustained the demurrer, and the plaintiffs excepted.

Feagin & Hancock, of Macon, for plaintiffs in error. Williams & Bradley, of Swainsboro, and M. H. Blackshear and J. S. Adams, both of Dublin, for defendant in error.

LUMPKIN, J. (after stating the facts as above). While the contracts, agreements, or understandings alleged in the petition are not expressly stated to have been in parol, yet from the petition as a whole it may fairly be inferred that such was the fact, and counsel on both sides argued the case on that basis, each treating the alleged contract or agreement relied on as having been in parol. We will so consider it.

At the time when the alleged agreement was made, the property had been sold by the sheriff, and bought by Harris. Neither J. N. Wood, Sr., nor his wife, nor his children, had any right or interest whatsoever in or in regard to it. Harris, the absolute owner, was willing to let Wood repurchase the property for \$4,500, but Wood was unable to raise the money. According to the allegations, Rice agreed to buy the property from Harris and pay his own money for it; and it was "the understanding and agreement" that the \$4,500 paid by Rice was to be repaid to him, with interest at 7 per cent., and that when this amount had been paid he—

"was to have no further interest in said property, and was to relinquish all claim thereto in favor of your petitioners."

It was alleged that there was no restriction in the agreement preventing Rice from selling any part of the property, but that it was "understood and agreed" that he was to account to the plaintiffs for all money so received. Most of the property was realty. In so far as it was sought to create an express trust in favor of the plaintiffs, this could not be done by parol, especially not as to the realty. Civil Code 1910, § 3738. In the petition the expression is several times used that J. N. Wood, Sr., did certain things, "acting for petitioners." Sometimes it is stated that he acted "for the benefit of petitioners." Considering the allegations together, it is appar-

ent that it was not intended to allege that he was acting as agent for his wife and minor children, and that they were the real principals in the contract or agreement, but merely that he desired to obtain the property from Harris for the benefit of his family. Neither Wood nor any of the plaintiffs paid anything to Rice or to Harris. The cases in which an owner has conveyed land to another, and in which a resulting trust in favor of the grantor or his heirs has been declared on account, of fraud or other circumstances, are not applicable. Neither are those decisions applicable in which a parol contract in regard to land has been held to be taken out of the statute of frauds by reason of full performance by the party seeking to enforce it, such as full payment of the purchase money, or by such part performance on his part as would make it a fraud not to enforce the contract against the other party. Neither Wood nor Harris is here seeking to enforce any contract made by Rice with either of them. Stripped of all surplusage, the proceeding is an effort by Mrs. Wood and her children to enforce an alleged parol agreement made by Wood with Rice, by which the latter was to buy certain land and personality, and, after receiving back the amount advanced by him with interest, to deliver what remained, or its proceeds, if sold, to the plaintiffs. There was not even a direct allegation that Rice was to sell the property and reimburse himself, but it was alleged that:

"There was no restriction in the agreement aforesaid that said Rice should not sell off any part of the property so deeded to him by the said Harris, but it was understood and agreed that he should account to petitioners for all moneys so received by him in the sale of said property."

At another place, it was alleged that after Rice should have received the \$4,500 paid by him, he was to have no further interest in the property. It was also alleged that the petitioners were allowed to remain upon the land without payment of rent for four years. How their being permitted to use the land free of rent gave them any rights in regard to it which they did not possess before is not apparent. Rice was not in the position of an agent or attorney who buys property for his principal and takes the title in his own name. There are various rather indefinite allegations as to agreements, understandings, and impressions of parties, and as to Wood and his wife and children acquiescing in sales of parts of the property by Rice upon the understanding that they were being made for the purpose of paying back to him the \$4,500 which he had paid to Harris for the land, with interest thereon, and upon the understanding and agreement that any surplus received by him would be paid to the plaintiffs. The allegations do not show an implied trust under Civil Code 1910, § 3739. The plaintiffs' right to recover, if

any, must at last rest upon the alleged parol agreement above indicated, together with the fact that Rice sold the property for more than the amount which he had paid for it, with interest. They seek to recover a judgment for the excess. There is nothing to take the agreement, as to the land, out of the statute of frauds.

An examination of the facts of the case relied on by counsel for the plaintiffs, in which a person having title to land, or an interest in it, made a parol agreement with another in regard to it, which was so far performed as to take it out of the statute of frauds, or in which an agent or attorney bought land for his principal and took title in his own name, or in which the circumstances were such as to create an implied trust, will show that they are quite different from those here involved. Thus in *Freeman v. Cooper*, 14 Ga. 238, the owner of land which was to be sold under levy made an agreement with another person that the latter should purchase the property, and that the former should have the right to buy it back by paying to the purchaser what he gave for it, with interest. It was alleged that the person with whom the agreement was made bought the land at the sheriff's sale, and that the owner whose land was thus sold and bought in had repaid the amount of the purchase money. In *Gilmore v. Johnston*, 14 Ga. 683, it was alleged that an owner of property, consisting of lands and negroes, received the greater portion of it by virtue of his marriage; that executions were about to be levied upon it; that, knowing it would be sold at a sacrifice, he and his wife agreed with her brother for the latter to attend the sheriff's sale, become the purchaser, and, after reimbursing himself out of the property, to hold the remainder in trust for the benefit of the debtor's wife and children; that the brother attended the sale, announced to the bidders that he was buying the property for the benefit of his sister and her children, and thereby was enabled to buy land worth \$1,000 for \$20, and negroes worth several hundred dollars for \$50, and thus to become the purchaser of the property for a comparatively inconsiderable sum; that, to enable him to pay off the debts and carry out the agreement, the debtor placed in his hands other assets, from which he realized \$3,200; that he had sold the land for about \$1,000, which, with the sum above mentioned, was sufficient to reimburse him; that he had used the negroes for several years, and was in possession of some of them which were of large value. In *Holmes v. Holmes*, 106 Ga. 858, 33 S. E. 216, an attorney for the defendant in execution purchased the land of his client at a sheriff's sale, and took a deed in his own name. There was also a parol agreement which was alleged to have been carried out by all the parties concerned, and it was further alleged

that the estate had become ready for distribution among the children of the defendant in execution, in accordance with the agreement. In the opinion of the court it was said that it might be contended that the record failed to show any payment by the plaintiffs of any part of the purchase money, or any other circumstance by virtue of which they could claim a beneficial interest in the property. Lewis, J., said:

"This presents the only real difficulty in the case, but this does not answer the proposition that, even if they had no rights by virtue of the voluntary agreement made in their interest, they have rights in this property as heirs at law of their deceased father."

It was added that if, under the facts, there was a resulting or implied trust in favor of the estate of the decedent, the plaintiffs, as heirs at law, would have an interest in the property. No such facts are involved in the present case. See, in this connection, *Roughton v. Rawlings*, 88 Ga. 819, 16 S. E. 89; *Lyons v. Bass*, 108 Ga. 573, 34 S. E. 721.

What has been said above renders it unnecessary to discuss the ground of the demurrer based on the statute of limitations. Judgment affirmed. All the Justices concur.

(143 Ga. 665)

**FIRST NAT. BANK OF QUITMAN v.
RAMBO et al. (No. 434.)**

(Supreme Court of Georgia. July 8, 1915.)

(Syllabus by the Court.)

1. USURY § 2 — LAW GOVERNING — CONTRACTS SECURED ON LAND.

Where a person who had purchased a lot of land lying in Georgia procured another to advance money with which to pay the balance of the purchase price, and a deed was made by the vendor to such other person, and a bond for title was executed by him, agreeing to convey the land to the vendee upon payment of notes given to him by such vendee, and all of these papers were executed in Georgia, and where it did not appear that payment was to be made or the contract consummated in any way elsewhere, the usury law of this state, and not that of the state of Florida, applied to the contract and conveyances so made, although the negotiations and parol agreements preceding the execution of the papers may have taken place in Florida.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 2-15, 418; Dec. Dig. § 2.]

2. USURY § 75 — EFFECT — SECURITY — CONVEYANCE OF LAND.

Where, in a transaction of the character indicated in the preceding headnote, the vendor was willing to take less than the full amount of the indebtedness held by him, and the vendee paid a portion thereof, and the person who was procured to make the advance paid the balance of the amount which the vendor was willing to accept in settlement, but took notes from the vendee, each of which included in one sum principal and interest to maturity, and the aggregate of such notes amounted to the sum so advanced, with more than 8 per cent. interest thereon, and where, by agreement between the parties, the person making the advance took from the vendor, to secure such amount, a con-

veyance of the land, such deed was infected with usury and was void.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 148; Dec. Dig. ¶ 75.]

3. USURY ¶ 128—REMEDIES OF THIRD PERSON—SUBSEQUENT LIENOR—RIGHT TO CONVEYANCE.

Where, in a transaction of the character above indicated, the vendee transferred to a bank the bond for title, which she had taken from her original vendor, and which had not been surrendered or canceled in connection with the loan and payment of the purchase money, and the bank took the transfer to secure a loan, without knowledge or notice of the making of the deed by the vendor to the third person advancing money to the vendee, or of the bond for title made by such person to the vendee, the bank acquired an equitable interest by such transfer, and could set up, as against the third person who had advanced the money and taken a deed to secure the usurious debt, that the title so taken was infected with usury.

(a) If the deed to which reference has just been made was void, the bank, as the transferee of the original bond for title, would not have the right to a decree requiring the taker of such deed to execute a conveyance to it upon payment of the balance of the purchase price due under the original contract.

(b) A verdict finding that there was no usury in the transaction—the evidence being substantially without conflict as to what transpired—was contrary to law.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 380-383; Dec. Dig. ¶ 128.]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Suit by the First National Bank of Quitman against Mrs. J. M. Rambo and others. Decree for defendants, and plaintiff brings error. Reversed.

G. Owens owned certain land in Brooks county. On November 22, 1906, he made a bond for title to Mrs. J. M. Rambo, the purchase money being \$3,200, of which \$1,000 was paid in cash, and the balance was represented by five notes for \$440 each, with interest at 8 per cent. per annum, the first of which was due on January 1, 1908, and the others annually thereafter. This bond for title was recorded on November 30, 1906, and on October 22, 1910, it was transferred by Mrs. Rambo to the First National Bank of Quitman to secure an indebtedness by her to it. Prior to this, on December 31, 1909, before all of the notes to Owens became due, an arrangement was made between him, Mrs. Rambo, and one Wimberly by which the debt to Owens was satisfied, a deed was made by him to Wimberly, the latter executed a bond for title to Mrs. Rambo, and she gave notes to him. The original bond was not canceled or delivered up. Owens testified that at that time the debt of Mrs. Rambo to him was about \$2,100. Mrs. Rambo testified that it was between \$2,000 and \$2,200. Another person calculated the amount then due as \$2,172.97. Owens was willing to take \$1,900 in settlement. Of this Wimberly paid \$1,600, and Mrs. Rambo \$300, and the matter was closed as above stated. The evidence show-

ed that this was not a purchase by Wimberly and a resale to Mrs. Rambo, but a means by which Wimberly advanced money for Mrs. Rambo to pay Owens, and was substituted as the holder of the title to secure repayment. She gave him three notes, each dated December 31, 1909, the first for \$920, due January 1, 1912, the second for \$600, due January 1, 1913, and the third for \$550, due January 1, 1914. Each of them bore 8 per cent. interest after maturity. The bond for title executed by Wimberly was transferred by Mrs. Rambo to Powers & Co. to secure a debt due by her to them. On December 8, 1911, Wimberly loaned to Mrs. Rambo and paid to Powers & Co. \$250 in part payment of the indebtedness of Mrs. Rambo to them, and took her note for that amount; and an agreement was made that this was to become a part of the purchase money described in the bond, and to be paid before title should be made to her.

The account given by Wimberly in his testimony as to the amount advanced by him and the amount of the notes given to him was substantially this: Mrs. Rambo applied to him for a loan, but only wanted to pay 8 per cent. interest. The rate allowed in Florida, where he lived, was 10 per cent., and he declined to let her have the money at 8. Owens proposed to discount the debt so that Wimberly would get 10 per cent. for the money advanced by him, 8 per cent. being paid directly by Mrs. Rambo, and the additional 2 per cent. from the deduction or "discount" allowed by Owens. This was agreed to. The witness then said:

"I was getting a discount of about 2 per cent. from Mr. Owens; that is, getting a discount of 2 per cent. on the \$1,600. This amounts to something like \$125. I had Mr. Knight to figure it for me. My understanding is that I told him I was interested in \$1,725."

He further testified that he lived in Florida; that Mrs. Rambo came to his home there to borrow the money; and that he there agreed to let her have it. Mrs. Rambo testified that on December 31, 1909, Owens came to Quitman, Ga., to draw up the papers; that she made a deed to Wimberly to the land, and she gave Wimberly notes aggregating \$2,070, principal and interest; that he told Owens that the original bond was in the Bank of Quitman; that she did not know how much interest Wimberly charged her, but understood that she was giving him notes for \$1,600, and interest; that all the agreements about the contract with Wimberly were made in Florida; and that she told him that she was willing to pay 10 per cent., because she knew the rate in that state was 10 per cent., and he lived in Florida. She then said: "We came to Quitman because it was convenient."

It was conceded that the First National Bank of Quitman took a transfer of the bond for title of Owens, as security, without actual knowledge that Owens had made a deed

to Wimberly, or that the latter had made a bond for title to Mrs. Rambo, or that it had been transferred to Powers & Co.; that this is the only security held by the bank; and that Mrs. Rambo has remained in possession of the property. From copies of the papers attached to the answer of Wimberly it appeared that they were executed in Brooks county, Ga.

On November 14, 1918, the bank filed an equitable petition against Mrs. Rambo and Wimberly, alleging that it had tendered to Wimberly the amount paid by him for Mrs. Rambo and demanded a deed from him, which he refused. The petition prayed for a judgment on the debt due to the plaintiff; that Wimberly be required to execute a deed to the bank; and that it have general relief. By amendment the deed from Owens to Wimberly was attacked as void for usury, and it was prayed that title to the land should be decreed to be in Mrs. Rambo, subject to the rights of the plaintiff under the bond transferred to it; and that the property be sold and the proceeds be applied to the payment of Mrs. Rambo's indebtedness to the plaintiff, and the balance as the court might direct.

The jury found for the plaintiff against Mrs. Rambo, but that the deed to Wimberly was not infected with usury, and in his favor in other respects. The plaintiff's motion for a new trial was refused, and it excepted.

Branch & Snow, of Quitman, for plaintiff in error. William H. Long, of Quitman, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Was the transaction controlled by the Georgia law, or did the law of Florida (which the testimony showed permitted the charging of 10 per cent. interest) apply? It appeared that Mrs. Rambo and Powers & Co. lived in Brooks county, in this state, while Wimberly lived in Florida; that the land lay in Brooks county; and that the notes and other papers were there executed. It did not appear that the notes given to Wimberly were made payable at any other place, or that the contract was to be performed elsewhere than in Georgia. This was a Georgia contract, and governed by Georgia law; and the mere fact that the negotiations preliminary to the execution of the papers took place in Florida did not alter the case. Civil Code 1910, § 3430; 1 Dan. Neg. Inst. (6th Ed.) 590; Taylor v. American Freehold, etc., Co., 106 Ga. 238, 32 S. E. 153; Martin v. Johnson, 84 Ga. 481, 486, 10 S. E. 1092, 8 L. R. A. 170

[2] 2. Section 3436 of Civil Code 1910 declares:

"It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances,

discount, exchange, or by any contract or contrivance or device whatever."

And section 3442 declares:

"All titles to property made as a part of an usurious contract, or to evade the laws against usury, are void."

According to the undisputed evidence, Owens made to Mrs. Rambo a bond for title, and she gave notes for the balance of the purchase money. The bond was transferred to the bank as security. Wimberly agreed to take up the indebtedness and give time. It was not a purchase by him and a resale to her, but he took the title as security. The deed was made by Owens to him; but, as between the parties, it was in substance a security given by Mrs. Rambo to him. She remained in possession. The original purchase-money notes made to Owens were not transferred to Wimberly; but they were treated as paid, and a new debt was created for an advance made by Wimberly. The indebtedness due to Owens then amounted to about \$2,100 or \$2,200. He was willing to take \$1,900 in settlement. Wimberly actually paid \$1,600, and Mrs. Rambo \$300. Wimberly took from her notes which included principal and interest, and which accountants testified included something more than 10 per cent. interest on \$1,600, the amount actually advanced by him. According to his own evidence, this was done because he was not willing to take 8 per cent. for the use of his money, and required 10 per cent. He also testified that he had a certain person figure the amount, and told such person that he was "interested in \$1,725," thus giving, as a basis for calculating the amount of the indebtedness for which Mrs. Rambo was to give notes, a sum in excess of the real amount advanced for her by him. Calling this a discount, and claiming that Wimberly was to get 10 per cent. for his money, but Mrs. Rambo was to pay 8 per cent., while Owens, through the medium of a so-called discount, contributed the other 2 per cent., was one of those diaphanous devices which the statute intended to prevent. Taking the evidence most favorably to the defendants, there was none which authorized a verdict finding such an arrangement not to be usurious. The verdict was contrary to law.

[3] 3. Under the rulings made in the preceding divisions of this opinion, the deed from Owens to Wimberly was to secure a usurious debt, and was consequently void. Instead of the land being conveyed by Owens to Mrs. Rambo, and by her to Wimberly, Owens made the conveyance directly to Wimberly, the debt of Mrs. Rambo to Owens was discharged, and she gave notes to Wimberly for the amount advanced by him, with usurious interest, and took a bond for title from him. The transaction was expressly for the purpose of securing to Wimberly more than the rate of interest which could be lawfully charged under the Georgia law, and its sub-

stance was not changed by making one conveyance instead of two to accomplish that result. *National Bank of Tifton v. Smith*, 142 Ga. 663, 83 S. E. 526; *Sharpe v. Denmark*, 143 Ga. 156, 84 S. E. 554. Mrs. Rambo remained in possession, with the purchase money paid to Owens. Wimberly was a creditor for the amount actually due him, but his security was lost by being infected with usury. The bank holds the bond for title executed by Owens to Mrs. Rambo and transferred to it as security. By the transfer it was subrogated to her rights thereunder, at least to the extent of the secured debt, although the bond was not a negotiable instrument in the legal sense of that expression. *Walker v. Maddox*, 105 Ga. 253 (2), 254, 31 S. E. 165. Clearly the bank has a standing in equity against her, and a right to attack as void for usury a deed which it was claimed superseded and outranked the bond for title held by it.

If the deed from Owens to Wimberly was void, a decree requiring Wimberly to make a conveyance to the bank would be a non sequitur. We need not now declare in advance what would be a proper decree under the other prayer. Powers & Co. were not parties, but no point was raised as to that fact by proper pleading.

The verdict being contrary to law, a reversal results.

Judgment reversed. All the Justices concur.

(143 Ga. 647)

HENDRICKS & CHRISTIAN v. LOTT et al.
(No. 428.)

(Supreme Court of Georgia. July 3, 1915.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 491—**TRIAL** \S 25—**BURDEN OF PROOF—RIGHT TO OPEN AND CLOSE.**

Suit was brought on a promissory note, seeking to recover principal, interest, and attorney's fees. The answer of the defendant denied the substantial paragraphs of the petition, including the allegation of service of notice 10 days before the filing of the suit, in order to claim attorney's fees. It further pleaded want of consideration for the note sued upon, and that the defendants had paid the full amount due to the plaintiffs, and "by accident" had paid \$15 in excess of such amount, for which they prayed judgment. *Held*, that the answer did not admit a prima facie case in the plaintiffs, or amount to an assumption of the burden of proof by the defendants, and give to them the right to claim the opening and conclusion of argument. *Culver v. Wood*, 138 Ga. 60 (2), 62, 74 S. E. 790.

(a) As the defendants did not by their pleadings admit a prima facie case in the plaintiffs, although, after the jury was stricken and before evidence was introduced, they stated orally that they admitted a prima facie case, that they signed the note, that it belonged to the plaintiffs, and that notice had been served upon them of the intention to sue for attorney's fees in addition to the note, this did not operate as a proper assumption of the burden of proof on the whole case, so as to place it upon the de-

fendants, with the rights incident to the assumption thereof.

(b) Accordingly it was not error under such facts, and where both parties introduced evidence, to fail to charge that the burden of proof in the case was upon the defendants; nor was there error in charging that "the material issues in this case you will determine in favor of that party with whom you find the preponderance of the evidence lies."

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1643-1648; Dec. Dig. \S 491; *Trial*, Cent. Dig. §§ 44-75; Dec. Dig. \S 25.]

2. APPEAL AND ERROR \S 1068 — **HARMLESS ERROR—INSTRUCTIONS.**

The defendants not having recovered the \$15 claimed to have been paid by them by mistake, it will not require a reversal, at the instance of the plaintiff, that the presiding judge in his charge referred to such contention, whether or not the evidence was sufficient to show a mistake in making the payment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. \S 1068.]

3. GROUNDS FOR NEW TRIAL.

There was no merit in any of the other grounds of the motion for a new trial, and there was no error in overruling them.

Error from Superior Court, Colquitt County; W. B. Thomas, Judge.

Action between Hendricks & Christian and Jesse Lott and others. From the judgment, the parties first mentioned bring error. Affirmed.

Jas. Humphreys, of Moultrie, and Hendricks & Hendricks, of Nashville, for plaintiffs in error. Shipp & Kline, of Moultrie, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 648)

HINDMAN v. RAPER. (No. 426.)

(Supreme Court of Georgia. July 3, 1915.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT \S 309, 311—**DISPOSSESSORY WARRANT PROCEEDINGS—RIGHTS OF LANDLORD'S VENDEE—INSTRUCTIONS.**

In dispossessionary warrant proceedings, where it appeared that the tenant contracted to pay a stipulated sum for a year, and that at the end of the year he had failed to pay it, and that his landlord had foreclosed a distress warrant to collect the rent, the landlord's vendee was entitled to all the rights of the original landlord, including the right to issue a dispossessionary warrant; and in an issue formed upon that, where the counter affidavit did not deny that a demand was made, it was not error to charge that the plaintiff was entitled to recover the premises in dispute.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1317, 1318, 1322-1324; Dec. Dig. \S 309, 311.]

2. LANDLORD AND TENANT \S 300, 306, 310—**DISPOSSESSORY WARRANT—RIGHT TO ISSUE—LANDLORD'S VENDEE—DOUBLE RENT.**

Where a vendee from a landlord sues out a dispossessionary warrant on the ground of failure to pay rent when due, and the tenant by counter affidavit denies that he is holding possession over and beyond his term, and denies that he

holds the premises from the plaintiff, or any one from whom the plaintiff claims, the demand for possession is not put in issue. *Mitchell v. White*, 74 Ga. 327 (2). And where it appears from the undisputed evidence that the landlord, after his rental to the tenant, sold and conveyed the land to the plaintiff by warranty deed, such vendee from the landlord, and not the landlord, could issue a dispossessory warrant. *Raines v. Hindman*, 138 Ga. 450, 71 S. E. 738, 38 L. R. A. (N. S.) 863, Ann. Cas. 1912C, 347. And on the trial, where the tenancy under the original landlord is not denied, and the evidence is without dispute that the tenant failed to pay the rent when due, the plaintiff is entitled to recover double rent from the time of the demand, or, if no specified time of demand is proved, from the date of the issuance of the dispossessory warrant. The statute permits recovery of double rent from the time possession was demanded of the tenant. In order to recover double rent from the time of the demand, it is incumbent upon the plaintiff to establish the date of the demand. If there be a failure in the evidence to show the date the demand was made, then the plaintiff would be entitled to recover from the tenant double rent from the date of the issuance of the dispossessory warrant, upon the doctrine that, inasmuch as no issue is made by the counter affidavit as to the making of demand, it will be presumed to have been made as a prerequisite to the issuance of the warrant. The same doctrine is applicable where there is a dispute between the tenant and the landlord, on the trial of the case, as to whether a demand in point of fact had been made, where the tenant fails to make this issue in his counter affidavit.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1292-1294, 1313, 1319, 1320; Dec. Dig. §§ 300, 306, 310.]

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action by *Lewis Raper* against *George Hindman*. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 140 Ga. 775, 79 S. E. 945.

Eubanks & Mebane, of Rome, for plaintiff in error. *Harris & Harris*, of Rome, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 705)

CAVERLY v. STOVALL. (No. 452.)

(Supreme Court of Georgia. July 14, 1915.)

(Syllabus by the Court.)

1. BOUNDARIES §52 — PROCESSIONING OF LAND—COUNTY LINE.

A lot of land having for its boundary a land lot line, which is also a divisional line between counties, is not, on account of such coincidence, excluded from the operation of the statute relating to the processioning of land.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 253-260, 262, 263; Dec. Dig. §52.]

2. BOUNDARIES §52 — PROCESSIONING OF LAND — JUDGMENT — LOCATING OF COUNTY LINE.

An owner of land applied to the land processioners of De Kalb county to trace and mark anew the lines around his land, which was described as being situated in that county. The processioners made a return locating the lines, one of which was a land lot line. The land lot line was also the line between the counties of

De Kalb and Fulton. An owner of adjacent land protested the location of the line, which was the land lot line; and the issue formed by his protest was adjudicated against him in the superior court of De Kalb county. Subsequently the line between the counties of De Kalb and Fulton was located under the Civil Code of 1910, § 472 et seq., and, as so located by the public authorities, it was coincident with the line contended for by the protestant. Held, that the action of the public authorities in locating the county line did not nullify the judgment of the superior court of De Kalb county, fixing the boundary line between the coterminous owners, notwithstanding the county line, as located by the public authorities, included the land between the lines contended for by the parties in that litigation in the county of De Kalb.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 253-260, 262, 263; Dec. Dig. §52.]

3. INJUNCTION §130—DIRECTION OF VERDICT—EVIDENCE.

There was no error in directing the verdict.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 288-300; Dec. Dig. §130.]

Error from Superior Court, Fulton County; *W. D. Ellis*, Judge.

Action by *S. C. Stovall* against *C. E. Caverly*. Judgment for plaintiff on directed verdict, and defendant brings error. Affirmed.

See, also, 139 Ga. 243, 77 S. E. 29.

L. Z. Rosser and Hines & Jordan, all of Atlanta, for plaintiff in error. *Jas. W. Austin*, of Atlanta, for defendant in error.

EVANS, P. J. The county of Fulton was created in part from territory which lay in De Kalb county. Lot 239 of land district 18 is in De Kalb county, and lot 10 of land district 17 is in Fulton county. *S. C. Stovall* is the owner of a tract of land on the eastern side of lot 10, and *C. E. Caverly* owns a tract on the western side of lot 239; the dividing line between the two landowners being the line between these two land lots, which is also the county line. *Stovall* applied to the land processioners of De Kalb county to have the lines of his land marked and established; and this was done. *Caverly* protested the location of the line between *Stovall* and himself; and that issue was tried in the superior court of De Kalb county, and a verdict adverse to *Caverly* was returned. Upon this verdict a judgment was duly entered up. The line claimed by *Caverly* runs parallel with and 13 feet east of the line which the processioners established. Subsequently to the judgment in the processioning case *Stovall* filed a petition against *Caverly*, to enjoin him against trespassing on this 13-foot strip of land. *Caverly*, amongst other things, pleaded that the judgment in the processioning case was void, because the statute relating to the location of lines by processioners does not apply to the location of a boundary line, which is also a county line, and further because, since the judgment in the processioning case, the line had been located pursuant to the statute for

defining uncertain lines between counties, and, as located, the strip of land lies in Fulton county, and the superior court of De Kalb county was without jurisdiction of the subject-matter.

[1] 1. We do not think that the statute prescribing a method for the remarking of lines around an owner's land by processioners (Civil Code of 1910, § 3817 et seq.) is excluded from applying to a tract of land having a county line as one of its boundaries. The scope and purpose of the statute is to settle disputed or uncertain lines between coterminous landowners. A line located pursuant to the statute is binding on the landowners, but not on the state or the counties. The inquiry about the county line, which is also the divisional line between the coterminous landowners, is only incidental to the ascertainment of the latter. Processioners cannot change county lines any more than they can mark new lines for the parties. But the isolated circumstance that a lot of land having for one of its boundaries a land lot line, which land lot line is also a divisional line between counties, will not exclude it from the operation of our processioning laws on account of that circumstance. *Bowen v. Jackson*, 101 Ga. 817, 29 S. E. 40.

[2] 2. The statute provides that wherever the boundary line between two or more counties shall be in dispute, and the grand jury of either county shall present that the same requires to be marked out and defined, it shall be the duty of the clerk of the superior court, in the county where such presentment is made, to certify the same to the Governor. The Governor shall appoint a surveyor to mark out and define the disputed boundary line, and return the survey, with a plat, to the office of the Secretary of State. If no protest or exceptions to the survey or plat are filed, such survey and plat are recorded by the Secretary of State, and the same shall be final and conclusive as to the boundary line in dispute. Civil Code 1910, § 472 et seq. Pursuant to this section, the line between lot 239 of land district 18 in De Kalb county and lot 10 of land district 17 in Fulton county were surveyed and the line marked out and defined, and a survey and plat was duly recorded in the office of the Secretary of State. It is insisted that the location of the county line between these two land lots, under this statute, rendered the prior judgment in the superior court of De Kalb county in the processioning case null and void, on account of want of jurisdiction of the subject-matter. The application of Stovall to trace and mark anew the lines around his tract described the land as lying in the county of De Kalb. The processioners located this line as being the boundary of land situated in De Kalb county. Caverly, who owned the adjacent land in Fulton county, filed his protest to the line lo-

cated by the processioners as the western boundary line of Stovall and the eastern boundary of his land. The issue formed by the protest was adjudicated against the protestant. That adjudication bound the protestant that the land was located within the limits of De Kalb county. It concluded the protestant from disputing the line marked out by the processioners as being the true dividing line between himself and Stovall. *Stovall v. Caverly*, 139 Ga. 243, 77 S. E. 29. The subsequent delineation of the county line was in the exercise of a political function, to make clear an uncertain boundary of a political subdivision. *Early County v. Baker County*, 137 Ga. 126, 72 S. E. 905. It would be giving this statute a too far-sweeping effect, and perhaps one which would exceed the bounds of the constitutional protection of private rights, to hold that where a judgment of a court, having jurisdiction of the parties and the subject-matter, adjudicates and fixes a divisional line between the parties, such judgment is nullified because the calls of the deeds of the parties are coincident with a county line subsequently located by the public authorities at a different place. Certainly the superior court of De Kalb county had jurisdiction of Stovall's land, alleged to be within its limits; and the issue adjudicated was not the location of the boundary line between the counties, but the location of the boundary line between the lands of two private citizens. Cf. *Mattox v. Bryan*, 19 Ga. 157, 160.

[3] 3. Under the undisputed evidence, the defendant was committing continuous acts of trespass upon this small strip of land, which was included in the Stovall tract by the judgment of the court. Where a judgment has been rendered sustaining the processioners' return on an issue made by a coterminous landowner as to the location of the division line, the contestant is thereafter concluded from disputing the line marked out by the processioners as the true line, and any invasion across the line thus established and upon the land of the adjacent owner by the protestant amounts to a trespass, and, if these trespasses be continuous, they will be repressed in equity. *Martin v. Pattillo*, 126 Ga. 436, 55 S. E. 240. There was no error in directing a verdict for a permanent injunction against such trespass.

Judgment affirmed. All the Justices concur.

(143 Ga. 618)

MULLIS v. KENNEDY. (No. 419.)

(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE—§135—FORTHCOMING BOND—VALIDITY—RIGHT OF ACTION—ESTOPPEL.

Where a mortgage on personal property was foreclosed in a justice's court, but the justice erroneously made the execution which he

issued returnable to the city court located in that county; and where such execution was levied by a constable, and, without the interposition of an affidavit of illegality, the defendant tendered to the constable a forthcoming bond, conditioned to deliver the property on the day of sale, which was specified, but the bond was improperly made payable to the sheriff of the city court, and thereupon the defendant received from the constable possession of the property, in a suit for a breach of such bond, it was error to dismiss the action on the ground that the process was invalid, and the bond was accordingly also invalid.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447, 749; Dec. Dig. § 135.]

Error from Superior Court, Laurens County; W. W. Larsen, Judge.

Action by T. G. Mullis against A. F. Kennedy. Judgment for defendant, and plaintiff brings error. Reversed.

T. G. Mullis filed his petition against A. F. Kennedy, alleging in substance as follows: On January 31, 1912, the plaintiff foreclosed, in a justice's court in Laurens county, a mortgage given by L. C. Joiner on a mule. In issuing the execution the justice made it returnable to the city court of Dublin. The levy was made on February 3, 1912. Two days later Joiner executed a forthcoming bond, payable to the sheriff of the city court of Dublin, the condition being that he would produce the property at the time and place of sale on the 4th day of March. The bond was signed by L. C. Joiner, as principal, and by B. C. Joiner, R. M. Benford and A. F. Kennedy as sureties, and bound the principal and sureties jointly and severally. It was accepted and approved by the levying officer, and attested by him. The property was delivered to the principal, and the execution and bond were returned by the constable to the sheriff of the city court of Dublin. On March 9, 1912, the mortgagor and principal in the bond paid to the sheriff of the city court the sum of \$35, which the sheriff paid to the plaintiff in execution. The property was never advertised by the sheriff for sale. Soon after the levy, the constable who made it demanded that the property be returned to him, which the principal in the bond refused to do. Shortly after the property had been delivered by the levying officer to the principal in the bond, the latter sold it and delivered it to a third person. The refusal to return it on demand to the bailiff and the delivery of it to another person contributed a breach of the bond. The balance due upon the execution amounted to \$102.24, and the mortgaged property was worth more than that amount. While the bond may not have been good as a statutory bond, the principal in the bond having obtained possession of the property under it, the plaintiff having been placed at a disadvantage, and all parties having treated it as valid, it should be binding as a common-law obligation.

The defendant demurred to the petition, on

the grounds, among others, that it appeared on the face of the pleading that the proceeding to foreclose the mortgage was void, because the execution issued by the justice of the peace was made returnable to the city court of Dublin, without authority of law, and that the bond given for the forthcoming of the property described in the mortgage was also void. The presiding judge sustained the demurrer, and the plaintiff accepted.

Davis & New, of Dublin, for plaintiff in error. J. S. Adams, of Dublin, for defendant in error.

LUMPKIN, J. (after stating the facts as above). Forthcoming bonds are ordinarily given in connection with a claim case or an affidavit of illegality, where the possession of the property is desired pending the litigation. In the present instance no claim or illegality was interposed; but, after the levy of an execution based on the foreclosure of a chattel mortgage, the defendant desired to retain possession of the property. Accordingly he tendered to the levying officer a bond executed by himself, as principal, and by certain sureties, and reciting that they were bound jointly and severally. The condition was that the property levied on should be produced at the time and place of sale on the 4th day of March, 1912. The property was thereupon delivered by the levying officer into the possession of the principal, who subsequently sold it and delivered possession to a third person. By section 6041 of the Civil Code of 1910 it is declared that:

"All bonds taken by the sheriffs or other executing officers, from the defendants in execution, for the delivery of property (on the day of sale or any other time) which they may have levied on by virtue of any *fi. fa.*, or other legal process from any court, shall be good and valid in law, and recoverable in any court in this state having jurisdiction thereof."

This section seems to be peculiarly applicable to a case like the present, in which a levying officer leaves the property in the custody of the defendant, without the interposition of a claim or an affidavit of illegality, and takes a bond for its production. Section 13 of the Civil Code 1910 declares that:

"All bonds taken by public officers, under the laws of this state, shall be returned to the offices specified by law; and any person interested therein may bring suit thereon, in his own name, in any court having jurisdiction thereof."

Where a claim is interposed, and a forthcoming bond given, reciting the fact of the levy and possession of the property thereby obtained, this estops the claimant and the surety on the bond from denying the completeness and sufficiency of the seizure of the property made by the levying officer; but the estoppel does not extend to the validity of the process, or the authority of the officer to make the levy, so as to prevent the claimant, on the trial of the claim case, from

attacking them. So, where an affidavit of illegality is interposed, it may attack the validity of the proceeding or the authority of the officer, although a forthcoming bond may be given. But in a suit upon a forthcoming bond given in a case like this, where its execution is not denied, the only issue is whether or not there has been a breach of such bond.

Neither the legality of the levy nor the authority of the officer to make it is an issuable fact. *Oliver v. Warren*, 124 Ga. 549, 551, 53 S. E. 100, 4 L. R. A. (N. S.) 1020, 110 Am. St. Rep. 188, and authorities cited. The suggestion to the contrary in *Strange v. Franklin*, 126 Ga. 715, 55 S. E. 943, was an obiter dictum. In that case an execution issued upon a void judgment was levied, and a forthcoming bond given. A suit was brought against the surety on the bond, and a judgment rendered in favor of the plaintiff, which was also void, because rendered by a court which had no legal existence. The defendant in this latter judgment voluntarily paid it, but subsequently brought an action against the plaintiff for money had and received. It was held that he could not recover. A suggestion as to what might have been set up in a suit on the replevy bond was not necessary to the decision.

While the bond given in the case before us was not a good statutory bond, being made payable to the sheriff of the city court of Dublin, it was good as a common-law bond, and, having served the purpose of obtaining the delivery of possession of the property by the levying officer to the principal, a recovery could be had for the breach of it, whether the process under which the levy was made was valid or not. The presiding judge held the process under which the levy was made to have been void. From what has been said it will be seen that this was erroneous.

Judgment reversed. All the Justices concur.

(143 Ga. 610)

SOUTHERN RY. CO. v. BAILEY. (No. 417.)
(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

1. RAILROADS §218, 223—REGULATIONS—SCHEDULE—REASONABLENESS.

A railway company may make reasonable regulations in the conduct of its business. In the absence of a statute to the contrary, a schedule which provides for the nonstoppage of a certain train at a particular place will not be considered unreasonable, where it appears that other trains are scheduled to stop at such place, and it is not alleged that they do not afford adequate service.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 715, 725-729, 738; Dec. Dig. § 218, 223.]

2. CARRIERS §271—PASSENGERS—RIGHT TO EJECT—DESTINATION.

It is the duty of the purchaser of a ticket, or one who desires to become a passenger on a train, to ascertain, before boarding it, that it

stops at the station to which he desires to be transported; and where he fails to do so, the proper agent of the railway company may compel him to leave the train at the last place at which the train is scheduled by the company's published regulations to stop before reaching the point of destination desired by the passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1067-1071; Dec. Dig. § 271.]

3. CARRIERS §380—EXPULSION OF PASSENGER—PETITION.

The court erred in overruling the general demurrer to the petition.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1464-1466, 1469, 1470, 1472; Dec. Dig. § 380.]

Error from Superior Court, Henry County; Robt. T. Daniel, Judge.

Action by M. J. Bailey against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The petition and the amendment thereto alleged that on the 6th of December, 1912, the plaintiff purchased of the ticket agent of the Cincinnati, New Orleans and Texas Pacific Railway Company, at Danville, Ky., a ticket entitling her to first-class passage from that place over the lines of that company to Chattanooga, Tenn., and from there over the line of the Southern Railway Company to Jenkinsburg, Ga. "After purchasing said ticket, petitioner boarded a train at Danville, Ky., at about 11 o'clock p. m., on said date." This was a through train operating over the lines of the said railway companies from Cincinnati, Ohio, to Macon, Ga., and, according to the published regulations of the defendant and connecting carriers, was not scheduled to stop at Jenkinsburg, McDonough being the last place of stoppage before reaching Jenkinsburg. After the train had left Chattanooga, Tenn., her ticket was demanded of her by the ticket collector of the defendant's train, who "inspected" and punched it and returned it to her. After the train left Atlanta, Ga., "a ticket collector or conductor, who was collecting tickets on said train," again demanded of her her ticket, who, when exhibited to him, looked at it and punched it and returned it to her with the statement that she would have to leave the train at McDonough, as the train she was on was a through train and did not stop at Jenkinsburg. To this she objected, but the collector, upon arrival at McDonough, over her protest, demanded that she leave the train, which she did, and she was compelled to wait in the waiting room of the depot at McDonough for six hours. She did not know that the train which she boarded at Danville was a through train and was not scheduled to stop at Jenkinsburg, and she was not informed, either by the ticket agent from whom she purchased the ticket or the ticket collector to whom she exhibited it, until after she had left Atlanta, that it would not do so, nor did she inquire of any one as to whether it would stop at Jenkinsburg. The defendant has local trains sched-

uled to stop at Jenkinsburg. Damages were claimed for alleged physical discomfort and mental agony experienced in the waiting room at McDonough on account of the expulsion from defendant's train, and punitive damages sought for the expulsion. The defendant demurred generally and specially to the petition, and the demurrer having been overruled, it excepted.

Harris & Harris, of Macon, and Smith & Turner, of McDonough, for plaintiff in error. J. T. Moore, of Jackson, for defendant in error.

HILL, J. (after stating the facts as above). [3] This is an action ex delicto for an alleged breach of duty owed by defendant to plaintiff, who was a passenger on defendant's train, occasioned by the wrongful expulsion of plaintiff from defendant's car by one of its agents. Under the view we take of the case, we shall only deal with the question raised by the petition and the general demurrer. The plaintiff boarded as a passenger a through train of a connecting carrier of defendant at a place in another state for transportation to a point of destination situate within this state on defendant's line of railway at which the train was not scheduled to stop, in ignorance on her part of this fact; and the question presented is whether the ticket agent of the connecting carrier from whom she purchased the ticket, or the ticket collector of the defendant when the ticket was exhibited to him, was under a duty to volunteer the information to her that the train would not stop at the place of destination called for by her ticket, without any inquiry from her. As there is no allegation in the petition that the contract of carriage between plaintiff and defendant bound itself to stop this train at Jenkinsburg contrary to its published rules, if such a duty existed at all, it must be considered as having arisen by virtue of the relation of carrier and passenger, as created by the presence of plaintiff on defendant's cars in possession of an ordinary first-class ticket. It is alleged in the petition that the regulation of this train of nonstoppage at Jenkinsburg was a published rule of the defendant, promulgated by itself and connecting carriers, and that the defendant had other trains scheduled to stop at this place.

[1] A railway company may make reasonable rules and regulations for the conduct of its business, which are binding on the public in transactions with it. Civil Code 1910, § 2729; Southern Ry. Co. v. Watson, 110 Ga. 681, 36 S. E. 209; Southern Ry. Co. v. Howard, 111 Ga. 842, 36 S. E. 213; Central Ry. Co. v. Motes, 117 Ga. 923, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. Rep. 223. And, in the absence of statutory prohibition, a regulation of a railway company forbidding the stoppage of a through train at a specified place cannot be considered an unreasonable

regulation, where other trains are scheduled to stop at that place. See Southern Ry. Co. v. Flanigan, 10 Ga. App. 745, 74 S. E. 85; Hutchinson on Carriers (3d Ed.) § 1060; 1 Elliott on Railroads, 302, § 200; Sira v. Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386, and cases cited in note, page 392; L. & N. R. Co. v. Miles, 100 Ky. 84, 37 S. W. 486. See, also, cases cited in note to International, etc., Ry. Co. v. Hassell, in 50 Am. Rep. 527 (62 Tex. 256). Therefore, when the plaintiff purchased a ticket at Danville, Ky., for transportation to Jenkinsburg, Ga., the reasonable regulation that the train upon which she afterwards took passage would not stop at Jenkinsburg, by implication entered into the contract of carriage, and no duty devolved upon defendant to stop the train there. Furthermore, the contract of carriage, as evidenced by the plaintiff's possession of an ordinary ticket, was not one for transportation on any particular train; but the undertaking on the part of the railway companies was to transport the plaintiff from Danville to Jenkinsburg over their lines of railway according to the reasonable rules promulgated by them. Assuming then that the agent at Danville was the agent of the defendant when he sold this ticket (as to this see Head v. Georgia Pacific Ry. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; 4 Elliott on Railroads, § 1596, and cases cited), under a strict construction of the pleadings, the mere allegation of the purchase of a ticket on the same date as that upon which plaintiff boarded the train would not create, in this case, the relation of carrier and passenger from the time of purchase, so that any duty could arise therefrom. For instance, it is alleged that plaintiff boarded the train at 1 p. m. on the day of the purchase of the ticket. She may have purchased the ticket at 7 o'clock in the morning and then returned to her abode in the city until the time of the departure of this train. In doing so, she may have taken passage to and from the depot on a street car. Were she to be considered a passenger of the railway company from the time of the purchase of the ticket and by virtue of her being the holder thereof, under the foregoing facts she would while in the street car be a passenger of two carriers at the same time, the street car company and the railway company. Hence, under the allegations of the petition, any duty to inform her being founded on the relation of carrier and passenger, and this relation not being established by an averment of the purchase of a ticket alone, it must follow that the duty could not be held to have existed at the time of the purchase from the agent of the ticket.

[2] Nor do we think it was the duty of the ticket collector to so inform her. It might be urged that the exhibition, by a passenger to the ticket collector on a through train, of a ticket calling for destination at a place at which the train was not scheduled to stop

was sufficient to excite the attention of, or notify, the ticket collector that the passenger expected or intended to ride on that train to the place of destination, and to place the duty upon him of informing her that the train did not stop at that place, that she might leave the train at some intermediate point; and that his failure to do so amounted to an acceptance of her by the defendant as a passenger on that train to the place of destination called for by her ticket, so that her subsequent expulsion from defendant's car, short of arrival thereat, would amount to a breach of duty to her. The answer to this is that the published schedule that this train did not stop at the place of destination called for by the ticket having by implication, under the right to make reasonable regulations under the statute, entered into and become a part of the contract of carriage (there being nothing alleged in the petition to negative this regulation of this train), and hence binding on the plaintiff, she had no right to expect or intend to be transported to this place, but the ticket collector had the right to act on the assumption that she was only taking advantage of the quick schedule afforded by the through train as far as the reasonable rules of the company permitted her to be carried on that train, or to some intermediate station at which that train was scheduled to stop. In the case of *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620, it was held:

"A railway passenger, with a ticket for a station at which the train does not stop, has the right to ride to an intermediate station at which it does stop."

Schedules of railway companies of their trains are made by them with reference to the convenience of the public, and any one who wishes to enjoy as a passenger the privileges afforded the public by a railway company as a carrier of passengers must bring himself within the requirements placed upon the public in the enjoyment of that relationship. "Reasonable regulations," as contained in the statute, would become meaningless, if a carrier of passengers were compelled to conduct its business and arrange its schedules to suit the convenience of each individual passenger, and not base its regulations upon the public good and convenience; for, under such circumstances, the number of regulations would be coextensive with the patronage of the road. If, on the other hand, it were considered, as an original proposition, the duty of a carrier of passengers to inform a passenger of the schedules and stopping places of its trains in this state it may do so either by publishing, under the statute, such regulations to the public, or verbally through its agents; and when a passenger is informed thereof in the one way, this duty has been executed, and the carrier need not also inform him in the other manner, where no inquiry is made by the passenger.

It has been held that when one presents himself for transportation on a particular train, the duty is upon him to inquire whether it stops at the place of destination called for by his ticket. In the case of *Pittsburgh, etc., Ry. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703, it was said:

"It was the duty of the appellee to inform himself when, where, and how he could go, or stop, according to the regulations of the appellant's trains, and if he made a mistake, which was not induced by the appellant, he has no remedy. *Cheney v. Boston & Maine R. R. Co.*, 11 Metc. (52 Mass.) 121, 45 Am. Dec. 190; *Boston & Lowell R. R. Co. v. Proctor*, 1 Allen (Mass.) 267, 79 Am. Dec. 729; *Johnson v. Concord R. R. Co.*, 46 N. H. 213, 88 Am. Dec. 190; *Cleveland, etc., R. R. Co. v. Bartram*, 11 Ohio St. 457."

And to the same effect, see *Chicago, etc., R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; 4 Elliott on Railroads, § 1593, and cases cited in note; 2 Hutchinson on Carriers, § 1060.

There being no duty owing to the plaintiff in this particular, the defendant was concerned only with its duty to the public of maintaining its published schedule, and the plaintiff's right under her ticket was to be transported in compliance therewith to the last place, before reaching Jenkinsburg, at which this train was scheduled to stop, and the defendant's agent had the right to demand that she leave the train and to eject her at this point. 2 Moore on Carriers (2d Ed.) § 7; *International, etc., Ry. Co. v. Hussell*, supra; *Duling v. Philadelphia, etc., R. Co.*, 66 Md. 120, 6 Atl. 592; *Allen v. Wilmington, etc., R. Co.*, 119 N. C. 710, 25 S. E. 787, 8 Am. & Eng. R. Cas. (N. S.) 257; *Richmond, etc., R. Co. v. Ashby*, supra; 2 Hutchinson on Carriers, § 1060, and cases cited in the note.

We hold, therefore, that the ejection by defendant of plaintiff from this train at McDonough, the last stopping place scheduled for this train before reaching Jenkinsburg, the place of destination called for by her ticket, did not give plaintiff a right of action for breach of duty owed by defendant to her.

The court erred in overruling the general demurrer.

Judgment reversed. All the Justices concur.

(143 Ga. 616)

HOOD v. HOOD et al. (No. 418.)

(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

JUDGMENT \S 518—COLLATERAL ATTACK—DIVORCE JUDGMENT—OBJECTION TO ALLOWANCE TO WIDOW.

Where an application for the setting apart of a year's support to an alleged widow from the estate of a named decedent is resisted upon the grounds that the caveatrix is the widow of the decedent, and that the marriage of the applicant to the decedent was void because at the time of such marriage the caveatrix, who had previously been married to the decedent, had never been legally divorced from him, upon the trial of a case thus made, on appeal to the superior court, it is error to allow an amend-

ment to the caveat setting up, in substance, that, while there was a judgment and decree of divorce between the caveatrix and the decedent, it was void, because the decedent in his libel for divorce against the caveatrix, his then wife, had alleged that she was a nonresident of the state of Georgia, and that her whereabouts was unknown to him, when in fact he knew, at the time of filing the petition, that the defendant named therein was a resident of a named county in the state of Georgia. Such an amendment is a collateral attack upon the judgment and decree in the divorce proceedings—a judgment of a court having jurisdiction of the person and the subject-matter, and presumed to be regular and valid until set aside by the court rendering the same. Such an attack as this can only be made in a direct proceeding to set aside the judgment, and not collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. § 518.]

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Application by Mrs. D. T. Hood for the setting apart of a year's support for herself and minor child out of the estate of her deceased husband, to which Mrs. Nannie Hood filed a caveat. From an order allowing an amendment to the caveat, and refusing a new trial after verdict against the applicant, the applicant brings error. Reversed.

Mrs. D. T. Hood, alleging herself to be the widow of D. T. Hood, made application to the court of ordinary of Macon county for the setting apart of a year's support for herself and minor child out of the estate of her alleged deceased husband. Appraisers were appointed, and citations were duly issued and published. Thereupon came Mrs. Nannie Hood, claiming to be the lawful wife of the decedent, D. T. Hood, and filed a caveat to the application. With the caveatrix named joined certain other parties alleging themselves to be the lawful children of the decedent. They contested the setting apart of a year's support to the applicant, on the grounds, that she was not the lawful wife and widow of the decedent; that the caveatrix, Mrs. Nannie Hood, and D. T. Hood, the decedent, had intermarried about the year 1888; that they lived together as husband and wife in Spalding county, Ga., until the year 1902, when the decedent abandoned his wife, Nannie, and left her in Spalding county, Ga., and subsequently entered into a void marriage with Josephine Watkins, the applicant for a year's support. The case went by appeal to the superior court, and when it came on there to be tried the caveators offered the following amendment:

"Now come the caveators and amend their objection, and say that in the year 1905, D. T. Hood filed his libel for divorce against Nannie Hood, his wife, and alleged in said petition that said Nannie Hood was a nonresident of the state of Georgia, and that her whereabouts was unknown to said D. T. Hood; that said D. T. Hood knew, at the time he filed said petition, that Nannie Hood was a resident of the state of Georgia, and was never a resident of any other state; that the allegation of D. T. Hood's affidavit that Nannie Hood was a resident of the state of Tennessee was not true;

that D. T. Hood knew that Nannie Hood was a resident of Georgia and Spalding county at that time; that Josephine Watkins, now claiming to be the widow of D. T. Hood, knew that Nannie Hood lived in the state of Georgia at the time Hood applied for a divorce, and since that time, wherefore these objectors pray that their amendment be allowed and filed; that Nannie Hood was never served with any copy or process, or with publication of D. T. Hood's divorce proceedings, and did not know D. T. Hood had obtained a divorce until about the year 1912 or 1913."

This was allowed over objections of the applicant, and a verdict against her application was rendered. She excepted to the allowance of the amendment, and to the refusal of a new trial on her motion.

Jule Felton, of Montezuma, for plaintiff in error. J. J. Bull & Son, of Oglethorpe, for defendant in error.

BECK, J. (after stating the facts as above). The plaintiff excepted to the allowance of the amendment set out in the statement of facts, upon the ground that it was a collateral attack upon the judgment of divorce referred to in the caveat; and we are of the opinion that this objection was a valid one, and that the court erred in overruling it. The judgment and decree of divorce attacked being a judgment of a court of general jurisdiction, every presumption in favor of its validity and regularity should be indulged. If, as a matter of fact, the caveatrix, Mrs. Nannie Hood, was at the time of granting the divorce in question a resident of Spalding county, Ga., and not a resident of another state, and if she had never been duly served with process in the case, this would have constituted good ground for a direct attack upon the judgment and decree of divorce. But the judgment in the divorce proceeding should be attacked in the court which rendered the judgment, and the validity and regularity of that judgment should not be made a collateral issue in another proceeding. To rule otherwise in this case would violate the principles which are settled beyond controversy, that the judgment of a court having jurisdiction both of the subject-matter and of the parties, however erroneous it may be, is a valid, binding, and conclusive judgment of the matters in controversy upon the parties thereto and those claiming under them, and cannot be attacked or impeached in a collateral proceeding.

Having decided that the court erred in allowing the amendment, it is unnecessary to pass upon the questions raised by the grounds of the motion for a new trial. The issues made by the assignments in the motion for a new trial are involved in the ruling made as to the allowance of the amendment. With the amendment stricken from the proceedings, these questions will probably not arise upon the next trial.

Judgment reversed. All the Justices concur.

(148 Ga. 677)

ARMSTRONG v. CITIZENS' & SOUTHERN BANK. (No. 437.)

(Supreme Court of Georgia. July 8, 1915.)

*(Syllabus by the Court.)***APPEAL AND ERROR — 479 — SUPERSEDEAS — DENIAL OF LEAVE.**

The Citizens' & Southern Bank brought suit against the Irish-American Bank as maker, and Patrick Armstrong as surety, upon a certain promissory note. Armstrong filed a plea; and upon the trial of the issue made by this plea the court directed a verdict against Armstrong, who made a motion for a new trial, which was overruled at the hearing. Armstrong, being unable to give bond for the eventual condemnation money, as required by law, prior to suing out his bill of exceptions seeking to have the action of the court below reviewed in this court, and being doubtful of his right to file the pauper affidavit under the terms of the statute, presented his petition to the judge of the trial court for an injunction and the grant of a writ of supersedeas under the circumstances. Upon consideration of this petition the judge passed an order denying the petition, and to this order the petitioner excepted. *Held* that, even if the judge would have been authorized, under the law and the facts in the record, to grant the prayers of the petition, there was no error in refusing to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251-2256; Dec. Dig. 479.]

Error from Superior Court, Richmond County; Henry C. Hammond, Judge.

Action by the Citizens' & Southern Bank against the Irish-American Bank and Patrick Armstrong. Judgment for plaintiff against Armstrong, who petitioned for an injunction and a supersedeas. Petition denied, and petitioner brings error.

P. C. O'Gorman, Pierce Bros., and W. K. Miller, all of Augusta, for plaintiff in error. Boykin Wright and Boykin Wright, Jr., both of Augusta, and Samuel B. Adams, of Savannah, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(148 Ga. 726)

RAWLINGS v. COHEN. (No. 459.)

(Supreme Court of Georgia. July 17, 1915.)

*(Syllabus by the Court.)***1. DEEDS — 114 — VENDOR AND PURCHASER — 334 — DEFICIENCY IN QUANTITY — RIGHTS OF PURCHASER — CONSTRUCTION OF DEED.**

A deed described the land conveyed as follows: "All that tract or parcel of land lying, being, and situated in the state and county aforesaid, and in the 136th Dist. G. M., and containing two hundred and fifty-nine (259) acres, more or less, and bounded as follows: North by lands of J. W. Slade, G. D. Warthen, and W. L. Knight; east by lands of William Rawlings; south by lands of Wm. Rawlings, and west by lands of W. E. Jordan. The above-described land being the same conveyed by deed to me by R. L. Smith, the 10th November, 1894, and recorded in clerk's office, Washington coun-

ty, Nov. 10th, 1894, in Book 'M' folio 509." *Held*, that this was a conveyance by the tract, and not by the acre; and, unless the deed should be reformed, there could be no recovery by the vendor from the vendee, because the tract actually contained 345 acres, in the absence of actual fraud on the part of the vendee. Kendall v. Wells, 126 Ga. 843, 55 S. E. 41.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 816-322, 326-329, 388; Dec. Dig. 114; Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. 334.]

2. TRIAL — 251 — ACTION BY PURCHASER — DEFICIENCY IN QUANTITY — INSTRUCTIONS.

While the petition alleged that, as a part of the contract of sale of land, it was agreed between the vendor and vendee that the land should be surveyed and measured, and if there should be less than 259 acres, the vendor was to pay back to the vendee such proportionate part of the purchase money paid as would represent such shortage in the acreage, and that if there should be more than the stated number of acres the purchaser should pay to the vendor the sum of \$18 per acre for such excess, yet it was not alleged that such agreement was left out of the deed by accident or mistake, but only the provision that the sale was by the acre and not by the tract; and a reformation was sought on that basis. It was accordingly error to charge as follows: "I charge you that the burden is on the plaintiff in this case to show you, by a preponderance of the evidence, the facts and circumstances of the case; that the contract was one by the acre and not by the tract; and he must also show, by the preponderance of the evidence, facts, and circumstances, that the deed which he made to the defendant does not speak the real and true contract as between these parties; and he must also show that under the contract the land was to be surveyed and measured so as to ascertain the exact number of acres; and he must also show to you that the contract was by the acre at \$18 per acre, and an agreement to survey and measure the land was intended by both the plaintiff and the defendant to be written and inserted in the deed, and that by oversight, accident, and mistake the contract relative to the surveying and measuring by the acre was left out of the deed."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. 251.]

3. GROUNDS FOR NEW TRIAL.

While some of the rulings set out in the other grounds of the motion for a new trial may not have been entirely accurate, they would not require a new trial.

Evans, P. J., dissenting.

Error from Superior Court, Washington County; B. F. Walker, Judge.

Action between Wm. Rawlings and Louis Cohen. From the judgment, Rawlings brings error. Reversed.

Hines & Jordan, of Atlanta, and J. J. Harris and Hardwick & Wright, all of Sandersville, for plaintiff in error. Evans & Evans, of Sandersville, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

EVANS, P. J. I dissent from the ruling made in the second headnote, and from the judgment.

(143 Ga. 607)

ENDSLEY et al. v. TAYLOR et al. (No. 416.)
(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE — 116 — PROPERTY GIVEN WIFE — OWNERSHIP.

Prior to the enactment of the Married Woman's Act, approved December 13, 1866 (Acts 1866, p. 146), all property given to a wife during coverture vested in her husband, unless there were words in the gift indicating a wish for the personal enjoyment thereof by the wife; in that event, the property given would become her separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 398, 413-417; Dec. Dig. § 116.]

2. TRUSTS — 81, 356 — IMPLIED TRUST — HUSBAND AND WIFE — PURCHASER.

Where, before the passage of the act just referred to, a married woman received a gift of money from her father under circumstances that would render it her separate estate, and the money was delivered to her husband to buy a home for her, and he bought the home and, without notice to her or by her consent, took the title in his own name, the legal title so held by him would be impressed with an implied trust in favor of the wife.

(a) A purchaser from the husband with notice of the trust would take subject thereto.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115-118, 529-538; Dec. Dig. § 81, 356.]

3. TRUSTS — 365 — IMPLIED TRUST — PROCEEDINGS TO ESTABLISH — LAPSE OF TIME.

Where real estate was purchased as indicated in the preceding note, and, without notice of the status of the legal title, the wife went with her husband upon the property at the time of the purchase and continuously resided there with him until her death in 1907, and after the death of the wife the husband, being in possession, conveyed the entire property to one of their sons, who had notice of the trust, an action against the husband and the son to whom he had conveyed, instituted by the daughters and remaining sons in 1911, to declare the trust and recover their respective interests in the property, as heirs at law of their mother, would not be barred on account of lapse of time.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.]

4. TRUSTS — 90 — IMPLIED TRUST — PROCEEDINGS TO ESTABLISH — HUSBAND AND WIFE — NONSUIT.

The body of land in controversy consisted of three tracts acquired at different times, the legal title to each being taken in the name of the husband. There was evidence to show that the tract first acquired was paid for with money which formed the separate estate of the wife. It was erroneous to grant a nonsuit relatively to this tract.

(a) There was evidence tending to show that the other two tracts were paid for, in part at least, with money produced by the farming enterprise conducted by the husband and his family on the several tracts as they were acquired. As the case will go back for another trial, when the evidence may not be the same, no ruling is made as to the sufficiency of the evidence to authorize a recovery by the plaintiffs relatively to the two tracts last acquired.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 138; Dec. Dig. § 90.]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by P. A. Endsley and others against A. Q. Taylor and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Polly Ann Endsley and others, who were daughters and sons of A. Q. Taylor and his wife, N. J. Taylor, instituted an action jointly and severally against their brother D. S. Taylor, and their father, A. Q. Taylor, to recover a certain body of land composed of three smaller tracts, and to cancel, as a cloud upon their title, a deed from A. Q. Taylor to D. S. Taylor, purporting to convey the land. It was alleged that A. Q. Taylor purchased one of the tracts from John Shearer in 1866, another from Nathan Walden in 1873, and another from John Morris in 1884, and received deeds to each of the lots in his own name. The deed from Shearer was dated October 17, 1866. A. Q. Taylor moved on the Shearer place with his wife and family immediately after the purchase, and continued to reside there until after the children had grown up and moved away. Taylor and his wife continued to reside there until 1907, when the wife died. After her death A. Q. Taylor, continuing to reside on the property, married a second time. In 1910 he sold the entire tract to his codefendant, D. S. Taylor. It was alleged that the property was purchased by A. Q. Taylor with money of his wife, taking the deed in his own name, thereby raising an implied trust; that D. S. Taylor purchased with notice of the trust, that there was no administration upon the estate of Mrs. Taylor, and that the plaintiffs conceded to each of the defendants separate interests in the property as heirs at law of the deceased. The defendants answered, admitting some of the allegations and denying, among others, those relating to implied trusts. On the trial there was evidence tending to show the following as to the manner in which A. Q. Taylor acquired the property: He lived in Alabama and made a crop there in 1866. He left in August, with his wife and children, to come to Georgia. Heath, his father-in-law, told him to look up a home. He did so, and made a trade for the Shearer tract. Heath sold out in Alabama, and gave \$1,000 to his daughter, N. J. Taylor, the wife of A. Q. Taylor and the mother of the plaintiffs. He paid the money to her in the presence of A. Q. Taylor. Concerning this, one of the plaintiffs testified:

"As to what occurred between my grandfather and mother and father at that time, he told them he wanted her to buy her a place with the money for her—wanted her to buy a place with the money—wanted him to, and my mother consented to that; that is what he wanted done with it."

The Shearer place was paid for by A. Q. Taylor entirely out of the \$1,000, but not all of it was so consumed. The balance was used by A. Q. Taylor in buying live stock and farm supplies and in supporting the

family. The family lived on the property from the time of the purchase, and conducted the farm. Subsequently the other two tracts were acquired by A. Q. Taylor and paid for out of profits which he had made from farming on the property. There was evidence tending to show that D. S. Taylor, before purchasing from A. Q. Taylor, had notice of the circumstances recited above, relative to the manner in which the property was acquired and paid for. It was admitted that there was no administration on the estate of Mrs. N. J. Taylor. At the conclusion of the evidence the judge, upon motion, granted a nonsuit, and plaintiffs excepted.

J. S. James, of Douglasville, for plaintiffs in error. W. T. Roberts and J. R. Hutcheson, both of Douglasville, for defendants in error.

ATKINSON, J. [1, 2] Prior to the enactment of the Married Woman's Act, approved December 13, 1866 (Acts 1866, p. 146), the Code provided, among other things, as follows:

"All property given to the wife during * * * coverture, or acquired by her, shall vest in the husband, but any words in the gift or bequest indicating a wish for the personal enjoyment thereof by the wife, such as a gift to the wife by name, shall create a separate estate therein for her." Code of 1863, § 1702.

This provision of the Code had the effect of a statute, as the Code was regularly adopted by the Legislature. The testimony of the witness quoted in the statement of facts, for convenience, may be again stated, as follows:

"As to what occurred between my grandfather and mother and father at that time, he told them he wanted her to buy her a place with the money for her—wanted her to buy a place with the money—wanted him to, and my mother consented to that; that is what he wanted done with it."

This indicated that the money with which the purchase price of the Shearer place was paid was a gift from Mrs. Taylor's father, intended for her, and was made in such way as to make it her separate estate. Under such circumstances the marital rights of the husband would not attach to it. In this connection see *Perkins v. Keith*, 33 Ga. 525; *Robson v. Jones*, 27 Ga. 266. As the money was the separate property of Mrs. Taylor, to which her husband's marital rights would not attach, he had no lawful right to appropriate it to his own use. If he purchased property with it and took title in his own name, his relation to the property would be the same as if the money had belonged to a stranger. So treating it, he would hold the legal title impressed with an implied trust for the benefit of his wife, whose money paid for the land. *Williams v. Smith*, 128 Ga. 306, 57 S. E. 801; *Manning v. Manning*, 135 Ga. 597, 69 S. E. 1126; *Civil Code*, § 3739. Such an implied trust could be enforced against the trustee, and also against a pur-

chaser from him with notice of the trust. *Williams v. Smith*, supra. There was sufficient evidence to authorize a finding that D. S. Taylor had notice of the trust at the time of his purchase.

[3, 4] Nor do the circumstances detailed by the evidence show that the plaintiffs are barred on account of delay in instituting the suit. It does not appear that their mother assented to the deed having been taken in the name of her husband, or that she knew of the fact. She lived on the property as a member of the family until her death in 1907. After her death the suit was brought in 1911, and no rights of innocent third persons had attached. From what has been said, it follows that it was erroneous to grant a nonsuit relatively to the Shearer place. In regard to the other two places, there was evidence tending to show that the property was bought in part with profits derived from the farm conducted by A. Q. Taylor and his family on the several tracts, including the Shearer tract. As the judgment will be reversed, and on another trial the evidence may not be the same, no ruling is made as to whether the evidence was sufficient to show an implied trust relatively to the other two tracts.

Judgment reversed. All the Justices concur.

(143 Ga. 602)

ELIOPOLO v. STUBBS.

(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS \S 259—INJUNCTION—STATUTE.

Section 5335 of the Civil Code of 1910 provides for the abatement of a blind tiger nuisance by established equitable procedure. Sections 5336 and 5337 apply to cases where the person alleged to carry on the nuisance is unknown or concealed and is proceeded against as such.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 398; Dec. Dig. \S 259.]

2. CONSTITUTIONAL LAW \S 240—INTOXICATING LIQUORS \S 259—EQUAL PROTECTION OF THE LAWS—INJUNCTION—BLIND TIGER.

Civ. Code 1910, § 5335, does not offend the constitutional guaranty of the equal protection of the laws to all citizens.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 683, 692, 693, 697-699; Dec. Dig. \S 240—*Intoxicating Liquors*, Cent. Dig. § 398; Dec. Dig. \S 259.]

3. CONSTITUTIONAL LAW \S 42—RIGHT TO RAISE QUESTIONS—INTEREST.

The present proceeding is against a known defendant alleged to be operating a blind tiger nuisance at a designated place. The defendant is not being proceeded against as an unknown or concealed person, and therefore is not concerned with the constitutionality of Civ. Code, 1910, §§ 5336 and 5337, which are not applicable to the case alleged against him. One who would strike down a statute as unconstitutional must show that it affects him injuriously, and actually deprives him of a constitutional right.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 39, 40; Dec. Dig. \S 42.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Petition by W. B. Stubbs against J. G. Eliopolo to enjoin the defendant from operating a nuisance. From a judgment overruling demurrer to the petition, the defendant brings error. Affirmed.

R. L. Colding and Osborne & Lawrence, all of Savannah, for plaintiff in error. Geo. H. Richter, of Savannah, for defendant in error.

EVANS, P. J. This was a petition by W. B. Stubbs against J. G. Eliopolo to enjoin the defendant from the operation of a nuisance, commonly called a "blind tiger." It was alleged in the petition that the defendant was the owner or proprietor of a place at 430 West Broad street, in Savannah, where spirituous, malt, and intoxicating liquors were being sold in violation of law, that the defendant was guilty of maintaining and running a "blind tiger," and that the same was a continuous nuisance, and subject to abatement; and the prayer was that the place be declared a nuisance and be abated by law, and the defendant be enjoined from keeping and maintaining the place for the illegal sale of intoxicating liquors. There was a further prayer that the officers serving the petition be directed, if necessary, to arrest those in charge of the place and seize their stock in trade, and bring them before the court to be dealt with as the law directs, and to break open such place of illegal sale, if necessary, for the purpose of executing this order, and to seize the books and papers therein necessary to show the sale and keeping of such liquors or the purchase of such liquors. The court granted an order temporarily restraining the defendant from selling any spirituous, malt, or intoxicating liquors on the premises until the final hearing in the cause. The defendant was personally served with a copy of the petition and process. He demurred to the petition, on the ground that the law (Civil Code 1910, § 5335 et seq.) authorizing the abatement of a blind tiger nuisance was unconstitutional. The various grounds of constitutional objection are grouped by the plaintiff in error, as raising only three objections, namely, that the statute (a) denies to persons the equal protection of the laws, (b) permits the taking or damaging of property without due process of law, and (c) authorizes an unreasonable search without probable cause, and without describing the person or things to be searched and seized. The demurrer was overruled, and the defendant excepted.

[1] 1. The Code sections above referred to are as follows:

Section 5335:

"Any place commonly known as a 'blind tiger,' where spirituous, malt, or intoxicating liquors are sold in violation of law, shall be deemed a nuisance, and the same may be abated or enjoined as such, as now provided by law, on

the application of any citizen or citizens of the county where the same may be located."

Section 5336:

"If the party or parties carrying on said nuisance shall be unknown or concealed, it shall be sufficient service, in the abatement or injunction proceedings under the preceding section, to leave the writ, or other papers to be served, at the place where such liquor or liquors may be sold, and the case may proceed against 'parties unknown,' as defendants."

Section 5337:

"The court shall have authority to order the officers to break open such 'blind tiger' and arrest the inmates thereof, and seize their stock in trade, and bring them before him to be dealt with as the law directs."

These sections are a codification of the act of 1899 (Acts 1899, p. 73). The general design of the legislation was to supply a civil remedy for the protection of citizens in the vicinity of the plaintiff where intoxicating liquors were being unlawfully sold. The procedure was adjusted to cases where the nuisance was maintained either by a known person or by one who was unknown or concealed. With respect to the former it was contemplated that service should be had in the manner usual in equity cases. The last two sections were designed to provide for service, and further procedure, in case the person carrying on the nuisance was unknown or concealed. The second of these sections (5336) by its own terms is limited to procedure for the enjoining of a nuisance carried on by persons unknown or concealed. The last section (5337) has reference to a proceeding brought against unknown or concealed persons, and has no application to a proceeding instituted under section 5335 against a known defendant. This is illustrated by the words "break open such 'blind tiger' and arrest the inmates," etc. We therefore think that section 5337 relates to section 5336, and is applicable only in proceedings against unknown or concealed persons.

[2] 2. The petition in the present case is against a known defendant, to enjoin him from maintaining a blind tiger nuisance at a specified place, and falls within the provision of section 5335. It is contended that this section is violative of the constitutional guaranty of the equal protection of the law, in that it does not subject others similarly situated to such jurisdiction; and, further, because other nuisances are abated by statutory remedies, and that the classification of this particular nuisance as abatable by injunction is arbitrary, and particularly so because under the general law a private person can only enjoin a public nuisance by showing special injury, which is not required by this act. It is well settled that there is no inherent right in a citizen to sell intoxicating liquors at retail. It is not a privilege of a citizen of the United States. It may be entirely prohibited by state legislation, or be permitted under such conditions as will limit its evil. *Crowley v. Christensen*, 137 U. S.

86, 11 Sup. Ct. 13, 34 L. Ed. 620. Having the right to prohibit the sale, it is just as much within the constitutional power of the Legislature to provide a specific civil remedy to root out the evil of the business, at the suit of a private citizen, as it is to enforce the Legislative prohibition of the sale by a public prosecution of the retailer. Its provisions extend to all persons who engage in the illegal sale of liquor. The statute has been construed by this court. *Legg v. Anderson*, 116 Ga. 405, 42 S. E. 721. It was their said:

"The purpose of the act was to provide that a nuisance may be abated by injunction, to be issued in the manner provided by law; that is, upon application to the judge of the superior court, upon a sworn petition and after a hearing, the judge having a right to grant a temporary restraining order until the interlocutory hearing, and a temporary injunction until the final hearing, and a permanent injunction after a hearing before a jury under existing rules. When the act is so construed, it is, in effect, a declaration by the Legislature that a blind tiger is a public nuisance, and may be abated by injunction issued upon the application of any citizen of the county, without regard to whether there are other remedies which might or might not bring about this result."

The first section of the act (section 5335) is not subject to the constitutional objections made against it.

[3] 3. The other sections are said to be violative of the due process clause of the Constitution, because it allows the property of a citizen to be taken or damaged without any previous notice, and also violative of the Constitution, as permitting an unreasonable search of a citizen's premises without probable cause, and without describing the person or things to be seized or searched. We do not think this plaintiff in error is in position to raise this constitutional objection to sections 5336, 5337, for the reason that the plaintiff is not proceeding against him as an unknown or concealed person. The petition alleges that he is carrying on a blind tiger nuisance at a particularly designated place. We construe the petition as being brought under section 5335, and hold that the last two sections are not applicable to the case, and that so much of the prayer as refers to any procedure authorized therein is not germane to the case as alleged. So far as the procedure against the plaintiff in error is involved, it is in strict conformity to the statute as construed in *Legg v. Anderson*, supra. It is a fundamental principle that one who would strike down a statute as unconstitutional must show that it affects him injuriously, and actually deprives him of a constitutional right. *Southern Railway Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. Ed. 868; *Vestel v. Edwards*, 143 Ga. 368, 85 S. E. 187. It is a reply to these constitutional assaults that the present proceeding is not an undertaking to deprive the plaintiff in error of any property without notice, or to command any search of his premises; and he is not in a position to insist upon the un-

constitutionality of sections 5336 and 5337, which are not applicable to the case against him.

Judgment affirmed. All the Justices concur.

(143 Ga. 606)

LEAF v. STUBBS (five cases).

(Supreme Court of Georgia. June 25, 1915.)

(*Syllabus by the Court.*)

BLIND TIGERS—ABATEMENT—INJUNCTION.

These cases are controlled by the opinion this day rendered in the case of *Eliopolo v. Stubbs*, 85 S. E. 853.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Separate actions by W. B. Stubbs against A. Leaf, Wallace & Sutker, L. Weitz, Isadore Wood, and A. Rauzin. Judgments for the plaintiff, and defendants bring error. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiffs in error. Geo. H. Richter, of Savannah, for defendant in error.

EVANS, P. J. Judgments affirmed. All the Justices concur.

(143 Ga. 552)

ROCKMART BRICK & SLATE CO. v. WILLIAMS PATENT CRUSHER & PULVERIZER CO.

(Supreme Court of Georgia. June 22, 1915.)

(*Syllabus by the Court.*)

SALES—§363—ACTION FOR PRICE—DIRECTED VERDICT—UNDISPUTED FACTS.

The undisputed facts of this case, as divulged by the pleadings, bring it within the principles of law ruled in *Malsby v. Young*, 104 Ga. 205, 212, 30 S. E. 854, *McCormick Harvesting Machine Co. v. Allison*, 116 Ga. 445, 42 S. E. 778, and similar cases, so as to show a binding acceptance of the machinery sold subject to approval, and a waiver of any right to object to alleged defects therein, and consequent liability to pay therefor in accordance with the contract of sale. The court, therefore, did not err in dismissing, on general demurrer, the answer of the defendant, nor in directing a verdict in favor of the plaintiff for the amount due under the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1064; Dec. Dig. § 363.]

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by the Williams Patent Crusher & Pulverizer Company against the Rockmart Brick & Slate Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

Mundy & Mundy, of Rockmart, and John K. Davis, of Cedartown, for plaintiff in error. W. W. Mundy, of Cedartown, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 563)

BEDINGFIELD v. MOYE. (No. 338.)
(Supreme Court of Georgia. June 22, 1915.)

(*Syllabus by the Court.*)

1. JUDGMENT — 707—ADMISSIBILITY IN EVIDENCE—IDENTITY OF PARTIES.

The court erred in admitting in evidence a certain decree affecting adversely the title of the defendant, where the pleadings themselves upon which the decree was based were not introduced in evidence, and there was no other competent evidence to show that the defendant in this case or any of his predecessors in title were parties to the case wherein the decree was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. —707.]

2. TRIAL — 253, 296—INSTRUCTIONS—DISREGARDING EVIDENCE—CURE BY OTHER INSTRUCTIONS.

It was error, under the evidence, for the court to charge the jury as follows: "Now the question for you to determine, as I see it in this case: Has Dr. Bedingfield [the defendant] been in possession of the land sued for, under color of title, for seven years? If he has, you should find in favor of the defendant. If he has not, you should find in favor of the plaintiff." This charge is subject to the criticism that it tended to restrict the jury, in passing upon the defendant's claim that he had a good prescriptive title, to the consideration of the question whether or not the defendant himself had had possession under written color of title, and to exclude from the consideration of the jury the defendant's contention that he and those under whom he claimed had been in possession under color of title for seven years; and it cannot be held that the injurious effects of this charge were sufficiently remedied by the court's instructions, in another portion of the charge, that "the defendant's possession you tack onto those under whom he claims."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623, 705-713, 715, 716, 718; Dec. Dig. —253, 296.]

3. MOTION FOR NEW TRIAL—GROUNDS.

There is nothing in the other grounds of the motion to authorize a reversal of the judgment of the court below.

Error from Superior Court, Laurens County; K. J. Hawkins, Judge.

Action by W. L. Moye against W. E. Bedingfield. Judgment for plaintiff, and defendant brings error. Reversed.

Davis & Sturgis and J. S. Adams, all of Dublin, for plaintiff in error. Ira S. Chappell, of Dublin, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(143 Ga. 547)

FOX v. SMITH. (No. 379.)
(Supreme Court of Georgia. June 19, 1915.)

(*Syllabus by the Court.*)

1. BAILMENT — 18—LIEN OF BAILEE—STATUTE—REPAIRS BY EMPLOYEES.

"All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property, shall have a special lien on the same." Civ. Code 1910, § 3354. The lien so provided for is afforded to mechanics, notwithstanding the work employed in manufacturing or repairing the property

may have been performed entirely by an employé of the mechanic. *Quillian v. Central Railroad, etc., Co.*, 52 Ga. 374. See, also, *Brunton & Wade v. Beasley*, 135 Ga. 412, 69 S. E. 561.

(a) Accordingly, a firm engaged in operating a repair shop, where others are employed to do expert mechanical work, and where material is furnished for the repair of carriages and automobiles, is entitled to a lien on the property manufactured or improved.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. —18.]

2. REVIEW—QUESTIONS RAISED.

The above rulings dispose of the only question raised by the bill of exceptions.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. E. Smith against W. W. Fox. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. B. Rush, of Atlanta, for plaintiff in error. Evins, Spence & Moore, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(143 Ga. 581)

BRIDGES & MURPHY v. McFARLAND.
(Supreme Court of Georgia. June 23, 1915.)

(*Syllabus by the Court.*)

1. SALES — 340, 469—TRANSFER OF TITLE—BREACH OF CONTRACT—REMEDY OF SELLER.

Where, in a contract of sale, the purchaser agrees to make a partial cash payment and give notes for the balance, the seller to retain title until the full purchase money is paid, tender on the terms of the buyer's compliance with the contract will not have the effect of transferring the title to the purchaser. If the buyer refuses to make the partial payment and give the notes as called for by the terms of sale, or to accept any possession or control of the property, no title passes to him, and the seller's remedy is not for the purchase price of the chattel, but for the breach of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942, 1357; Dec. Dig. —340, 469.]

2. SALES — 384 — BREACH OF CONTRACT — DAMAGES RECOVERABLE—ATTORNEY'S FEES.

Where an executory contract of sale does not stipulate to pay attorney's fees, but to give notes providing for their payment, in addition to the purchase price, in an action for its breach attorney's fees as stipulated are not recoverable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1093-1107; Dec. Dig. —384.]

3. TRIAL — 85—RECEPTION OF EVIDENCE.

Where testimony is offered as a whole, if only a part of such testimony be admissible, the refusal to admit it as a whole is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222-225; Dec. Dig. —85.]

4. SALES — 384 — BREACH OF CONTRACT — DAMAGES RECOVERABLE.

In this case it was error to direct a verdict to the purchase price of the chattel, with attorney's fees.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1093-1107; Dec. Dig. —384.]

Error from Superior Court, Decatur County; E. E. Cox, Judge.

Action by the Southern Combing Gin Company against Bridges & Murphy, a partnership composed of R. L. Z. Bridges and another. Pending the action plaintiff was adjudicated bankrupt, and T. F. McFarland, his trustee, was substituted as plaintiff. Judgment for plaintiff on directed verdict, and defendants bring error. Reversed.

The Southern Combing Gin Company brought an action against Bridges & Murphy, a partnership composed of R. L. Z. Bridges and E. T. Murphy, alleging that the defendants were indebted to them in the sum of \$275, besides interest and attorney's fees, on a contract executed by them on April 27, 1911, whereby the defendants bought of the plaintiff a certain gin described therein, and promised to pay to them \$68.75 on delivery and \$206.25 on December 15, 1911, a copy of the contract being attached; that the plaintiff shipped the gin to the defendants in accordance with the terms of the contract, and tendered the same to them upon the payment of the cash consideration of \$68.75 and the signing of a promissory note for the balance of \$206.25, which cash payment the defendants refused to make, and they refused to sign the promissory note; that the plaintiff then tendered and continues to tender the gin to the defendants, in compliance with the obligation of the contract; that by reason of their failure to make the cash payment specified in the contract the deferred payment has become due and payable; that they had been notified that the gin was subject to their order at the depot at Brinson, Ga.; and that the defendants were indebted under the contract for attorney's fees, and had been duly served with notice as required by law that they would claim the same. The prayer was for judgment against the defendants for the full amount due under the contract, together with attorney's fees and interest. The contract attached to the petition directed the plaintiff to ship to the defendants, on or about July 1, 1911, to Brinson, Ga., the machinery described in the contract, which the defendants agreed to receive on arrival and pay all freight thereon, and in addition thereto the sum of \$275, as follows: Cash on delivery \$68.75, and a note due December 15, 1911, for \$206.25. "The above described notes are to be executed for the purchase price of the aforesaid machinery hereby conveyed and purchased and to be put up and operated as stated in this order contract, and the vendor's privilege and the title is specially retained and granted securing their payment." The contract contained a further obligation to "pay to the said Southern Combing Gin Company all damages incurred on my or our failure to comply with this contract, including 10 per cent. attorney's fees in case of suit to enforce the payment of said notes or protect the property. * * * No agreement, verbal or otherwise, will be recognized, unless specified in this contract, which includes warranty on the back hereof." A spe-

cial warranty appeared on the back of the contract. Pending the action the plaintiff was adjudicated a bankrupt and its trustee was made a party in its stead.

The defendants demurred to the petition generally on the ground that no cause of action was set forth, and specially to the paragraph charging the defendants with liability for attorney's fees. The demurrer was overruled, and exceptions pendente lite were taken. The defendants in their plea admitted the execution of the contract, but denied their indebtedness, and denied that the gin had ever been tendered them in accordance with the terms of the contract. On the trial the plaintiff introduced the contract of purchase; also a stipulation between counsel to the effect that a certain witness, if present, would testify that he measured the gin shipped to the defendants and found that same was five inches longer than the Pratt feeder and condenser owned by the defendants, which the defendants expected to use with the gin; that the agent of the railroad at Brinson, Ga., notified the defendants of the arrival of the gin, which had been shipped to the plaintiff at Brinson, Ga., with order to notify Bridges & Murphy, Brinson, Ga.; and that the defendants refused to receive the gin, and the railroad agent sent it to Savannah, Ga., to be sold for charges. Plaintiff also introduced a draft on the defendants, drawn by the Southern Combing Gin Company, dated August 26, 1911, for \$68.75, and a note for \$206.25, conditioned to pay to the Southern Combing Gin Company this sum on December 15, 1911, stipulating: "This note is given in part payment of the purchase price of the following personal property this day purchased from said Southern Combing Gin Company, to wit: One combing cotton gin"—which note was unsigned. Upon the conclusion of this testimony the court refused a nonsuit, and directed a verdict for the plaintiff for the amount of the purchase price of the gin. A motion for a new trial was overruled, and the defendants excepted.

W. V. Custer and W. O. Fleming, both of Bainbridge, for plaintiffs in error. R. G. Hartsfield, of Bainbridge, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The defendants demurred to the petition as not setting out a cause of action. This demurrer was overruled by the court. Although pendente lite exceptions were taken to the ruling, and error assigned thereon in the bill of exceptions, counsel for the plaintiff in error expressly abandon the point in this court. He is committed to the proposition, therefore, that a cause of action is set out. Where parties enter into a written contract for the purchase and sale of a chattel, before the seller can maintain an action for its agreed price there must be such delivery, actual or constructive, as will pass the title and vest the ownership of the

property in the purchaser. *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112. Where the contract is that the defendant is to make a partial cash payment and give notes for the balance, the seller retaining the title until the full purchase money is paid, a tender on terms of the buyer's compliance with the contract will not have the effect of transferring the title to the buyer. If the buyer refuses to make the partial cash payment and give notes as called for by the terms of the sale, or to accept any possession or control of the property, no title passes to him, and the seller's remedy is not for the purchase price of the chattel, but for the breach of the contract. *Dilman v. Patterson Produce, etc., Co.*, 2 Ga. App. 213, 58 S. E. 865; *Tufts v. Grewer*, 83 Me. 407, 412, 22 Atl. 382. We therefore will consider the petition as alleging a case upon a breach of contract, this being in accord with the ruling of the court that the petition set out a cause of action, and the acquiescence therein by the plaintiff in error.

[2] 2. So construed, the plaintiff was not entitled to recover the attorney's fees named in the contract. The contract did not stipulate to pay attorney's fees, but to give notes providing for the payment of attorney's fees, in addition to the principal and interest; and the special demurrer on this ground was meritorious and should have been sustained.

[3] 3. Certain correspondence between the plaintiff and the defendants was rejected on the ground of irrelevancy. Clearly most of it is irrelevant to the issue made by the pleadings. Where testimony is offered as a whole, if only a part of such testimony be admissible, the refusal to admit it as a whole is not error. *Tillman v. Bomar*, 134 Ga. 660, 68 S. E. 504.

[4] 4. The verdict was directed for the agreed purchase price of the machine. In a suit for the breach of a contract, where the seller retains the goods, he cannot recover the full purchase price, because he would thus be allowed, not only to retain the goods, but to recover the full purchase price thereof. The court erred in directing the verdict for the agreed purchase price of the chattel.

Judgment reversed. All the Justices concur.

(143 Ga. 623)

McMANUS v. CASH GROCERY CO.
(No. 421.)

(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** — 516 — **EXECUTION AND INDORSEMENT — ADMISSION.**

Where suit was brought upon a promissory note against one defendant as maker thereof and the other as indorser, and on the trial the defendants admitted a prima facie case, assumed the burden of proof, and proceeded to introduce evidence, this was sufficient to show

that the note had been made by the alleged principal defendant and had been indorsed to the plaintiff by the other defendant.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1800-1806; Dec. Dig. § 516.]

2. **BILLS AND NOTES** — 496 — **ACTION BY INDORSEE — INDORSEMENT — PRESUMPTION.**

Where a negotiable promissory note is sued on by an indorsee thereof, in the absence of any evidence to the contrary, the presumption is that it was indorsed for value and before due. *Bank of Stewart County v. Adams*, 96 Ga. 529, 23 S. E. 496.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1665½, 1669-1674; Dec. Dig. § 496.]

3. **BILLS AND NOTES** — 343 — **NEGOTIABLE INSTRUMENT — FAILURE OF CONSIDERATION — NOTICE TO INDORSEE.**

The mere fact that an indorsee of a negotiable promissory note, taken by him for value, has notice that the note was given to the payee for commissions as a real estate agent, is not sufficient to put him on notice or inquiry as to whether the consideration failed. *Howard v. Simpkins*, 70 Ga. 322.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 853-855, 864, 865; Dec. Dig. § 343.]

4. **BROKERS** — 42 — **NOTE GIVEN FOR COMMISSIONS — DEFENSE — FAILURE TO REGISTER AND PAY TAX.**

Although a person may not have registered and paid the tax required of a real estate agent, this will not prevent a recovery upon a promissory note given to him for commissions in connection with selling property. *Toole v. Wiregrass Development Company*, 142 Ga. 57, 82 S. E. 514.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 43; Dec. Dig. § 42.]

Error from Superior Court, Jeff Davis County; O. B. Conyers, Judge.

Action by the Cash Grocery Company against J. T. McManus. Judgment for plaintiff, and defendant brings error. Affirmed.

S. D. Dell, of Hazlehurst, for plaintiff in error. J. O. Bennett and J. M. Swain, Jr., both of Hazlehurst, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 634)

McDANIEL et al. v. MADDOX.
(No. 422.)

(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

JUDGMENT — 640 — **CONCLUSIVENESS — COURT OF ORDINARY — GRANT OF LETTERS DISMISORY.**

A will was probated in common form, and an administrator with the will annexed was appointed; the testator not having named an executor. By the terms of the will the entire estate was devised to the testator's widow, to the exclusion of his other heirs at law, consisting of his children. After the estate had been administered, and final returns filed, and application for discharge made by the administrator, the children of testator filed objections to the discharge of the administrator, which were withdrawn before trial at the June term, 1906, of the court of ordinary, and letters of

dismissal were granted by the ordinary to the administrator at the same term. On September 14, 1911, the plaintiffs in the court below, who were the objectors to the discharge of the administrator in the court of ordinary in 1906, filed a petition to the court of ordinary against the sole beneficiary under the will, calling on her to produce the will and have it probated in solemn form. The case was appealed by consent from the court of ordinary to the superior court, where a demurrer was filed and a motion made to dismiss the proceeding which was accordingly done by the trial judge, and to this judgment the plaintiffs excepted. *Held*, that this case is controlled by the reasoning in *Thompson v. Chapeau*, 132 Ga. 847, 65 S. E. 127, and consequently the court did not err in sustaining the motion and dismissing the application to probate the will in solemn form.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1154; Dec. Dig. § 640.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Lillian McDaniel and others against Matilda Maddox. Judgment for defendant, and plaintiffs bring error. Affirmed.

John S. Gleaton, of Atlanta, for plaintiffs in error. A. C. & J. H. McCalla, of Conyers, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 585)

MOBLEY v. G. S. BAXTER & CO. et al.
(No. 390.)

(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

1. WITNESSES § 87—KNOWLEDGE OF WITNESS—DEATH AND HEIRSHIP.

It was not competent for a witness to testify as to the death of a certain person, and who were his heirs surviving at a certain date when a deed was executed, the witness testifying that he did not know these facts from his own personal knowledge, but that he knew them "from family repute and from various other sources of information, such as a vast amount of correspondence from said [decendent's] family, and from the court records, and from wills and documents which made the matter conclusive so far as could be ascertained by search."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.]

2. STIPULATIONS § 14 — CONSTRUCTION — ADMISSIBILITY OF EVIDENCE.

Where suit was brought, and the evidence of a witness was taken by interrogatories, which contained the statement indicated in the first headnote, and the suit was dismissed by the plaintiff, and was later renewed, and counsel for the defendants, in response to a request from counsel for the plaintiff, wrote a letter to the latter, in which they stated that they would consent that the evidence of the witness taken in the first case might be used in the second for the purpose of showing that the parties who had executed a certain deed were the heirs at law of the person to whom the grant was issued by the state, this did not amount to an agreement that such facts might be proved by the conclusions of the witness from various sources, or waive the right to object to the testimony giving such a conclusion.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.]

3. PRIMA FACIE CASE—EXCLUSION OF EVIDENCE—NONSUIT.

After the evidence indicated in the previous headnote had been excluded, no prima facie case was made by the plaintiff, and there was no error in granting a nonsuit.

Error from Superior Court, Clinch County; J. W. Quincey, Judge.

Suit by S. S. Mobley against G. S. Baxter & Co. and another. Judgment for defendants on nonsuit, and plaintiff brings error. Affirmed.

S. S. Mobley brought an equitable petition against G. S. Baxter & Co. and W. H. Mobley, seeking to enjoin the defendants from cutting, working, or using certain timber. The abstract of title attached to plaintiff's petition showed that he claimed under a chain of title beginning with a grant from the state to Thomas Taylor in 1848. The next link in the chain was a deed signed by a number of persons. This deed was dated January 2, 1896. It recited that the persons signing it (except Ebenezer Wakeley and his wife) were the widow and children of Thomas Taylor, deceased, the husbands and wives of certain heirs at law of his, and the heirs at law of certain other persons named. When the case came on for trial it was dismissed by the plaintiff on October 29, 1912, and was recommenced shortly afterward. When the case thus rebrought came on for trial, the interrogatories of E. Wakeley which had been taken while the first case was pending were offered in evidence. He testified, in substance, that Thomas Taylor died in 1870 or 1871; that his sole surviving heirs on January 2, 1896, when the deed above mentioned was executed, were seven signers of that deed; that there had been ten original heirs, the nearest of kin of the whole blood in the paternal line, but the other three had died in 1875, 1887, and prior to January 2, 1896, respectively; that the last-mentioned decedent left surviving him a wife and five children, one daughter, and four sons, being his only heirs at law; that the first of the three deceased heirs died intestate, unmarried, without children or descendants of children, and left as his only heirs at law his nine brothers and sisters, naming them; that the second of the three deceased heirs mentioned died intestate, unmarried, without children or descendants of children, and left as his only heirs at law his eight brothers and sisters, naming them. The witness testified:

"That he did not know of the death of Thomas Taylor, who his sole surviving heirs at law were, at the time said 'big deed' was made, from his own personal knowledge, but he did know it from family repute and from various other sources of information, such as a vast amount of correspondence from said Thomas Taylor's family, and from the court records, and from wills and documents, which made the matter conclusive so far as could be ascertained by search."

Objection was made to the evidence of Wakeley, but it was admitted temporarily.

When the plaintiff closed his evidence, a motion was made to exclude the answers of Wakeley to the interrogatories, on the grounds that the witness testified that he did not know the fact as to the death of Thomas Taylor and the relationship of the parties from his own personal knowledge, but from family repute and other sources of information; that his evidence was purely hearsay; that his answer that he knew it from family repute was a conclusion; that it did not appear that he knew it from general family repute; and that the source of his information on the subject was not disclosed. In connection with the motion to exclude the evidence counsel for the defendants introduced a letter dated at Jacksonville, Fla., January 3, 1913, and signed by Toomer & Reynolds, who were referred to in the bill of exceptions as "defendants' attorneys." It contained the following statement:

"We will consent, as requested, that you use the evidence of Ebenezer Wakeley, submitted by you on the former trial of substantially the same case at the last term of Clinch court, and that you use it for the purpose of showing that the parties who executed the so-called 'big deed' were in fact heirs at law of Thomas Taylor."

The motion to exclude the evidence of Ebenezer Wakeley was sustained, and, the plaintiff having rested his case, counsel for the defendants moved for a nonsuit, which was granted, and the plaintiff excepted.

J. L. Sweat and L. A. Wilson, both of Waycross, and R. G. Dickerson, of Homerville, for plaintiff in error. J. C. Reynolds, of Jacksonville, Fla., and E. K. Wilcox, of Valdosta, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The evidence of Wakeley was properly excluded. It was merely a conclusion on his part. It did not appear that Wakeley was a member of the family of Thomas Taylor, deceased. The witness did not state any family repute known to him, or any statements of deceased persons who were members of the family, or any other distinct admissible fact. He stated the death of Taylor and its date, who were his heirs, and which of them survived at a certain time, and other facts in regard to them. He testified that he did not know of the death of Taylor or who were his sole surviving heirs at the time mentioned of his own personal knowledge, but that he did know it "from family repute and from various other sources of information, such as a vast amount of correspondence from said Thomas Taylor's family, and from the court records, and from wills and documents, which made the matter conclusive so far as could be ascertained by search." This was not the statement of any fact, but an inference or conclusion of the witness, drawn from various sources, and was not admissible in evidence. Section 5764 of Civil Code 1910 does

not authorize the introduction of such evidence. While in *Imboden v. Etowah, etc., Mining Co.*, 70 Ga. 86, some broad and rather unguarded language was used in regard to the admissibility of hearsay evidence to prove death, that case does not decide that the conclusion of a witness drawn from various sources, some oral and some documentary, is admissible to prove death and relationship. Moreover, it appeared that a witness in that case stated that he believed a certain person to be dead, from having heard so by word of mouth from a named deceased person, and having also seen documents relating to his death. No objection was made that the deceased person who made the declaration was not a member of the family whose statement would be admissible, and apparently he was treated as such.

[2] 2. The suit first brought was dismissed on October 29, 1912. The present suit was filed on November 22d thereafter. The letter from Messrs. Toomer & Reynolds amounted to nothing more than agreeing that the interrogatories of Wakeley which had been taken in the first case might be used in the second, for the purpose of showing that certain persons who executed a deed were the heirs of Thomas Taylor, deceased. It did not purport to agree that the witness might testify to his conclusions on this subject from various sources of information, or to waive objection to such incompetent evidence.

[3] 3. The evidence of Wakeley having been excluded, no prima facie case was made by the plaintiff, and a nonsuit was properly granted.

Judgment affirmed. All the Justices concur.

(143 Ga. 563)

PEOPLE'S BANK OF SAVANNAH v.
PIERCE.

(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES §283—FORECLOSURE
—PROPERTY LEVIED ON—RIGHT TO POSSESSION.

Where a mortgagee foreclosed his security upon certain personal property, and the mortgage *fi. fa.* was levied upon the property described in the mortgage, and where subsequently to this levy, and while the levy was still subsisting, the defendant executed a paper in terms conveying the property to the plaintiff and agreeing to deliver it to the plaintiff upon default in the payment of the debt to secure which this instrument was executed, and expressly stipulated that the levy which had been made should not be dismissed but should continue as a valid subsisting levy, the right to the custody and control of the property was in the officer who had levied the *fi. fa.*, and the plaintiff in *fi. fa.* could not maintain trover against the defendant to recover possession of this property.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 569, 572; Dec. Dig. § 283.]

2. NONSUIT.

The court properly granted a nonsuit in this case.

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action by the People's Bank of Savannah against W. E. Pierce. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. Bowden and Gordon Knox, both of Hazlehurst, and W. M. Farr, of Savannah, for plaintiff in error. F. Willis Dart, of Douglas, and W. W. Bennett, of Baxley, for defendant in error.

BECK, J. People's Bank of Savannah brought an action of trover against the defendant to recover possession of certain personal property, to wit, four automobiles, specifically described in the petition. When the case came on for trial, the plaintiff offered in evidence a certain written instrument; the same being offered as evidence of title and of the right of the plaintiff to recover in the action. The defendant objected, and it was thereupon excluded. The plaintiff then offered an amendment to his petition, which was objected to by the defendant, and this objection was sustained. To these rulings, and to the grant of a nonsuit, the plaintiff excepted.

[1] We are of the opinion that each of the rulings of the court complained of was proper. From the amendment tendered and the instrument of writing which was offered in evidence it appears that the plaintiff had foreclosed a mortgage in its favor upon certain personal property. Subsequently to the foreclosure the plaintiff and the defendant entered into an agreement or contract which recited, among other things, that the defendant sold and conveyed certain automobiles to the plaintiff. Some of these automobiles were in Savannah, Ga.; others were at Hazlehurst, Jeff Davis county. There was an express power of sale given to the plaintiff in error as to the machines in Savannah; and it was also recited in the written instrument offered in evidence that the machines which constituted the personal property, the subject of litigation in this case, should be held subject to the order of the plaintiff, but it also distinctly appears from the record that these very machines had been levied upon by the sheriff of Jeff Davis county under a mortgage *fi. fa.* in favor of the plaintiff. It also appears that it was agreed that this levy was not dismissed but continued, and was to continue as a subsisting levy. That being true, the machines were in the custody of the levying officer; the plaintiff was estopped, under the recitals, from denying that the right to the custody of them was in the sheriff; and that custody and right of possession was the result of the proceedings which the plaintiff had instituted. While it is recited in the written instrument which was excluded from evidence that the machines were to be held by the defendant subject to the order of the plaintiff, that recital must be considered in

connection with the undisputed fact that there was a subsisting levy upon the property, and that it was in the lawful possession of the sheriff. If, for any reason, the possession of the sheriff was not actual at the time, or if the defendant was wrongfully holding the property, the sheriff was the party to bring trover. But so long as the present status of the property continues (that is, so long as the sheriff has, by virtue of the levy, the actual custody or right to the custody and control of the machines), the plaintiff is in no position to maintain this action.

[2] The court properly rejected the amendment and the evidence, and a nonsuit necessarily followed.

Judgment affirmed. All the Justices concur.

(143 Ga. 552)

McDONALD et al. v. FARMERS' SUPPLY CO.

(Supreme Court of Georgia. June 22, 1915.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE §53—PLACE OF HOLDING COURT.

The Constitution requires that justices' courts shall be held at fixed times and places. The statute expressly declares that a judgment rendered at a place other than that so fixed shall be void. A judgment so rendered is not merely irregular, but void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 147; Dec. Dig. § 53.]

2. JUSTICES OF THE PEACE §135 — VOID JUDGMENT — AFFIDAVIT OF ILLEGALITY — CERTIORARI.

It has been held that a writ of certiorari cannot be used as a means of attacking a judgment which is not merely erroneous, but wholly void. Accordingly, the suing out of a writ of certiorari to a verdict or judgment admittedly rendered at a place other than that established by law did not furnish to the complaining party an available method of raising that question, and the overruling of the certiorari did not operate as a waiver or estoppel in regard to such question, which was not and could not have been thus raised, and prevent it from being raised by affidavit of illegality after levy of the execution based upon the judgment rendered on the certiorari.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 426-447, 749; Dec. Dig. § 135.]

Error from Superior Court, Upson County; Robert T. Daniel, Judge.

Action by the Farmers' Supply Company against C. J. McDonald and another. Judgment dismissing defendants' affidavit of illegality, and defendants bring error. Reversed.

An issue upon an affidavit of illegality was submitted to the presiding judge, without the intervention of a jury, upon the following statement of facts:

"That at the February term of the justice's court in and for the 588th district G. M., Upson county, held on the 15th day of February, 1913, there was pending in said court the case of the Farmers' Supply Company against C. J. Mc-

Donald, principal, and L. T. Matthews, security, the same being a suit on account; that, further, the weather on said court day being very cold, and, the justice having provided no means for heating the lawfully appointed justice's courthouse, by agreement of counsel for both plaintiff and defendant the said justice's court was held, for the 15th day of February, 1913, 50 yards from the lawfully appointed place, in the rear of the Planters' Bank building, located in the town of Yatesville, Upson county, Ga., said Planters' Bank building not being the lawfully appointed place for holding said justice's court; that said case of the Farmers' Supply Company against C. J. McDonald, principal, and L. T. Matthews, security, was tried before a jury in said justice's court, and verdict rendered against said C. J. McDonald and L. T. Matthews in favor of the Farmers' Supply Company in said Planters' Bank building, and judgment upon said verdict was rendered against C. J. McDonald and L. T. Matthews in said Planters' building, the same not being the lawfully appointed place for holding said justice's court; that said case was certified to Upson superior court, May term, 1913, in answer to the state's writ of certiorari, in which certiorari no effort was made by plaintiffs in certiorari to take advantage of the fact that the justice's court aforesaid was held at other than the lawfully appointed place for holding such justice's court."

The superior court overruled the certiorari and entered judgment on the certiorari bond. An execution was issued and levied. An affidavit of illegality was interposed, on the ground that the judgment was void. Under the facts, the court dismissed the affidavit of illegality, and to this ruling exception was taken.

Hugh Thurston, of Thomaston, and J. B. McDonald, of Yatesville, for plaintiffs in error. Claude Worrill, of Thomaston, for defendant in error.

LUMPKIN, J. At the time when a case in a justice's court came on for trial the weather was cold, and no provision had been made for heating the lawfully appointed place for holding court. By agreement court was held in a house in the same town, about 50 yards from the regular place for holding court. From the verdict a certiorari was sued out. No point was raised as to the place where the justice's court was held. On the hearing a judgment was rendered, declaring that the certiorari was "refused," and a judgment was entered on the certiorari bond. A *fi. fa.* was issued and levied, and an affidavit of illegality was interposed on the ground that the judgment rendered in the justice's court was void, and that the judgment rendered in the certiorari proceeding was also void. The court dismissed the illegality, and the defendant in *fi. fa.* excepted.

[1] The Constitution declares that justices' courts shall sit at fixed times and places. Const. art. 6, § 7, par. 2; Civil Code 1910, § 6524. By section 4705 of the Civil Code it is declared that:

"All judgments of such justices rendered, in any civil cause, anywhere else than at the place for holding their courts lawfully appointed are void."

No provision is made for holding such courts by agreement at other places than those fixed by law. Accordingly, the trial and verdict in this case were not merely irregular, but, by the positive terms of the statute, were void.

[2] It has been declared that the writ of certiorari will not lie to set aside a verdict or judgment which is not merely irregular, but absolutely void. *Levadas v. Beach*, 117 Ga. 178, 43 S. E. 418. If this remedy could not be used, the overruling of the certiorari could not conclude the defendant on this point. If the question were one which could and should have been raised by certiorari, but this was not done, the decision might be different. If the judgment was void, and the ruling on the certiorari did not and could not make it valid by waiver or estoppel, it follows that such void judgment could be attacked by an affidavit of illegality. *Hilson v. Kitchens*, 107 Ga. 230(2), 233, 33 S. E. 71, 73 Am. St. Rep. 119.

In *Green v. Alexander*, 88 Ga. 161, 13 S. E. 946, it was held that a judgment of a superior court rendered on appeal from a justice's court is not void so as to be attacked by affidavit of illegality on the ground that the justice's court was not held "at a courthouse established by law," both parties having had their day in the superior court; thus treating the trial in the superior court as a *de novo* investigation, and the verdict and judgment rendered therein as binding. Indeed, an appeal may be entered by consent before any judgment is rendered by the justice. Civil Code 1910, § 4740. It will be seen that this differs from a hearing on the writ of certiorari by which it has been held that the point could not be raised.

The decisions are not uniform as to whether a void judgment can be set aside by certiorari; and the rulings of this court are not in entire harmony on the subject. In *Brown v. Brown*, 99 Ga. 168, 25 S. E. 95, a distress warrant was issued and levied. No counter affidavit was interposed. Nevertheless the magistrate tried the question of liability, and from his judgment an appeal was taken to a jury in that court, and a verdict was rendered. It was held by two justices (when this court was composed of three justices) that:

"The whole proceeding being *coram non iudice*, the verdict rendered on appeal in the plaintiff's favor could not be reviewed by certiorari."

In *Mathis v. Bagwell*, 101 Ga. 167, 28 S. E. 638, an affidavit of illegality was interposed to the levy of an execution issued in a justice's court. Among other grounds of illegality, it was set up that the judgment was not rendered at the regular court ground or on the regular court day. The presiding judge sustained the certiorari and ordered a new trial. This judgment was affirmed. It was said that whether the judgment was rendered on a regular court day, or at a place other than the court ground, involved ques-

tions of fact, and that the judge, being doubtful, did not err in directing a new trial to be had. In the case before us there is no dispute as to facts, and the question is one of law. In *Hilson v. Kitchens*, 107 Ga. 230(2), 33 S. E. 71, 73 Am. St. Rep. 119, supra, it was held that a judgment purporting to have been rendered by a justice's court was void when it affirmatively appeared that the court was held at a place where it could not lawfully sit. In that case an execution issuing from a justice's court was levied and an affidavit of illegality was filed. The case was carried to the superior court by appeal. In *Levadas v. Beach*, 117 Ga. 179, 43 S. E. 418, supra, it was declared that the writ of certiorari does not lie to set aside a verdict or judgment which is not merely erroneous, but absolutely void. In *Bass v. City of Milledgeville*, 122 Ga. 177, 50 S. E. 59, it was held that the writ of certiorari cannot be used to bring in question the legal existence of the court to which the writ is directed. In the opinion Mr. Justice Cobb said:

"It is settled by the decisions of this court that the writ of certiorari will not lie to review a void judgment by a court legally constituted, or any pretended judgment by an individual or body of individuals assuming to exercise judicial powers without any lawful authority so to do. *Murray v. State*, 112 Ga. 7, 13, 37 S. E. 111. See, in this connection, *Wright v. Davis*, 120 Ga. 670(3), 48 S. E. 170."

In *Kingsbery v. People's Furniture Co.*, 130 Ga. 365, 60 S. E. 865, when a case was called for trial in a justice's court, it was contended that it had already been dismissed, and there was no case pending to be tried, but the entry had not been duly made, and a motion was made to have a judgment of dismissal entered. It was held that a denial of the motion furnished a basis for certiorari after verdict. The Court of Appeals has followed the statement above quoted as to what was the fixed rule of this court. *Sawyer v. City of Blakely*, 2 Ga. App. 159, 58 S. E. 399; *Simpkins v. Hester*, 3 Ga. App. 160, 59 S. E. 322; *Robertson v. Russell*, 13 Ga. App. 27, 78 S. E. 682.

It would seem that this rule has become too firmly fixed to be disregarded, at least without a review of the decisions in the manner pointed out in the statute. Speaking for myself, I think the rule is not sound. If there is no court at all, the attempt to make a ruling is a mere assumption of authority. But, if there is a court with a case before it, I have never appreciated the force of the reasoning by which it is held that, if the judgment is wrong, the litigant against whom it is pronounced may have it reversed by certiorari; but, if it is so wrong as to be void, the injured party cannot get rid of it by that means—in other words, that there is any inverse ratio between the degree of the wrong and the right to correct it. One of the functions of the common-law writ of certiorari was to pass upon the question of

the jurisdiction of an inferior court. *Harris on Certiorari*, § 45; 2 Burr. 1042. It is declared in the Constitution of the state that the superior courts shall have power to correct errors in inferior judicatories, by writ of certiorari. Article 6, § 4, par. 5; Civil Code 1910, § 6514. The statute contains a like statement (Civil Code 1910, § 5180). A similar provision in a former Constitution was held to be self-executing, and to confer the right to have a writ of certiorari, without the necessity for a statute. *Livingston v. Livingston*, 24 Ga. 379. Thus the writ, under the Constitution and statute, is broader than at common law, and, relatively to inferior courts, serves somewhat the same purpose as a writ of error to a court of record. But it is well established in this state that a writ of error will lie to reverse and get rid of a judgment though it may be void for want of jurisdiction. *Walker v. Banks*, 65 Ga. 20; *Worsham v. Murchison*, 66 Ga. 715; *Pope v. Jones*, 79 Ga. 487 (2), 4 S. E. 860. A sound reason for this is that, if a court without jurisdiction renders a judgment, it may stand of record as an apparent lien on the property of the defendant, and may seriously affect his disposition thereof. A proposed purchaser would hardly be satisfied with an assurance that there was parol evidence to show that the judgment was not rendered at the proper time or place. This evidence in time might become inaccessible. The party injured by having such a judgment entered against him ought to have the right to clear the record. Nor is there any reason why he should be compelled to resort to an equitable petition. If he did so, the same argument would doubtless be used against him—that it is unnecessary if the judgment is void. So far as I am aware, this is the only argument which has been used against getting rid of such a judgment of an inferior court by writ of certiorari. This case does not present a question of entire want of jurisdiction of a subject-matter or whether that could be waived.

Judgment reversed. All the Justices concur.

(143 Ga. 516)

CARLTON v. SEABOARD AIR LINE RY.
(No. 369.)

(Supreme Court of Georgia. June 18, 1915.)

(Syllabus by the Court.)

1. RAILROADS—71—RIGHT OF WAY—CONVEYANCE—PRIVATE ROAD.

Where the owner of a body of land through which a private road is maintained by him as a way necessary for ingress and egress between his residence and his farm and timbered lands located thereon sells a strip of land through his tract to a railroad company for the purpose of locating a railroad thereon in such way as to intersect with the private road, and executes to the purchaser a formal deed, whereby he conveys the bargained land to the purchaser in fee simple, with a general warranty of title, and recites in the deed that the land is con-

veyed "absolutely and without reservation," there is no implied reservation of a right to continue the use of the road at the point of intersection with the land so granted, and, under authority of the deed, the grantee, in so far as it might affect the grantor, can close the road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 167; Dec. Dig. ¶71.]

2. EASEMENTS ¶7—ESTOPPEL ¶32—ESTOPPEL BY DEED—MATTERS PRECLUDED—"IMPROVED LAND"—PRESCRIPTIVE TITLE—PRIVATE WAY.

Under circumstances such as are set forth in the preceding note, if the grantor, after conveying the strip of land to the railroad company, continued to use the private way, including that part which was intersected by the strip conveyed to the railroad company, the fact that he had made such conveyance would not prevent him from acquiring under the statute a private way by prescription.

(a) If the railroad was constructed and the tracks were made to cross the private way by means of a trestle, the land of the railroad company at such point of intersection was "improved land" within the meaning of the statute, and the period of prescription would be seven years.

(b) If the private way was less than 15 feet in width, and the prescriber kept it in repair and used it as such continuously for the statutory period, he would acquire a private way by prescription.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 16-19, 27, 33; Dec. Dig. ¶7; Estoppel, Cent. Dig. § 81; Dec. Dig. ¶32.]

For other definitions, see Words and Phrases, First and Second Series, Improved Land.]

3. EASEMENTS ¶61—INJUNCTION—PETITION—PRESCRIPTIVE TITLE.

Applying the ruling announced in the preceding note, the petition sufficiently set forth a cause of action, and it was error to dismiss it on general demurrer.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. ¶61.]

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by H. M. Carlton against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff brings error. Reversed.

H. M. Carlton instituted an action against the Seaboard Air Line Railway to enjoin the closing of a wagon road which passed under the defendant's trestle, and to recover damages. The defendant was engaged in "filling in" the trestle; the work having been commenced shortly before the suit was filed. On an interlocutory hearing the judge refused an ad interim injunction, and the plaintiff excepted. No supersedeas having been granted, the defendant completed the work. This fact having been duly presented to this court, the bill of exceptions was dismissed. *Carlton v. Seaboard Air Line Ry.*, 139 Ga. 692, 77 S. E. 1128. The plaintiff persisted in that branch of his suit which sought to recover damages. The petition was twice amended, and the defendant filed demurrers, on special and general grounds, to the original petition and to the petition as amended. Without passing on the grounds of special

demurrer the judge dismissed the case on general demurrer. The writ of error brings this judgment up for review. The following appears from the allegations of the petition as amended: Plaintiff owned a large body of land in Polk county, consisting of designated lots and fractions of lots. He resided on the property and cultivated farms thereon. The uncultivated portions of the land contained valuable timber and wood, all of which, before the injury complained of, were available to him for market and farm purposes. The defendant's line of railway runs east and west through the plaintiff's body of land, dividing it approximately into two equal parts. His residence and the larger part of his cultivated lands are on the north side of the railroad. A considerable part of cultivated land and land on which there is valuable timber and wood are situated on the south side of the railroad. Concerning the location of the wagon road involved in this litigation the petition alleged:

"Petitioner further says that the only accessible way there is from the north side of said farm to the land lying on the south side of the railway is the roadway leading from the public road which leads from Rockmart to Dallas, and runs in a southeasterly direction through said farm, by the residence of the petitioner, and then on through said farm to trestle No. 612.3 on land lot Nos. 1022 and 1023, thence up the valley between said mountain ranges, penetrating the entire wood and timber land, and affording petitioner the only outlet from one part of his farm to another, and the only way petitioner can transport wood and timber located thereon to the market, and for farm purposes. And this road furnishes the only outlet to that portion of said land which is tillable, as the range on the east and west sides of said land is so high that it cannot be successfully crossed with a wagon, said range extending south approximately 2½ miles, where it intersects with another range which runs practically east and west, thus making it impossible for petitioner to approach said lands and remove therefrom the wood and timber thereon, or to cultivate the same."

An amendment to the petition in regard to the location of the road referred to above alleged that:

It "leads from the Rockmart and Marietta public road across his farm to the Yorkville and Dallas public road, intersecting with the latter road near Braswell."

This road was in existence before the location of the railroad was acquired and before the railroad was constructed. The railroad was located upon a strip of land conveyed by the terms of a deed executed by the plaintiff to the Atlanta & Birmingham Air Line Railway Company, a corporation, in 1903. The consideration expressed in the deed was \$1,550. It recited that:

The grantor "has granted, bargained, and sold, and by these presents does grant, bargain, sell, and convey, unto the said party of the second part, and its successors and assigns, a tract or strip of land."

Then follows a description of the strip of land described as running across the several lots forming the body of plaintiff's land, re-

cited as being in width 200 feet through one lot, 250 feet through another, and 160 feet through each of the others. The quantity of land covered by the strip was recited as being 20.50 acres. After the description above referred to, the recitals of the deed proceeded:

"It is the intention of the said H. M. Carlton to convey to said railway in this conveyance all the right of way over his said lands, including the right of way above described in the third paragraph of this deed; all of which lands, including the 200-foot strip on each side, is conveyed absolutely and without reservation, and running through said lands — feet wide, as above described, to where said survey or line leaves or shall leave the said lands. To have and to hold the said tract or strip of land, with all and singular the rights, members, and appurtenances thereunto appertaining, unto the said party of the second part, its successors and assigns, in fee simple, and the said H. M. Carlton, the said bargained lot or tract of land unto the said party of the second part, its successors and assigns, against the said H. M. Carlton and against his heirs, administrators, and executors, and against all and every other person or persons, shall and will warrant and forever defend by virtue of these presents. And for the same consideration does further grant, bargain, sell, and convey to the said party of the second part, its successors and assigns, the following additional rights and privileges upon the foregoing described lands."

Then follows recitals conferring a right to cut trees on an additional described strip through the plaintiff's lands adjacent to the strip mentioned above, where necessary to prevent the trees from falling on the railroad track; also the right to change the course of streams "on or off the right of way herein conveyed," by cutting canals, ditches, or otherwise; also "the right to quarry and use such stone or gravel on said right of way as may be required in the construction of said railway, and also the right to construct and use such wagon roads through said lands as will facilitate the construction of the railroad of said party of the second part"; also "the right to take material where necessary outside of the right of way for the purpose of making embankments; and also the right to deposit material excavated from cuts, canals, or ditches, on portions of said lands within a limit of 200 additional feet on either side of said right of way." The wagon road through plaintiff's farm had been located along its present roadbed for a period of 25 years or more, and the plaintiff and his tenants have worked and kept it in repair for the past 21 years. It is not over 15 feet in width, and has been worked and used both as a way of convenience and necessity for the purpose of using and enjoying plaintiff's land south of the railroad. When the railroad company went to construct the trestle over the road it had notice of the existence of the road, and recognized it as an easement, and so arranged the timbers of the trestle as not to interfere with the use of the road, and afterwards permitted its continuous use, recognizing it as a private way of necessity for more than 7 years immediately preceding the attempt to obstruct it. The defendant

failed to give 30 days' notice of its intention to close the way, but closed it quickly, with the view of completing the obstruction before any action of law could be taken to prevent it. The special damage sought to be recovered was alleged to be a stated amount in which the market value had been diminished on account of the closing of the road.

I. F. Mundy, of Rockmart, and W. W. Mundy, of Cedartown, for plaintiff in error. W. G. Loving, of Atlanta, and E. S. Ault, of Cedartown, for defendant in error.

ATKINSON, J. [1] 1. In order to recover damages from the railroad company for obstructing the private way, it was essential that the plaintiff should be entitled to maintain a road at the place where the defendant obstructed it. As to this feature of the case, the plaintiff projected his suit: First, upon the theory that he had title, and, though he had executed a deed conveying the land on which the railroad was constructed, that the deed did not operate to deprive him of the use of the existing private way which was intersected by the strip of land so granted; and, second, upon the theory that, if the deed had such effect, nevertheless, after the deed was executed and the railroad constructed, he continued to use the roadway under such circumstances and for such length of time as to afford him a private way by prescription. Whether the plaintiff could recover upon the first theory depends upon the effect of the deed. It was executed upon a valuable consideration, and purported to convey the strip of land therein specifically described, in fee simple, with a clause of general warranty of title. This was not all. It was also declared that all of the land "is conveyed absolutely and without reservation." Under these circumstances the deed, in effect, was an absolute conveyance of the grantor's interest in the strip of land described, without any reservation whatever, thereby vesting any title to the property which he had or might subsequently acquire in his grantee. In 3 Elliott on Railroads, § 1138, it is stated, relatively to a deed by a landowner to a railroad company conveying a right of way, which is silent as to private crossings between the different parts of his land, that the rule is:

"That such a conveyance does not constitute a waiver of a right to a private crossing, and the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding his unconditional instrument of conveyance."

See, also, *Brigham v. Smith*, 4 Gray (Mass.) 297, 64 Am. Dec. 77, and annotations in 9 Notes to Am. Dec. 353. See, also, cases cited in 17 Am. Dig. (Cent. Ed.) 807, § 59. The rule so stated rests upon the theory of an implied reservation. It does not seem that this rule has been adopted in Georgia. *Charleston & Western Carolina Railway Co. v. Fleming*, 118 Ga. 699, 45 S. E. 664. None of these authorities, however, go to the ex-

tent of holding that there would be an implied reservation where the land on which the railroad was to be located was conveyed in fee, and the deed expressly declared, as in the case now under consideration, that there should be no reservation. There could be no such implication in the face of an express recital that there should be no reservation. The land conveyed by the deed was so situated as to intersect the existing road; and by the terms of the deed the plaintiff put it out of his power, by virtue of his ownership theretofore existing, to maintain the road over the section of land which he granted to the railroad company, and put it in the power of the railroad company, in so far as it might affect the plaintiff, to close the road. *Charleston & Western Railway Co. v. Fleming*, 119 Ga. 995, 47 S. E. 541.

[2] 2. The right of private way over another's land may arise by prescription from 7 years' uninterrupted use through improved lands, or 20 years' use over wild lands. Civil Code, §§ 818, 824, 3641. A prescription of this character may arise notwithstanding the prescriber may know that the land over which he undertakes to prescribe is the property of another. The way must not exceed 15 feet in width, and its use as a way must have been continuous for the statutory period, and the prescriber must have kept the road in repair. *Kirkland v. Pitman*, 122 Ga. 256, 50 S. E. 117. In the case at bar, notwithstanding the plaintiff, by virtue of his deed, had transferred his title in the property conveyed to his grantee, nevertheless, according to the allegations of the petition, he continued to use the private road across the land so granted. The land was improved by the construction of the railroad thereon and the trestle over that part of it which intersected with the plaintiff's private roadway. Accordingly, 7 years was the prescriptive period applicable in such a case. The road was less than 15 feet in width, and the same roadbed had been continuously used and kept in repair by the plaintiff for a length of time which exceeded the prescriptive period. Under such circumstances, he would acquire a right of private way by prescription. See, also, 3 Elliott on Railroads, § 1140.

[3] 3. Applying the ruling announced in the preceding division to the allegations of the petition, it set forth a cause of action sufficient as against general demurrer, and it was error to dismiss the petition.

Judgment reversed. All the Justices concur.

(143 Ga. 642)

ROME HARDWARE CO. v. CUZZORT.
(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

The evidence authorized the verdict finding the property not subject; and the special

grounds of the motion for new trial, in so far as they present any question for decision, are without merit.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action between the Rome Hardware Company and J. B. Cuzzort. Judgment for Cuzzort, and the Hardware Company brings error. Affirmed.

Henry Walker, of Rome, for plaintiff in error. Denny & Wright, of Rome, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(143 Ga. 624)

FULLER v. WESTERN & A. R. CO.
(No. 423.)

(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

CARRIERS ↔ 278—PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Under the evidence in this case, the grant of a nonsuit by the court was error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1080, 1081; Dec. Dig. ↔ 278.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. Nannie Fuller against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. R. Whitaker, of Cartersville, and Arnaud & Donehoo, of Atlanta, for plaintiff in error. Tye, Peebles & Jordan, of Atlanta, for defendant in error.

HILL, J. Mrs. Nannie Fuller brought suit against the Western & Atlantic Railroad Company, for damages alleged to have resulted from being carried beyond the destination called for by her ticket. She averred that she was a passenger entitled by her ticket to transportation from Calhoun, Ga., to Bolton, Ga.; that the conductor of the train failed to stop the train at Bolton, or to call or have called that station, but carried her on to Atlanta; that the failure to stop the train or call the station of Bolton was due to the negligence of the conductor or those in charge of the train; that she was not in any way responsible for such failure or negligence; and that, by reason of being carried to Atlanta, she was forced to walk several blocks to board an electric car and go back to Bolton, and was thereby exposed to severe cold, resulting in sickness and the permanent impairment of her health, etc.

The testimony of the plaintiff tended to show that on the day named in the petition she boarded a passenger train on the defendant's road, having a ticket entitling her to passage from Calhoun to Bolton. She did not give the ticket to the conductor on the

train between these stations. She testified:

"The conductor paid no attention to me; he did not come to me for the ticket. He passed through the car between the time we left Calhoun and the time we reached Bolton, going straight on. He did not stop near my seat. The train did not stop at Bolton, and the station of Bolton was not called. I gave my ticket to the conductor when I got into Atlanta. * * * When I went down the steps I said, 'You were to put me off at Bolton,' and he said, 'Have you a ticket?' I said, 'Yes,' and he said, 'Let me see it.' I took it and handed it to him, and he told me to stand aside. I stood up there about 10 minutes, and after he came back he said, 'Let's go.' He carried me to the station room and told me to stand there. * * * He took me to the street car. I was then 63 years old."

She testified that she did not know that Bolton was a flag station, and knew the conductor had not taken up her ticket before she reached Bolton. There was no affirmative evidence that Bolton was a flag station, or that the plaintiff knew it was such. In *Chattanooga, etc., R. Co. v. Lyon*, 89 Ga. 16 (3), 22, 15 S. E. 24, 15 L. R. A. 857, 32 Am. St. Rep. 72, it was held:

"When a railroad company sells a ticket to a flag station, at which its trains do not stop unless signaled to do so for the purpose of receiving passengers, or when there are on board passengers bound for such station, it is ordinarily the duty of the conductor, before reaching the station, to ascertain from a passenger holding such ticket his destination, and to stop the train there for the purpose of allowing the passenger to leave the train. This rule, under special circumstances, is subject to exceptions."

And in *Central R. Co. v. Dorsey*, 106 Ga. 826, 827, 32 S. E. 873, it was said by Simmons, C. J.:

"We think it is the duty of the conductor of a passenger train, when the company has sold tickets to passengers, to go through the train and ascertain the stations at which the passengers wish to alight; but we also think that in a case like the present there is a corresponding duty upon the part of a passenger, when he sees that the conductor has failed to call for and take up his ticket and is ignorant of his presence on the train and of his destination, to notify the conductor of his presence and of his destination, especially where the ride is a short one and the passenger knows that the train will not stop at his station unless the conductor has notice that there is on board a passenger for that station. A passenger or any other person cannot sit still when he sees he is about to be injured, make no attempt to avoid the injury, and rely upon recovering damages for the injury. Under the law, he must exercise reasonable and ordinary care, either to prevent the injury or, after the injury has been inflicted, to abate the damages. Here the passenger wished to leave the train at a station about 15 miles from her starting point; the conductor failed to take up her ticket or to notice her presence; and she must have known that in a very short time her destination would be reached. There is evidence tending to show that she nevertheless made no effort to inform the conductor of her presence or of her destination. It, therefore, became material, in the present case, for the jury to determine whether the railway company was entirely to blame and to be mulcted in heavy damages, or whether the plaintiff, by the exercise of ordinary care, could have avoided being carried beyond her station and the consequent injury to her."

Under the rulings in the cases cited, we think the evidence in this case was such as to make it a question for the jury to say whether the carrier was guilty of such negligence as would entitle the plaintiff to recover, or whether the plaintiff by the use of ordinary care could have avoided being carried beyond her station and obviated the injury alleged to have resulted therefrom. We do not think that under the evidence the court could say, as a matter of law, that the plaintiff was wholly to blame for the injury which she alleges came to her as set out in the petition. The case should have been submitted to the jury, and they should have been allowed to determine, under proper instructions from the court, whether the plaintiff, under the evidence, could recover.

Judgment reversed. All the Justices concur.

(143 Ga. 621)

PAULK v. SPEER. (No. 420.)

(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

1. TRIAL \S 330—VERDICT—CORRECTION.

Where in the trial of an action to recover land and mesne profits the judge directed the return of a verdict for the plaintiff, and submitted to the jury, under the evidence, the question as to the amount of mesne profits to be recovered, it was not error (no complaint being made as to the court's directing a verdict in favor of the plaintiff) to have the jury, upon their returning into court a verdict finding a certain sum of money in favor of the plaintiff, amend their verdict by the addition of proper words showing that the verdict was for the recovery of the land and rent, or mesne profits.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 791-794; Dec. Dig. \S 339.]

2. APPEAL AND ERROR \S 302—ASSIGNMENTS OF ERROR—MOTION FOR NEW TRIAL.

An assignment of error in a motion for new trial complaining that the court failed and omitted to properly and legally instruct the jury as to "the rules of law governing their deliberations" in determining the question of rent and the amount of rent, or mesne profits, is too vague and indefinite to raise a question for determination by the reviewing court, it not appearing from the ground of the motion containing this exception what instructions were actually given upon the subject nor what "rules of law" should have been given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1744-1752; Dec. Dig. \S 302.]

3. EJECTMENT \S 107—ACTION TO RECOVER LAND—MESNE PROFITS—SUBMISSION OF ISSUES.

While there was no specific prayer for the recovery of mesne profits, it does appear from the prayer that the plaintiff was seeking to recover his rents; and all of the evidence except the documentary evidence related to the question of mesne profits and the evidence of the rental value of the land was admitted without objection. It was therefore proper for the court to submit to the jury the question of mesne profits, and for the jury to make a verdict upon that question.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 311; Dec. Dig. \S 107.]

4. VERDICT APPROVED.

The evidence authorized the verdict for the rent found as mesne profits.

Error from Superior Court, Appling County; E. D. Graham, Judge.

Action by Thos. Paulk against L. N. Speer. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error.

BECK, J. The plaintiff brought an equitable action against the defendant to recover certain land, for a receivership, and for other relief. Upon the trial of the case the court directed a verdict in favor of the plaintiff, instructing the jury to return a verdict finding that the plaintiff should recover the land sued for, and submitting to them the question of the amount of mesne profits. The defendant made a motion for a new trial, which was overruled, and he excepted.

[1] 1. The plaintiff in error does not complain of the court's instructions directing the jury to return a verdict in favor of the plaintiff as to the land sued for; but error is assigned upon the action of the court in adding to the verdict certain words which were not in the verdict when it was returned into court by the jury. The verdict as returned by the jury was in the following words:

"We, the jury, find for the plaintiff \$300, and against the defendant, Thomas Paulk. So say we all."

This verdict was signed by the foreman of the jury. When the verdict was published, and before the jury dispersed, the presiding judge propounded to the jury the following question:

"Gentlemen, I suppose that you all intended finding a verdict in favor of the plaintiff for the premises in dispute?"

And a member of the jury responded orally in the affirmative. Thereupon the presiding judge, without having the jury retire, took his pen and wrote into the verdict the following words:

"The premises in dispute, and also find for plaintiff the rent."

The judge then read over to the jury the verdict as amended by the insertion of these words, inquiring whether the verdict as amended expressed their finding; and the jury responded in the affirmative. Clearly there was no error in adding the words quoted above to the verdict. As stated, the judge had directed the jury to find that the plaintiff should recover the land in controversy, and no complaint is made of this direction. The court had also instructed them upon the issue as to mesne profits. When the jury returned the verdict in favor of the plaintiff in the sum of \$300 under these instructions, they meant, as a matter of course, that they found the premises and the sum stated as mesne profits for the plaintiff; and the court, more

properly to make the record complete, added the words. It might have been more formally correct to have directed the jury to write the words in the verdict; but what difference can it make that, instead of directing a member of the jury to write these words in, the judge himself wrote them, and the jury assented to it?

[2-4] 2-4. The rulings made in headnotes 2 to 4 require no elaboration.

Judgment affirmed. All the Justices concur.

(143 Ga. 740)

WILLIAMS v. HINSON et al. (No. 468.)

(Supreme Court of Georgia. July 20, 1915.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE — 135 — EXECUTION — INJUNCTION — REMEDY AT LAW.

The plaintiff filed a petition to enjoin the enforcement of an execution issued from a justice's court, contending that the execution and the judgment upon which it was based were void, because the judgment was rendered by the justice at a time when the court could not legally be held, inasmuch as another date had properly, and in accordance with the statute, been fixed and appointed for the holding of the court. The petition at the appearance term of the superior court was dismissed upon demurrer. *Held*, without discussing the question as to whether or not the judgment was void as contended by petitioner, the court did not err in sustaining the demurrer to the petition. If the execution and judgment referred to were void for the reasons assigned, the petitioner had an adequate remedy at law; for he could have resisted the enforcement of the execution by filing an affidavit of illegality. *Planters' Loan & Savings Bank v. Berry*, 91 Ga. 264, 18 S. E. 137; *Hilson v. Kitchens*, 107 Ga. 230, 33 S. E. 71, 73 Am. St. Rep. 119; *Harbig v. Freund*, 69 Ga. 180.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447, 749; Dec. Dig. — 135.]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action by Polly Williams against Nancy Hinson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Grant & Rogers, of Hazlehurst, for plaintiff in error. Bennett & Swain, of Hazlehurst, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

HARDY et al. v. HARDY. (No. 447.)*

(Supreme Court of Georgia. July 13, 1915.

Rehearing Denied July 21, 1915.)

(Syllabus by the Court.)

CREDITORS' SUIT — 11 — EXECUTORS AND ADMINISTRATORS — 200 — SUBJECTING PROPERTY TO DEBT — JUDGMENT.

This was a proceeding by which it was sought to subject certain property, held by a widow for herself and as guardian of a minor child, which had been set apart to them as a year's support, to an alleged indebtedness of her deceased husband. There was no indebtedness or liability directly from the widow or

the child to the creditor, but he was an alleged creditor of the decedent. Property in the hands of one person cannot be subjected to a general debt against another, unless such debt has been first reduced to judgment, or unless there is a proceeding coincidently to reduce it to judgment. In the present instance there was neither a judgment against the administrator of the deceased person nor a proceeding to obtain a judgment; and without this there could be no subjection of the property, which had been set apart as a year's support to such alleged indebtedness of the decedent, whether the other contentions in regard to the manner of the setting apart of the year's support were good or not. Accordingly it was error to overrule the demurrer to the petition.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 46-66; Dec. Dig. ¶11; Executors and Administrators, Cent. Dig. § 728; Dec. Dig. ¶200.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. T. Hardy against V. S. Hardy and others. Judgment for plaintiff, and defendants bring error. Reversed.

R. B. Blackburn, of Atlanta, for plaintiffs in error. W. W. Mundy, of Cedartown, and E. A. Neely, of Atlanta, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(143 Ga. 729)

CLARK v. RAMSEY et al. (No. 463.)
(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

JUDGMENT ¶432 — ACTION TO VACATE — GROUNDS.

Under the pleadings and the evidence in this case, the court did not err in directing a verdict in favor of the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 816, 818, 819; Dec. Dig. ¶432.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by L. C. Clark against W. W. Ramsey and others. Judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 138 Ga. 726, 75 S. E. 1128.

R. N. Hardeman, of Louisville, for plaintiff in error. M. C. Barwick, of Augusta, for defendants in error.

HILL, J. From the record it appears that the plaintiff in the present case was sued for the recovery of a described tract of land, with mesne profits, in Burke county. The evidence shows that through her son she employed an attorney to defend the ejectment suit, which was brought to the October term, 1909, of Burke superior court. But no defense to the suit was filed at that term, and a verdict and judgment in favor of the plaintiff against the defendant, for the land and mesne profits, was rendered by default at the April term, 1910. On October 31, 1910, the present equitable petition was filed by

the plaintiff to set aside the verdict and judgment, on various grounds set out in the petition, chief among which were that the plaintiff was old and infirm, being nearly 81 years old, and that she had no permanent place of residence, residing at different times with 1 of her 4 children, who lived at distances ranging from 18 to 25 miles from the county site of Burke county. She was distinctly informed that the attorney employed for her by her son was sick and unable to attend to any business at the trial term of court, and for this reason she did not attend the term of court at which the judgment was obtained against her, but relied upon his filing an answer to the suit and representing her at the proper time, having employed him for that purpose. She did not know judgment had been rendered against her for more than 30 days after its rendition, and obtained this information indirectly from her son, who had been informed of it by the sheriff of Burke county. She did not attend court, because she knew of the physical condition of her attorney, and believed that he had leave of absence from the court on account of his physical condition, and that his business would be protected during his illness. She had turned over all her land papers to her attorney, but just what they were she could not recollect. She did not send any one to see her attorney at Waynesboro before court, but received a letter from his daughter, stating that he was unable to attend court, and that his business would be passed for the term, "upon which information I relied. In the utmost good faith I did not attend court, nor did I send any representative."

The evidence failed to show that the plaintiff's attorney had leave of absence from court at the appearance or the trial term. On the contrary, the uncontradicted evidence shows that plaintiff's counsel was in attendance at the appearance term. At the trial the plaintiff offered in evidence a deed from J. E. Templeton to Mrs. L. C. Clark, the plaintiff, together with a plat of the land attached to the deed; the deed purporting to convey the land in controversy in the ejectment suit. Before the plaintiff would be entitled to set aside the verdict and judgment in the ejectment suit, she must know that she not only has a meritorious defense to that suit, but was unable to make such defense, for some reason which would excuse her for a failure to do so. Assuming that she had a meritorious defense, has she carried the burden which the law places upon her of showing that she has exercised that care and diligence which every litigant must exercise with reference to appearing in court, in person or by attorney, when summoned to answer suit, and making such defense as will protect and preserve her legal rights? This responsibility is placed upon all liti-

gants, and it is their duty to know the status of their cases. It is not enough to simply employ an attorney, though it is the duty of every attorney to faithfully guard and protect his client's interest, and, if he fails to do so, he may be responsible for such failure. But there is a duty also on the litigant to see that the attorney is at his post of duty and files his client's defense. The plaintiff has utterly failed to prove her case as laid. When this case was formerly before this court, it was on petition and demurrer, and the facts alleged were to be taken as true. It was there said:

"There can be no question that at the trial term neither counsel nor client was in laches. The former had a leave of absence, which was an assurance to the latter that her case would not be tried. Besides it was alleged that opposing counsel was aware that counsel represented the client in the particular case and had a leave of absence for that term of the court." *Clark v. Ramsey*, 138 Ga. 726, 727, 75 S. E. 1128.

The evidence in the instant case does not come up to these allegations. It shows that the attorney employed by the plaintiff (then defendant) to represent her was in court at the appearance term, when her defense should have been filed, and that it was not filed. It does not appear that he had leave of absence on account of sickness or for any other cause, or why the defense was not filed. He did not ask for leave of absence or additional time in which to file an answer. He was in court and tried a case or cases. He had no leave of absence at the trial term, and no answer had been filed. Judgment was taken at the trial term without the knowledge of counsel for the plaintiff in that suit that there was any defense whatever to the suit, or that any attorney had been employed to represent the defendant. The case was in default as far as the record showed, and the plaintiff's attorney in the ejectment suit testified that he did not know Mrs. Clark was represented by counsel until he was informed by her present counsel in October, 1910, after the judgment was obtained in April, 1910; on the contrary, the attorney named as representing her had told him that he did not represent Mrs. Clark. The present case does not come up to the rule laid down in the case when it was here before (138 Ga. 727, 75 S. E. 1128), to wit:

"Sudden illness of counsel has been treated as an accident or misfortune, and judgments have been vacated in cases where counsel was stricken with serious illness, incapacitating him from filing a defense or representing his client, where the client was ignorant of counsel's illness."

So far as the record shows, no effort was made by the defendant or counsel to secure leave of absence on account of sudden or prolonged illness, or to postpone filing an answer for that or any other reason. The burden is on the plaintiff in the present case to show that she had a meritorious defense to the ejectment suit and was prevented from

making it by fraud or accident, or the act of the adverse party unmixed with fraud or negligence on her part. Civil Code, § 4585. Having utterly failed to carry the burden imposed on her by law in order to set aside the solemn judgment of a court of competent jurisdiction, the court did not err in directing a verdict for the defendant.

Judgment affirmed. All the Justices concur.

(143 Ga. 671)

PRICE v. BROWN. (No. 435.)

(Supreme Court of Georgia. July 8, 1915.)

(Syllabus by the Court.)

1. INJUNCTION ~~126~~—SLAVES ~~25~~—TRESPASS ~~44~~—ACTION FOR DAMAGES—TITLE—BURDEN OF PROOF.

Where a plaintiff sought to recover damages for alleged trespasses upon land, and to enjoin further trespasses thereon, and his title to the land was alleged to be by virtue of his being the heir of a deceased person, the burden was upon him to make out his case, and as a part thereof to show that he was the heir of such decedent.

(a) If the plaintiff showed that he was the heir of the decedent, but there was also another heir, this might affect the extent of the recovery, or the question of parties.

(b) Where, in a case of the character indicated in the preceding headnote, it appeared that the person alleged to be the deceased father of the plaintiff and the plaintiff's mother were colored persons and had been slaves, and that the plaintiff was born prior to March 9, 1866, in order to establish his heirship it was incumbent upon him to show that he was the legitimate son of his father, under Civil Code 1910, § 2180.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 276; Dec. Dig. ~~126~~; Slaves, Cent. Dig. §§ 114, 115; Dec. Dig. ~~25~~; Trespass, Cent. Dig. §§ 112-115; Dec. Dig. ~~44~~.]

2. SLAVES ~~25~~—CHILDREN OF SLAVE PARTNERS—LEGITIMACY.

By Civil Code 1910, § 2180, every colored child born before the 9th day of March, 1866, is declared to be the legitimate child of his mother; but such child is the legitimate child of his colored father only when born within what was regarded as a state of wedlock, or when the parents were living together as husband and wife.

(a) There was no merit in the exception to a portion of the charge of the court which was in substantial accord with the section just cited.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 114, 115; Dec. Dig. ~~25~~.]

3. TRIAL ~~29~~, 193, 244, 252—INSTRUCTIONS—EVIDENCE.

It was error for the court, at the conclusion of the testimony of the plaintiff, to state, in the presence of the jury: "Under the evidence, so far as plaintiff is concerned, he is bound by his evidence. Under the evidence, both he and the other are not both legitimate children. It does not appear which one is. They both are not. Whichever one is would inherit all the property, and the other none." The testimony of the plaintiff did not exclude the possibility of the legitimacy of the other child to which reference was made. The court should not have thus enunciated a rule based upon the plaintiff's testimony, which it did not authorize, but should have given the jury

proper instructions upon the entire case made by the pleadings and evidence.

(a) It was recited in the motion for a new trial, which was duly certified, that nowhere in the entire charge was reference made to the above-quoted statement, and that the jury went into the consideration of the case with this rule to govern them in their deliberations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 436-438, 505, 508, 577-581, 596-612; Dec. Dig. §§ 29, 193, 244, 252.]

Error from Superior Court, Camden County; C. B. Conyers, Judge.

Action by W. H. Price against E. Brown. Judgment for defendant, and plaintiff brings error. Reversed.

W. H. Price, individually and as temporary administrator of Henry McPrice brought an equitable action in the superior court of Camden county against E. Brown, alleging, in substance, as follows: Jack Price, deceased, was at the time of his death the true and lawful owner and in possession of a described tract of land. The plaintiff and Henry McPrice, deceased, were the only heirs at law of Jack Price, and the plaintiff is the only heir at law of Henry McPrice, and also his temporary administrator. The administrator of the estate of Jack Price, deceased, consents to the bringing of this action. After the death of Jack Price an execution against Henry McPrice was levied upon the land described, and at the sheriff's sale S. C. Townsend and J. H. Rudolph became the purchasers. Henry McPrice, desiring to redeem or to repurchase the land, entered into an agreement with E. Brown to have Townsend and Rudolph convey the land to Brown, for the latter to lease the turpentine timber to Davis & Kicklighter at \$50 per thousand boxes, and to apply the proceeds as a payment on the purchase price, which was \$400, and that Brown should loan to Henry McPrice the balance at 8 per cent. interest, and hold the deed to the land until the money was repaid with interest. In furtherance of this agreement Kicklighter advanced \$100 and took the lease, and Brown paid the remainder of \$300. Townsend and Rudolph conveyed all their right, title, and interest to Brown. Davis & Kicklighter have since paid to Brown the balance due on the lease, reasonably amounting to \$200. Henry McPrice has paid several sums of money and sold a considerable amount of timber to Brown, to be applied on the debt. Brown refuses to disclose the amount of such sales, but it is charged that it is sufficient to liquidate the entire indebtedness. Since the death of the plaintiff's brother, Henry McPrice, Brown refuses to disclose the amount paid to him, and is fraudulently claiming to be the owner of such land, and has entered upon it and cut and removed logs and cross-ties to the amount of \$500. He is now continuing to cut and remove them, and has expressed his intention of further trespassing. As heir of Jack Price the plaintiff is the owner of one

undivided half interest in the land, which could not be conveyed by any sale under a *fi. fa.* against Henry McPrice; and, as the only heir of Henry McPrice, he is the owner of any equity which belonged to the latter at the time of his death, and as such, and as temporary administrator of Henry McPrice, he is entitled to recover it. The prayers were for an injunction against Brown to prevent him from cutting or removing any timber from the land until the final trial; that he be required to account for all payments made to him by Henry McPrice, and for all timber cut and removed from the land; that, if this be found to exceed the indebtedness of Henry McPrice to Brown, the plaintiff have a judgment therefor; that the title to the land be decreed to be in the plaintiff; that if there should be any balance due to Brown, a decree be so molded as to provide for its payment from the proceeds of the land, and the plaintiff should be authorized to sell it under order of the court; and that if the jury should find that Brown is the owner of one undivided half interest in the land, the court by proper order provide for a partition of it; and for general relief.

It is unnecessary to set out the answer further than to state that it admitted that Henry McPrice was an heir at law of Jack Price, deceased, but denied the remainder of the paragraph in which it was alleged that the plaintiff was also an heir of the deceased and temporary administrator on the estate of Henry McPrice. It was alleged that the land was levied on under an execution against Henry McPrice, and was sold to S. C. Townsend and J. H. Rudolph, and that they sold it to Brown. It was further alleged that the sale to Brown was an absolute sale, without any agreement with Henry McPrice as to redeeming or repurchasing it. The turpentine and timber lease to Davis & Kicklighter was admitted, but it was denied that there was any agreement as to the application of the proceeds thereof.

By amendment the plaintiff struck from the petition the allegation that Henry McPrice was an heir of Jack Price, and alleged that the plaintiff was the only heir at law of Jack Price, and as such was entitled to recover the entire property described.

The jury found for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted.

S. C. Townsend, of St. Marys, for plaintiff in error. Emmett McElreath, of Kingsland, and John J. Moore, of Waycross, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The presiding judge instructed the jury:

"You will first inquire as to the birth and legitimacy of the plaintiff, W. H. Price. If he was not the son of Jack Price—the burden is upon him, I should state, to establish his right

to recover, and to establish all the facts necessary to make up his right to recover, by a preponderance of evidence."

Error was assigned on this charge. There was no error in it. The plaintiff first alleged that he was one of two heirs left by Jack Price. By amendment he alleged that he was the only heir. The answer did not admit that he was an heir at law. The evidence showed that the parties were persons of color, Jack Price and the mother of the plaintiff and the mother of McPrice having been slaves; that introduced by the plaintiff tending to show that he was born in 1861 or 1862, and that McPrice was born about six months later. It seems that a conveyance was made to Jack Price in 1865, so that he was then in life. During the existence of slavery in this state, slave marriages were not binding, and their offspring was not legitimate. Their marital status and the legitimacy of their children was one dependent upon statutory enactment. On March 9, 1866, an act was passed which declared that:

"Persons of color, now living together as husband and wife, are hereby declared to sustain that legal relation to each other, unless the man shall have two or more reputed wives, or a woman two or more reputed husbands. In such event, the man, immediately after the passage of this act by the General Assembly, shall select one of his reputed wives, with her consent; or the woman one of her reputed husbands, with his consent; and the ceremony of marriage between these two shall be performed. If such man thus living with more than one woman, or such woman living with more than one man, shall fail or refuse to comply with the provisions of this section, he or she shall be prosecuted for the offense of fornication, or fornication or adultery, or fornication and adultery, and punished accordingly." Acts 1865-1866, p. 240.

On the same day another act was approved, which declared that among persons of color the parent should be required to maintain his or her children, whether legitimate or illegitimate, that children should be subject to the same obligations in relation to their parents as those which existed in relation to white persons, and—

"that every colored child heretofore born, is declared to be the legitimate child of his mother, and also of his colored father, if acknowledged by such father." Acts 1865-1866, p. 240.

On December 12, 1866, another act was approved. This act contained the following provision:

"Section third of the above recited act [that is the act of March 9, 1866] shall be so construed as to apply only to such children as were born within what was regarded as a state of wedlock, or when the parents were living together as husband and wife." Acts 1866, p. 156.

Another act, approved December 13, 1866, declared valid marriages theretofore celebrated by ordained colored ministers of the gospel between freedmen and freedwomen, and authorized colored ministers of the gospel to celebrate marriages between freedmen and freedwomen, or persons of African descent

only. These acts are now codified in sections 2178 and 2180 of the Civil Code of 1910. The latter section reads as follows:

"Every colored child born before the 'ninth day of March, 1866, is hereby declared to be the legitimate child of his mother; but such child is the legitimate child of his colored father only when born within what was regarded as a state of wedlock, or when the parents were living together as husband and wife."

Where, as in the present case, the plaintiff, a colored person born in this state prior to March 9, 1866, claimed to inherit from his father as the legitimate child of the latter, and the fact of his being an heir was put in issue by the pleadings, the burden was on him to show that he was the legitimate son of his father. The provision of the act of that date in regard to the recognition of a colored child by its father was omitted from the act of December 12, 1866; and in the case at bar the father did not die between those dates after a recognition of the plaintiff as his child. Hence the decision in *White v. Ross*, 40 Ga. 339, does not apply.

[2] 2. Exception was taken to the charge, which was substantially in accord with section 2180 of the Civil Code. The plaintiff contended that if the father and mother recognized their relation as that of husband and wife prior to March 9, 1866, and the father acknowledged the child as his, the child would be the legitimate child of both parents, whether the state in which the father and mother lived was recognized by any one else as a state of wedlock or not. But this contention is not in accord with the statute. The expression, "what was regarded as a state of wedlock," does not mean so regarded merely by the man and woman.

[3] 3. Error was assigned because the court stated in the presence of the jury, at the conclusion of the testimony of the plaintiff, as follows:

"Under the evidence, so far as the plaintiff is concerned, he is bound by his evidence. Under the evidence, both he and the other are not both legitimate children. It does not appear which one is. They both are not. Whichever one is would inherit all of the property, and the other none. I am not undertaking to say which was the legitimate child; but, under his evidence, both could not be legitimate children, and whichever one was would inherit all the property."

It was assigned as error that these remarks were calculated to mislead the jury, as nowhere in the entire charge of the court were they referred to or retracted, and the jury went into the consideration of the case with this rule given by the court to govern them in their deliberations. Error was also assigned on this statement, because it was an intimation to the jury as to what had or had not been proved, and because the evidence of the plaintiff did not warrant the enunciation of any such rule. This exception was well taken. The presiding judge should not have singled out the evidence of one witness, although the plaintiff, and have stated to the

jury that he was bound by such evidence, and under it he and McPrice were not both legitimate children. This expressed an opinion on the facts. Under Civil Code 1910, § 2180, it was possible for a colored man and woman to have been living together prior to March 9, 1866, as husband and wife, and to have had a child born to them, which would thus be the legitimate child of both the father and mother. It was further possible for them to have separated and for the same man, prior to the date mentioned, to have lived with another woman in the relation of husband and wife, and to have had born another child, which would also be legitimate. It may be anomalous that a colored father might have had two legitimate children by different mothers prior to March 9, 1866, by having lived with each of them as his wife at the time when her child was born. But the status of slave marriages and the legitimacy of the offspring therefrom is dependent upon the statute. We do not intimate that there was any such state of facts in this case as just above mentioned. But the testimony of the plaintiff himself did not exclude such a possibility. It is not clear just what the presiding judge meant by the expression—"so far as the plaintiff is concerned, he is bound by his evidence. Under the evidence, both he and the other are not both legitimate children."

But it was error, at the close of the testimony of the first witness in the case, for the court to hold that he, being the plaintiff, was bound, and to state in the presence of the jury the rule which was announced. The court should have waited until the close of the evidence, and have given instructions upon the whole case. It was stated in the motion, to which the judge certified, that no correction was made in regard to this remark. The case should be retried upon proper instructions. On the general subject, see *Rhodes v. Williams*, 148 Ga. 342, 85 S. E. 105.

Under the facts of the case and the statute above quoted, there was no other error requiring a reversal.

Judgment reversed. All the Justices concur.

(148 Ga. 724)

JENSEN v. JACOBS PHARMACY CO.

(No. 457.)

(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR 637—DISMISSAL—CERTIFICATION OF BILL OF EXCEPTIONS.

To the direction of a verdict rendered on January 13, 1914, a bill of exceptions was sued out, which contained eight pages. In the certificate the trial judge stated: "This bill of exceptions was presented to me on February 2, 1914. I was out of the state during the month of February, 1914. I turned over the bill of exceptions to counsel for defendant in error.

March 5, 1914. He stated that the bill of exceptions was not correct, and I requested counsel for defendant in error and plaintiff in error to try to agree upon the bill. It was presented to me again and agreed upon by counsel this May 23, 1914, on which day I sign this certificate." On motion to dismiss the bill of exceptions, on the ground that it is not certified within the time required by law, *held*, that the motion must prevail. *Walker v. Wood*, 119 Ga. 624, 46 S. E. 869; *Dykes v. Brock*, 128 Ga. 895, 57 S. E. 700; *Duke v. Kelly*, 186 Ga. 832, 72 S. E. 250.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2784, 2829; Dec. Dig. 637.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between H. Jensen and the Jacobs Pharmacy Company and others. From the judgment Jensen brings error. Dismissed.

Lowndes Calhoun, of Atlanta, for plaintiff in error. C. T. & L. C. Hopkins, of Atlanta, for defendants in error.

EVANS, P. J. Writ of error dismissed. All the Justices concur.

(148 Ga. 732)

WELLS et al. v. J. A. FAY & EGAN CO.
(No. 464.)

(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

1. CORPORATIONS 30—LIABILITY OF CONTRACTORS—PURCHASE OF GOODS.

Promoters of a corporation are personally liable on their contracts for property purchased and received by them before the corporation is chartered and organized, unless the other party agreed to look to some other person or fund for payment.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 97-100; Dec. Dig. 30.]

2. CORPORATIONS 30—PURCHASE BY PROMOTERS—PERSONAL LIABILITY.

Acceptance by the creditor of partial payments from the corporation subsequently organized, and his prosecution of a proceeding to hold the corporation liable on the debt as being its obligation, without more, will not extinguish the promoters' liability or estop the creditor from asserting the personal liability, under the circumstances stated in the previous syllabus.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 97-100; Dec. Dig. 30.]

3. SALES 467—RESERVATION OF TITLE—RESCISSION OF CONTRACT—DESTRUCTION OF PROPERTY.

In order for a vendee of personalty in a contract of sale, reserving title to the vendor until the full payment of purchase-money, to rescind the contract, or have an abatement in the price on account of its destruction, it must affirmatively appear that the property was destroyed without the vendee's fault.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1354, 1358-1364; Dec. Dig. 467.]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by the J. A. Fay & Egan Company against L. M. Wells and others. Judgment

for plaintiff, and defendants bring error. Affirmed.

W. A. Slaton, of Washington, Ga., for plaintiffs in error. C. E. Sutton, of Washington, Ga., for defendant in error.

EVANS, P. J. The J. A. Fay & Egan Company brought suit against L. M. Wells and others, alleging that the defendants, under the partnership name of Ficklen Spoke & Handle Company, purchased from the plaintiff certain machinery, for which they gave their notes, copies of which were attached. Judgment was prayed for the amount claimed to be due on the notes. Four of the defendants pleaded that they were not indebted to the plaintiff, denied the alleged partnership, and averred that the Ficklen Spoke & Handle Company was a corporation. The jury returned a verdict for the plaintiff.

[1] 1. It appeared from the evidence that the defendants promoted the organization of a corporation, and on March 23, 1909, authorized the purchase of certain machinery from the plaintiff; the contract of purchase being in writing and signed "Ficklen Spoke & Handle Company, by L. M. Wells." The machinery was shipped and received by the defendants, and on June 22, 1909, the notes in suit were executed by authority of the defendants; these notes being signed "Ficklen Spoke & Handle Co., per R. K. Carruth, Sec. & Treas." Subsequently, to wit, August 26, 1909, on the application of the defendants, they were granted a charter, and later perfected an organization of the corporation. These facts are not in dispute, and their effect is to charge the defendants with liability on the notes. Persons acting in concert to bring about the formation of a corporation are responsible for their acts. Where they buy machinery, receive it into their possession, and authorize one of their number to give a note for the purchase price, they cannot escape liability on the theory that they contemplated the organization of a corporation for which they intended the machinery. If one contracts as agent, when in fact he has no principal, he will be personally liable. A promoter, though he may assume to act on behalf of the projected corporation and not for himself, cannot be treated as an agent of the corporation, for it is not yet in existence; and he will be personally liable on his contract, unless the other party agreed to look to some other person or fund for payment. Clark on Contracts, § 47.

[2] 2. But it is contended that, after the corporation was formed, it made certain payments on the notes, which were accepted by the plaintiff, and that the plaintiff undertook to place the corporation into a receivership because of its default in the payment of the notes, which were alleged to be its debt; and that these facts estop the plaintiff from asserting a personal liability against the de-

fendants. Clearly the acceptance by a creditor of a partial payment from a stranger will not extinguish the balance due on the debtor's obligation. Nor do we see how the plaintiff's efforts to collect its debt from the corporation will serve to release the defendants. The pleadings in that case are not in the record, and, for aught we know, the plaintiff was attempting in that suit to fix the corporation's liability on the ground that it had adopted the contract of the promoters after its organization. There is nothing in the evidence which will afford an inference that the plaintiff released the defendants from their contract.

[3] 3. It was disclosed at the trial that the machinery was destroyed by fire. In the written contract of sale it was stipulated that the title should remain in the vendor until full payment of the purchase price. Though not pleaded, nevertheless it is urged in the argument that, under the statute (Civil Code of 1910, § 4123), the destruction of the property by fire discharges the debt. This Code section reads:

"Where property is sold and delivered, but title is not to pass until payment in full of the purchase money, and the property is lost, damaged, or destroyed without the vendee's fault, he is entitled to a rescission of the contract or to an abatement in the price, unless it is otherwise agreed in the contract of sale."

The complete reply is that the evidence does not show that the property was destroyed without the vendee's fault. All that the brief of evidence discloses concerning the destruction of the property is the bare fact that it was destroyed by fire.

Judgment affirmed. All the Justices concur.

(143 Ga. 727)

HARDEN v. SUTTON. (No. 460.)

(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS \S 349—ORDER TO SELL LAND.

The order of the ordinary granting the administrator leave to sell the land of his intestate is the same which was construed by this court in *Davis v. Harden*, 143 Ga. 98, 84 S. E. 426, and, as there ruled, such order was admissible in evidence, in a collateral proceeding, over the objection that it did not sufficiently describe the land ordered to be sold.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. \S 1446, 1449-1455; Dec. Dig. \S 349.]

2. EVIDENCE \S 353—ADMISSIBILITY OF DEED—SUFFICIENCY OF DESCRIPTION.

The deed excluded by the court on the ground of insufficiency of description is the same as that construed by this court in *Davis v. Harden*, supra, and it was there held that the "descriptive averments of the deed, especially those relating to the original grants to Samuel Kitchens and Nathaniel Lang, contained data from which the land intended to be conveyed can be definitely located." In that case the grant to Samuel Kitchens was introduced in evidence, and there was aliunde evidence to the effect that one of the original grants desig-

nated in the deed embraced the land in controversy; and under such proof it was held that it was not error to admit the deed over objection that it did not sufficiently describe the land. However, in the instant case the parol testimony of the plaintiff was to the effect that the land in controversy was embraced in neither grant; and the court accordingly did not err in rejecting the deed from evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. § 353.]

3. ADVERSE POSSESSION § 80—ADMISSIBILITY AS EVIDENCE—COLOR OF TITLE.

The deed was not admissible in evidence as color of title, for the rule is that the same certainty of description which is requisite to constitute an instrument a conveyance of title is required in an instrument which is relied on as color of title. *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691; *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 463-467; Dec. Dig. § 80.]

4. PLEADING § 251—AMENDMENT—CLAIM OF LAND.

An amendment alleging that one claiming to be the owner in fee of the land had sold it to the intestate, and it was in his possession at the time of the sale and purchase of the land described in her deed as being part of the Kitchens and Lang grants, and that she sold the same to the plaintiff and put him in possession as a purchaser, was properly rejected on the ground that it affirmatively appeared that the land described in the deed by the administrator did not embrace the premises in dispute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 734, 735; Dec. Dig. § 251.]

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Action between John Harden and J. L. Sutton. Judgment for the latter, and the former brings error. Affirmed.

Way & Burkhalter, of Reldsville, for plaintiff in error. G. W. Lankford, of Lyons, and Hines & Jordan, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(143 Ga. 741)

SMITH v. WILKINSON. (No. 469.)

(Supreme Court of Georgia. July 20, 1915.)

(Syllabus by the Court.)

1. REFERENCE § 100—REPORT OF AUDITOR—EXCEPTIONS—MOTION TO RECOMMIT.

An equitable suit for an accounting and specific performance was referred to an auditor. To the report of the auditor exceptions of law and fact were filed. The first and second grounds of exception, both of law and of fact, were "because the auditor does not include in his report of the evidence" certain documentary evidence and testimony introduced on the hearing before him; and the third exception of law was: "Plaintiff excepts, as an exception of law, to the auditor's report, because the auditor does not separately report as such his findings of facts and his findings of law, so that the parties may properly except to said report." *Held*, that such matters did not furnish proper grounds of exceptions to the auditor's report, but should have been made the basis for a mo-

tion to recommit the case to the auditor. Civ. Code 1910, § 5139; *Southern Pine Co. v. Dickey*, 136 Ga. 662, 71 S. E. 1110.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.]

2. REFERENCE § 100—AUDITOR'S REPORT—EXCEPTIONS—SUFFICIENCY.

"The neglect of a party excepting to an auditor's report on matters of fact, or on matters of law dependent for their decision upon the evidence, to set forth, in connection with each exception of law or of fact, the evidence necessary to be considered in passing thereon, or to point out the same by appropriate reference, or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact and for overruling the exceptions of law. *Orr v. Cooledge*, 125 Ga. 496, 54 S. E. 618." *Winkles v. Simpson Grocery Co.*, 132 Ga. 32, 63 S. E. 627; *McCord v. City of Jackson*, 135 Ga. 176 (4), 177, 69 S. E. 23.

(a) Certain other exceptions to the auditor's report depend for their determination upon the evidence. At the close of the exceptions of fact there was the following statement: "Plaintiff hereto attaches a brief of all the testimony material to his exceptions, which brief is referred to as a part of each exception as if the testimony was included in the exception." The brief covered seven typewritten pages, containing evidence of a number of witnesses on different matters, and also documentary evidence. *Held* that, under the ruling quoted in the second headnote, the trial judge did not err in refusing to approve such exceptions of fact, or in overruling such exceptions of law.

(b) No exception which is sufficiently made in this case requires a reversal.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.]

Error from Superior Court, Wilkes County; J. B. Park, Judge.

Action by R. T. Smith against J. J. Wilkinson. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. Slaton, of Washington, Ga., for plaintiff in error. J. M. Pitner and Colley & Colley, all of Washington, Ga., for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 734)

BALTIMORE BARGAIN HOUSE v. BUSBY. (No. 465.)

(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

BANKRUPTCY § 400—PROPERTY SUBJECT TO LEVY.

A bankrupt on his own petition was adjudicated a bankrupt, and had all of his property, consisting of a stock of merchandise, exempted in bankruptcy. The property was turned over to the bankrupt, who did not have it set apart as a homestead to him and his family in the state court. More than three years after the adjudication in bankruptcy, and after the exemption of the property in the bankruptcy court, a creditor whose claim was listed in the bankruptcy application brought suit on his claim. There was no plea or suggestion of bankruptcy. The suit eventuated in a judgment, and an execution based thereon was levied on the property exempted in the bankruptcy court, and a claim

was interposed by the bankrupt as head of the family. No discharge has been granted to the bankrupt. *Held*, that the property is subject to the *fi. fa.*

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. 400.]

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Claim case by J. A. Busby, head of family, against the Baltimore Bargain House. Judgment for Busby, and the Baltimore Bargain House brings error. Reversed.

I. T. Irvin, Jr., of Washington, Ga., for plaintiff in error. C. J. Perryman, of Lincoln, for defendant in error.

EVANS, P. J. This is a claim case, and was tried by the judge upon an agreed statement of facts, from which the following appears: In January, 1910, J. A. Busby was adjudged a bankrupt. On April 20, 1910, the bankruptcy court set aside to him, as an allowance for a homestead exemption, certain property, consisting mainly of a stock of merchandise, which exemption comprised his entire estate. The Baltimore Bargain House was listed as a creditor of the bankrupt, and duly proved its claim before the referee. No dividend was paid to creditors, and no discharge of the bankrupt has ever been granted. To the July term, 1913, of the superior court of Lincoln county the Baltimore Bargain House filed a suit against the bankrupt. No plea of any kind, nor any suggestion of bankruptcy, was filed by the defendant; and at the October term, 1912, a judgment was rendered for the plaintiff. Execution issued from the judgment, and on November 11, 1913, was levied on the bankrupt's stock of merchandise, which had been allowed as an exemption in the bankruptcy court. No homestead was ever set aside to the bankrupt in the state court. The bankrupt, as the head of a family, filed a claim to the property. Upon these facts appearing, the court adjudged the property not subject to the *fi. fa.*

Under the former Bankruptcy Act (Act March 2, 1867, c. 176, 14 Stat. 517) this court distinguished the effect and operation of an adjudication in bankruptcy upon liens existing at the time of the adjudication and those subsequently obtained pending the bankruptcy proceedings. Where the creditor's lien existed at the adjudication in bankruptcy, it was held that the allowance of an exemption by the bankruptcy court exempted the property from the operation of such lien. *Ross v. Worsham*, 65 Ga. 624; *Brady v. Brady*, 71 Ga. 71; *Dozier v. Wilson*, 84 Ga. 301, 10 S. E. 743. But where, pending the suit, the defendant was adjudg-

ed a bankrupt, and thereafter, but before final discharge, a judgment was rendered in the suit, there having been no plea or suggestion of bankruptcy, such judgment could subject the exemption which was set apart to the bankrupt, but was not exempted under the state laws. *Adams v. Dickson*, 72 Ga. 846. After a debtor has been adjudged a bankrupt and property has been allowed him by the referee as an exemption in bankruptcy, and it has been delivered to him by the bankruptcy court, he is as much at liberty to sell and dispose of it as he would have been at any time prior thereto, or he may apply to the state court and have the exempted property set apart as a homestead. *Pincus v. Meinhard*, 139 Ga. 365, 77 S. E. 82. The adjudication in bankruptcy does not discharge the liability of the bankrupt to his creditors. Pending the bankruptcy proceedings and before discharge, he may plead to any suit pending at the time of his adjudication, or subsequently brought, a suggestion of the bankruptcy proceedings, and ask a stay in the state court until the question of his discharge has been finally determined in the bankruptcy court. He cannot abandon his bankruptcy proceeding after receiving all of his property as an exemption, and defeat his creditor from pursuing that property, where he does not have the exemption allowed in the bankruptcy court set apart as a homestead in the state court. The defendant, when he was sued by his creditor, had two courses open to him. He could have filed a suggestion of bankruptcy and asked a stay of the proceedings, and prosecuted his bankruptcy proceedings to the obtaining of a discharge, if not in laches. The record is silent as to whether there is a pending application for a discharge. The bankruptcy act provides for the filing of the bankrupt's petition for a discharge at any time after the expiration of a month and before the expiration of a year from the adjudication in bankruptcy; and a petition for a discharge may be dismissed for want of prosecution, or by the bankrupt. 3 Remington on Bankruptcy, §§ 2423, 2433. It may be that the bankrupt is not entitled to a discharge, inasmuch as about three years intervened between his adjudication and the time of the trial. The other course was an application to the court of ordinary to have the exempted property set apart as a homestead for the benefit of his family. He neglected to pursue either of these remedies. It follows from what has been said that the court erred in adjudging the property not subject to the judgment.

Judgment reversed. All the Justices concur.

(143 Ga. 738)

MEGAHEE v. MEGAHEE. (No. 467.)

(Supreme Court of Georgia. July 19, 1915.)

*(Syllabus by the Court.)***1. EXECUTORS AND ADMINISTRATORS — 17 —
SELECTION OF ADMINISTRATOR.**

On the trial of an application for letters of administration de bonis non cum testamento annexo upon the estate of a testator, with caveat filed thereto, the person who is selected by a majority of the next of kin who are interested as distributees of the estate, and who are capable of expressing a choice, is entitled to be appointed administrator; and it is error to charge the jury that the person selected by a majority of the persons who might enter the contest is entitled to such appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. —17.]

2. EVIDENCE — 353—SHERIFF'S DEED—ADMISSIBILITY.

A sheriff's deed is inadmissible to show transfer of title, when not accompanied by the execution or judgment upon which it is founded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. —353.]

**3. EXECUTORS AND ADMINISTRATORS — 17 —
NOMINATION AS ADMINISTRATOR.**

The right to nominate an administrator of a decedent's estate is confined to those who are interested as distributees and who are next of kin at the time of death, and does not extend to an heir of an heir of the deceased.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. —17.]

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

W. T. Megahee applied for letters of administration. T. J. Megahee filed a caveat asking for his appointment. Verdict and judgment for the caveator, and the applicant brings error. Reversed.

L. D. McGregor, of Warrenton, and J. G. Stovall, of Thomson, for plaintiff in error. Ira E. Farmer and John T. West, both of Thomson, for defendant in error.

HILL, J. W. T. Megahee filed his application to the ordinary of McDuffie county, for letters of administration de bonis non cum testamento annexo upon the estate of Samuel Megahee, deceased. To this application T. J. Megahee filed his caveat, asking that he be appointed as such administrator, alleging that he was also a son and next of kin of the testator, and that he had been selected in writing by a majority of those interested as distributees of the estate who were capable of expressing a choice. On the trial of the cause in the superior court there was a verdict and judgment in favor of the caveator. A motion for a new trial was overruled, and the applicant excepted.

[1] 1. This is a contest between two brothers, children of the testator, for administration on the estate of their deceased father. One ground of error alleged is that the court erred in charging the jury as follows:

"I charge you, as a proposition of law, that, in a contest of this character, the greater number expressing a preference for one or the other of the contestants, that contestant will prevail. It is not a question on the part of the successful contestant of securing a majority of the persons who might enter the contest if they chose to do so. The thing that will determine is the majority of the persons who take part in the contest."

We think this charge was error. Section 3943, par. 2, of the Civil Code, declares that "the next of kin, at the time of the death, according to the law declaring relationship and distribution," shall be entitled to the administration. And paragraph 3 of that section provides:

"If there be several of the next kin equally near in degree, the person selected in writing by a majority of those interested as distributees of the estate, and who are capable of expressing a choice, shall be appointed."

It will be observed that the language of the statute confers the selection of an administrator on "a majority of those interested as distributees," and not "a majority of those who might enter the contest." An illustration by counsel for the plaintiff in error serves to bring out the error in the charge. Suppose a father to die leaving 20 children surviving him, all of whom are capable of exercising a choice of an administrator. Suppose that only 5 of these children should see fit to express their choice, the other 15 keeping silent; 3 of the 5 ask for one person to be appointed; and the other 2 of the 5 request the appointment of still another. In that event, if the charge of the court is correct, the 3 would be entitled to control the appointment of the administrator, which would be a minority of the distributees interested as next of kin. We do not think the rule laid down by the trial judge is the law. The statute says it takes a majority of those interested as next of kin at the time of death, who are distributees, to control the appointment of an administrator; and we so hold.

[2] 2. It is insisted that the court erred in withholding from the jury a deed executed by the sheriff of McDuffie county, conveying the undivided interest of S. C. Megahee in the land of the estate of Samuel F. Megahee to one Arrington. The deed was objected to on the ground that it was unaccompanied by the fl. fa. under which the interest was sold, and also because it did not appear that it conveyed all of the interest of S. C. Megahee, one of the petitioners, for the appointment of W. T. Megahee as administrator in the estate, and further that the purchaser would have no right to vote, even if he had purchased such interest. The court did not err in excluding the deed from the jury. No such case is made in the record as to make the deed admissible as color of title. It is well settled that a sheriff's deed is inadmissible in evidence to show a transfer of title, without the execution or judgment upon which it is founded. *Watson v. Tindal*, 24 Ga. 494(2),

503, 71 Am. Dec. 142; *Anderson v. Robinson*, 75 Ga. 375.

[3] 3. Error is assigned on the ground that the court withheld from the jury, over the objection of the movant, the written selection of B. F. Phillips requesting the appointment of the applicant W. T. Megahee as administrator. It was insisted that the evidence was admissible, because it showed that Phillips married Mary Ann Megahee, a daughter of the testator; that she died before her mother (who was the executrix of the testator); that Mary Ann Phillips (formerly Megahee) died leaving no children; that Phillips was her only heir at law; and that he had the right to join in the selection of an administrator of this estate under the facts shown. The court properly rejected this evidence. As held by this court, the right to nominate an administrator is given to one who is next of kin at the time of death, and who is interested as a distributee, and does not extend to the heir of the heir of the deceased. *Tanner v. Huss*, 80 Ga. 614, 6 S. E. 18; Civil Code, § 3943. As the case goes back for another trial, we express no opinion on the evidence; but the rulings here made can be applied on another trial. The other assignment of error is without substantial merit.

Judgment reversed. All the Justices concur.

(143 Ga. 642)

WHEATLEY v. WATSON. (No. 406.)
(Supreme Court of Georgia. June 25, 1915.)

(Syllabus by the Court.)

1. **EJECTMENT** §110—ISSUES—INSTRUCTIONS.

Mrs. Alma Wheatley instituted an action of complaint for land against Noble G. Watson. A verdict was rendered in favor of defendant. The exception is to a judgment refusing a new trial. The plaintiff claimed under a deed from E. R. Fairchild to H. T. Littlejohn, and a deed from H. T. Littlejohn to herself. Both deeds were recorded in October, 1911; the former having been executed in 1897, and the latter shortly before and during the month in which the recording took place. It was not denied that Fairchild had formerly owned the property. Concerning the manner in which title went out of him, and the respective claims of plaintiff and defendant to the property, evidence was introduced to the following effect: The deed first mentioned, while reciting a money consideration, was the result of a contract for exchange of land, which H. T. Littlejohn had entered into with Fairchild, in which no money consideration was paid. The former had previously bought from Gaines & Lewis certain land, which, without any valuable consideration moving him so to do, he caused to be conveyed by Gaines & Lewis to his wife, Mrs. Martha A. Littlejohn. At his request, as consideration for the property conveyed by Fairchild, Mrs. Littlejohn executed to Fairchild a deed conveying the property received from Gaines & Lewis. Neither Fairchild nor Littlejohn could read or write, and

Fairchild thought he was making a deed to Mrs. Littlejohn. The deed was turned over to Mrs. Littlejohn by her husband for record, but, as indicated by the date of its record, there was an omission to record it until 1911. Several years after the execution of the deed Mrs. Littlejohn approached Fairchild and stated that "her first deed was lost and not recorded," and requested him to execute to her another. In response to such request he executed another deed conveying to her the property in dispute. This deed was executed in 1906 and recorded a few days before the expiration of a year from the date of its execution. Subsequently to the record of such deed Mrs. Littlejohn procured a loan of \$500 from Felix Corput, which was evidenced by a promissory note, to secure which she executed to him a deed to the land, which deed was duly recorded. Mrs. Littlejohn was indebted to the defendant, and he procured a judgment against her. In order to bring the property to sale under Civ. Code 1910, § 6033, he paid off the debt of Felix Corput, and suit was brought for the amount thereof, and, after judgment, the property was duly sold. The defendant became the purchaser, and received a sheriff's deed under which he entered possession. The plaintiff was the daughter of H. T. Littlejohn by a former marriage, and, although her deed from him purported to be upon a valuable consideration, he testified, without contradiction, that it was a gift. *Held*, under the facts, it was not error to instruct the jury, in effect, that the sole question of fact involved, and controlling in the case, was whether Watson or Corput, or both of them, at the time they obtained title under Mrs. Littlejohn, had notice that there was outstanding title in her husband by virtue of the unrecorded deed, or whether the defendant Watson occupied the position of an innocent purchaser without notice, as against such unrecorded deed.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. §110.]

2. **TRIAL** §253—INSTRUCTIONS—COMPETING DEEDS.

Nor was the charge, "What I meant to say was, if Corput or Watson, or both or either of them, was a purchaser without notice from Mrs. Littlejohn of the existence of the older deed, that they would be protected and Watson ought to recover the property in this case," erroneous on the ground that "this instruction touching competing deeds overlooks the distinction between a voluntary deed and a deed for value."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. §253.]

3. **VERDICT AND DENIAL OF NEW TRIAL** APPROVED.

The evidence was sufficient to support the verdict, and none of the grounds of the motion for new trial require a reversal.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Alma Wheatley against N. G. Watson. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry Walker, of Rome, for plaintiff in error. Lipscomb & Willingham and Nathan Harris, all of Rome, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(143 Ga. 684)

BROOKE et al. v. JONES & OGLESBY et al.
(No. 439.)

(Supreme Court of Georgia. July 10, 1915.)

*(Syllabus by the Court.)*JUDGMENT \S 194—RENDITION—TIME—ORDER
OF SALE.

Where A. borrows money and secures it by deed to real estate, and subsequently sells a part of the land to B., giving him bond for title, and delivers the purchase-money notes to the holder of the security deed, which notes are in excess of the debt secured by such deed, and where B. sells to C. a portion of the land he has purchased and gives bond for title, and the two subsequent purchasers bring a suit against A. and others, praying certain equitable relief, and a demurrer to the petition is filed, it is error, in advance of passing on the demurrer and before the issues as made by the answer of the defendants are finally determined, to order a sale of the entire tract of land and, in such order, adjudicate certain rights of one of the parties and leave open other issues made by the pleadings for the final judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 354-356; Dec. Dig. \S 194.]

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Action by Jones & Oglesby and another against George W. Brooke and another. Judgment for plaintiffs, and defendants bring error. Reversed.

Jones & Oglesby and J. W. Bell filed their petition against George W. Brooke and J. P. Brooke. The case alleged may be briefly summarized as follows: George W. Brooke borrowed from the Lowry National Bank \$4,000, to secure the payment of which he gave a deed to three lots of land in Bartow county. Later he sold to Bell, in two separate transactions, part of the land covered by the deed, giving Bell a bond for title thereto, receiving a part of the consideration in cash, and taking Bell's notes, aggregating \$4,500. It was agreed that Brooke should deposit these notes with the Lowry National Bank, so that payments made thereon by Bell should, to that extent, relieve the prior lien of the bank upon the property, and \$4,250 of the notes were so deposited. Thereafter Bell sold to Jones & Oglesby 50 acres of the land, for a consideration of \$3,500. By agreement, notes aggregating this amount were executed by Jones & Oglesby to Bell, and indorsed by him in blank, in order that George W. Brooke might deposit them with the bank as additional collateral security, unless he could exchange them for some of the notes of Bell already held by the bank. Plaintiffs have only recently learned that these notes were not deposited with the bank by Brooke, and that one of them for \$500 has been by him negotiated to Foster & Collins. Plaintiffs have demanded the return to them of the remaining \$3,000 of notes, which demand said Brooke refuses, and claims he has the notes in the possession of his brother, J. P. Brooke. His only excuse is that he keeps them to pro-

tect his equity in the property, which is protected by the fact that the deed given by him to the bank is a security deed and not an absolute one. There are judgments against George W. Brooke, of record in Bartow county, amounting to over \$4,000, and plaintiffs know of no property of his liable to these judgments, or to plaintiffs for any loss they may sustain. George W. Brooke has no right to the custody or control of the notes, but it was his duty to carry out the understanding upon which they were given; that is, of exchanging them for some of the notes of Bell, or else depositing them with the bank. J. P. Brooke could sell or hypothecate the notes to an innocent purchaser, and might force a liability against the plaintiffs without their securing title to the property for the purchase price of which the notes were given. Neither of the plaintiffs should be required to pay any part of the notes until they get an unincumbered warranty title to the property, free from any liability for any judgments held by the creditors of George W. Brooke. Among other prayers, it is asked that each of the defendants be restrained from hypothecating or alienating any of the notes, and that they be returned to the plaintiffs, so they may cancel the same or strike off the indorsement of the plaintiff Bell, and strike out the negotiable words in the notes. By amendment the price agreed to be paid by Bell for the property purchased by him is stated as being \$5,500, for which he gave his notes, of which notes to the amount of namely \$4,250 were deposited with the Lowry National Bank. Twenty acres of the land included in the deed to the bank, but not included in the bonds for title given by Brooke, have been sold and conveyed by him; but the remaining 20 acres, unincumbered and not included in said bonds for title, have not been conveyed out of him. J. P. Brooke has claimed in his answer to have a transfer to him of the bond for titles given by the bank to George W. Brooke, and to have paid the latter therefor \$1,000; but J. P. Brooke stated in court that this \$1,000 represented a loan made by him to his brother, and the plaintiffs are not definitely advised as to the nature or effect of the transfer. George W. Brooke in his answer has alleged that he assigned the bond for title to J. P. Brooke, before this suit was begun, for a consideration of \$1,000, and that:

"This assignment took out of this defendant all interest then in Mr. Bell's notes, and in the land described in the said bond, except the interest he had as indorser on the papers, and as warrantor of the title," and that "this defendant insists that the date of this deed is back of any judgments against him, and this note could in no sense, in law or equity, be subject to any judgment subsequently obtained."

The names of a number of judgment creditors of George W. Brooke, with the amounts of their judgments and the date and place of their record in the clerk's office of Bartow

superior court, are set out. Parties holding \$1,250 of the notes signed by Bell, other than the \$4,250 of notes held by the bank, will be claiming to collect the same out of the plaintiff Bell, although he does not admit that they are innocent purchasers. "Said Lowry Bank will be contending that it has a right to collect the \$4,250 worth of J. W. Bell's notes held by it, and said J. W. Bell should not be forced to pay any of said notes until he can get a perfect title to the property described in the two bonds for title held by him and signed by Geo. W. Brooke, hereinbefore referred to, free from any of aforesaid judgments, or from any danger of litigation with reference thereto." Jones & Oglesby deny the right of Foster & Collins, or any one else, to collect the note claimed by them for the sum of \$500, given by them to Bell and indorsed by the latter and sold by George W. Brooke, or that they can be forced to pay their \$3,000 of notes in the hands of J. P. Brooke until they receive a deed from plaintiff J. W. Bell; but they cannot terminate their liability on the notes without the consent of the various parties, or without litigation with reference thereto. They cannot determine the nature of the transaction transferring the bond for title from the bank to J. P. Brooke, or what his rights are. They are ready and willing to discharge their obligations on the notes whenever they can obtain perfect title to the property purchased by them, free from liens of the various judgments or claims of title or liens by either of the Brookes. The making of the judgment creditors parties will prevent vexatious litigation and multiplicity of suits, and all matters and things involved should be determined in one decree, wherefore they pray that the judgment creditors be made parties, and that all matters involved be so determined. By a further amendment it is alleged that J. P. Brooke has notified the plaintiffs of his intention to bring suit against them on two of the notes held by him, and that when he was restrained from selling or hypothecating the notes, they did not contemplate his bringing suit thereon, and it was asked that he be enjoined from doing so. By still another amendment it is alleged that the Lowry National Bank

has obtained judgment against the land concerned and against George W. Brooke for the full amount of its claim, and is preparing to sell the land in controversy thereunder, and that Jones & Oglesby have paid the \$500 note which was negotiated to Foster & Collins, and under the order of the court have paid the balance due by them on the land they purchased to J. P. Brooke, who has turned the same over to the Lowry National Bank in reduction of its debt against George W. Brooke. It is sought to obtain a decree directing a sale of the entire property, under which decree the prior lien of the bank is to be preserved and the rights of the other parties fixed prior to the sale, so that the property will bring more than if sold, while the complications in regard thereto exist, under the judgment obtained by the Lowry National Bank. It is prayed that certain described tracts be sold in a named order, and that the funds so derived be dealt with in a designated manner.

Demurrers and answers were filed by the defendants. The answers raise several issues of fact as to the matters alleged. For instance, George W. Brooke denies the allegations as to the purpose for which the notes of Jones & Oglesby were indorsed and turned over to him, and sets out a different agreement. He further avers that the Lowry National Bank agreed to collect the Bell notes and to look to them for the payment of the balance due it, and that it had exclusive control of the notes, but refused to make the collection.

Without having passed on the demurrers, and without any final determination of the issues of fact made by the pleadings, the judge passed an order directing a sale of the entire property in a specified manner, in which decree he undertook to adjudicate certain rights of the parties with respect to certain tracts of the land. To this decree the defendants excepted.

J. P. Brooke, of Alpharetta, and Finley & Henson, of Cartersville, for plaintiffs in error. J. T. Norris, of Cartersville, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(143 Ga. 736)

BROWDER-MANGET CO. v. WEST END BANK. (No. 466.)

(Supreme Court of Georgia. July 19, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR ⇨1078 — BILLS AND NOTES ⇨431 — PAYMENT — WAIVER OF OBJECTIONS — FAILURE TO ARGUE.**

A petition alleged in substance as follows: A. gave to B. his promissory note, which was afterwards indorsed to T., and by T. to the plaintiff. Upon maturity of the note, B., the payee and first indorser, gave his bank check to the plaintiff, who surrendered to him the note, which was then by B., surrendered to A. The check was dishonored by the bank upon which it was drawn. The plaintiff demanded of A. and B. the note, offering to return the check; but they refused to return the note or pay it. B. has been adjudicated a bankrupt. The plaintiff cannot attach a copy of the note. Notice of intention to sue has been given. *Held:*

(a) A bank check is not payment until it is itself paid. Civil Code 1910, § 4314. There was nothing in the petition to show that the parties intended to change this general rule of law.

(b) In a suit on such note by the last holder against the maker thereof, the petition alleging the foregoing facts set forth a cause of action, and the court did not err in overruling a general demurrer thereto.

(c) Some of the other grounds of demurrer, not being argued in the brief of the plaintiff in error, will be considered as abandoned. Others were without merit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. ⇨1078; Bills and Notes, Cent. Dig. §§ 1257, 1258; Dec. Dig. ⇨431.]

2. BILLS AND NOTES ⇨534 — ATTORNEY'S FEES—STATUTE.

Where, from the petition in a suit on a note, it does not appear that it contained any provision relative to the collection of attorney's fees, attorney's fees cannot be recovered, although the plaintiff served the defendant with the notice provided by Civil Code 1910, § 4252, of his intention to bring suit upon the note. That section is applicable only to cases in which there is an agreement in the note to pay attorney's fees.

(a) It not appearing from the petition that the note sued on contained an agreement to pay attorney's fees, that part of the verdict providing for the recovery from the defendant of 10 per cent. on the principal and interest as attorney's fees is contrary to law; and direction is given that the same be written off from the judgment by the defendant in error within 20 days after the remittitur from this court is filed in the office of the clerk of the superior court, or the judgment will stand reversed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. ⇨534.]

3. TESTIMONY—ADMISSION—OBJECTIONS.

The admission of the testimony contained in the first ground of the amended motion for new trial, given by a witness in response to questions propounded by counsel for defendant (the movant for a new trial), was not error for the reason assigned.

4. NEW TRIAL ⇨128—GROUNDS—OBJECTION TO QUESTION—SHOWING ANSWER.

In order for the refusal of the trial judge to permit a witness to answer a certain question propounded to him by counsel for the party introducing him to constitute a ground of a motion for a new trial, it must appear what the defendant expected the witness to answer, and that

the trial judge was so informed at the time the question was propounded. A mere statement that the defendant "sought" to show certain things is not sufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. ⇨128.]

5. TRIAL ⇨259 — REQUESTED INSTRUCTIONS — NECESSITY OF WRITING.

It not appearing that the request to charge contained in the sixth ground of the amended motion for new trial was made in writing, the refusal to instruct the jury as contained therein was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648-650; Dec. Dig. ⇨259.]

6. CHARGE—OBJECTIONS.

The excerpt from the charge complained of in the seventh ground of the amended motion for new trial is not subject to the criticism urged against it.

7. PETITION—ATTORNEY'S FEES—NEW TRIAL.

The other grounds of the amended motion relate to the question of attorney's fees, and, since we hold that attorney's fees cannot be recovered under the allegations of the petition, and have directed that the same be written off from the judgment, need not be considered.

8. VERDICT—EVIDENCE—SUFFICIENCY.

The verdict was supported by the evidence, except as to the attorney's fees; and the court did not err in overruling the motion for new trial in other respects.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the West End Bank against the Browder-Manget Company. Judgment for plaintiff, and defendant brings error. Affirmed, on condition that plaintiff remit a portion of the judgment.

Moore & Pomeroy, of Atlanta, for plaintiff in error. Green, Tilson & McKinney, of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed, on condition. All the Justices concur.

(143 Ga. 637)

BIRDSEY v. COMMERCIAL NAT. BANK OF MACON et al.

(Supreme Court of Georgia. June 30, 1915.)

*(Syllabus by the Court.)***COURTS ⇨489 — JURISDICTION — NATIONAL BANK—SUIT TO WIND UP AFFAIRS.**

A state court has no jurisdiction to entertain a stockholder's suit for winding up the affairs of a national bank, where no other relief is prayed. Such actions must be brought in a court of the United States.

(a) Where the directors of an insolvent national bank undertook to liquidate its affairs and consolidate it with another national bank, by delivering its assets to such bank, which took over the business of the liquidating bank, a suit by a stockholder against the liquidating bank, its directors, and the absorbing bank, attacking the legality of such consolidation, praying no relief against the directors or the absorbing bank, but praying to wind up the affairs of the liquidating bank, must be brought in a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324-1330, 1333-1341, 1372-1374; Dec. Dig. ⇨489.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by A. H. Birdsey against the Commercial National Bank of Macon and others. Judgment for defendants, and plaintiff brings error. Affirmed.

A. H. Birdsey, a minority stockholder of the Commercial National Bank of Macon, Ga., a national bank organized under the laws of the United States, brought his petition against that bank, its directors, and the American National Bank of Macon, Ga., alleging, in substance, as follows: The Commercial National Bank was a going concern until Saturday night, August 1, 1914, when, without notice to petitioner, its directors transferred and delivered all of its assets to the American National Bank. The deposits of the Commercial National were placed with the American National Bank to the credit of the depositors of the Commercial, and notice to this effect, signed by the Commercial National Bank, was published the next day in the daily papers of Macon. In the same issue of the papers the American National Bank published a notice to the depositors and customers of the Commercial National Bank, announcing the consolidation of the Commercial National Bank with the American National Bank, and that the American National Bank had taken over all the assets of the Commercial National Bank, and would in the future take care of all the business formerly handled by the Commercial National Bank. The transfer of the assets of the Commercial National Bank by its directors to the American National Bank, without the consent of its stockholders, was an attempt to liquidate its business by the Commercial National Bank, which was insolvent at the time of such attempted transfer. The plaintiff will suffer a special injury by this transfer, as under the national banking law stockholders are personally liable to creditors in a sum equal to the stock owned by them; and it is charged that a deficit existed when the consolidation between the two banks was attempted. The Commercial National Bank, recognizing the lack of power on the part of its directors to transfer its assets to another bank without the assent of the stockholders, subsequently to the attempted transfer called a meeting of them for the purpose of submitting to them the action of the directors respecting the merger and consolidation of the two banks. In the notice of the proposed stockholders' meeting, no statement of the condition of the bank is contained, nor is any information given upon which the stockholders could act. It is alleged:

"That the insolvency of said bank on the 1st day of August, 1914, as charged by petitioner, evidences and shows gross mismanagement on the part of the officers and negligence on the part of the directors of said Commercial Bank. Your petitioner is advised and believes that large amounts of money (the exact amount unknown to petitioner) have been loaned to various individuals, said amount so loaned to each individual in many instances aggregating more than 10 per cent. of the capital stock of said bank."

That it would be more economical, and better conserve the interests of the Commercial National Bank, that its affairs be liquidated through a receivership than through a committee appointed for the liquidation of the bank by a majority of its stockholders, which the defendants are seeking to do. That the petitioner applied to the comptroller of the currency for relief, who, upon being informed that the depositors had been paid, declined to interfere or appoint a receiver. The prayers of the petition were for the appointment of a receiver to liquidate the business of the bank and to wind up its affairs and to enjoin the defendants from interference with such liquidation. No substantial relief was prayed either against the directors or the American National Bank. A rule nisi was issued, calling on the defendants to show cause why a receiver pendente lite should not be appointed. In response to the rule nisi, the defendants presented their respective demurrers, setting up, among other things, that the superior court of Bibb county was without jurisdiction to wind up the affairs of a national bank through a receivership, under the circumstances alleged in the petition. On the hearing the court refused to appoint a receiver, on the ground that the court was without jurisdiction. Exception is taken to this judgment.

Feagin & Hancock and T. S. Felder, all of Macon, for plaintiff in error. Jordan & Lane and Hardeman, Jones, Park & Johnston, all of Macon, for defendants in error.

EVANS, P. J. (after stating the facts as above). There are some loose allegations in the petition about the mismanagement of the affairs of the banking association by its directors, but no specific charge of fraud or mismanagement is alleged. There is no contention that the American National Bank or the directors of the Commercial National Bank are wasting the assets of the liquidating bank, included in the transfer of the 1st of August. No judgment or substantial relief is sought against either the directors of the Commercial National Bank or the American National Bank. The only relief prayed is against the Commercial National Bank, and that relief, in the language of the prayer, is "to liquidate the business of said bank and to wind up its affairs." This presents the question whether a stockholder is entitled to go into a state court for the sole purpose of liquidating and winding up the affairs of a national bank. National banks have been declared to be instrumentalities of the federal government, created for a special purpose, and as such necessarily subject to the paramount authority of the United States. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. The act of Congress providing for their establishment is a most complete and comprehensive system. Says Mr. Justice Field:

"Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate Code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates." *Cook County National Bank v. U. S.*, 107 U. S. 445, 448, 2 Sup. Ct. 561, 27 L. Ed. 537.

The fourth section of the act of Congress of August 13, 1888, c. 866, 25 Stat. 436 (5 Fed. St. Ann. 193, 194), provides that:

"All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

Opposing counsel entertain very divergent views as to the construction to be given the last clause of the proviso in this section. It is urged by the plaintiff in error that this clause has reference to such actions as may be brought by those in charge of the affairs of the bank under the provisions of the statute controlling liquidation of national banks, such as by a receiver appointed by the comptroller. We think that when it is taken into consideration that a national bank is an instrumentality of the federal government, under the control of the federal government, with power to issue notes under certain circumstances, it was not the intention of Congress that the state courts should have jurisdiction to wind up the affairs of a national government agency. The very attempt by a state court to distribute all of the assets of a national instrumentality, to take from a national bank all of its assets without regard to any control over it by the comptroller of currency or other national officers, suggests the impropriety of the remedy. In the recent Judicial Code, approved March 3, 1911, c. 231, in chapter 2, § 24, par. 16, 36 Stat. 1091 (U. S. Comp. St. 1913, § 991), it is provided that the District Court shall have original jurisdiction "of all such cases commenced by the United States, or by direction of an officer thereof, against any national banking association, and cases for winding up the affairs of * * * such bank," without regard to diverse citizenship. It is well settled that the United States courts have exclusive jurisdiction in cases commenced by the United States, or by direction of any officer thereof, against any national banking association; and the jurisdiction for winding up the affairs of a national bank would seem to be exclusive in the United States courts to the same extent as would be a case brought by the United States, or by direction of any officer thereof, against a national

banking association. Prior to the act of June 30, 1876 (19 Stat. 64, c. 156, § 6 [U. S. Comp. St. 1913, § 9778]), there was no provision for enforcing a stockholder's liability where a bank had gone into voluntary liquidation. This act has been construed as limiting the tribunal in which proceedings are to be instituted for enforcing a stockholder's liability to the United States court, instead of allowing creditors to resort to any competent tribunal with equity powers. *Irons v. Manufacturers' National Bank of Chicago (C. C.)* 17 Fed. 308. Where a national bank has gone into liquidation, and one holding its notes seeks to enforce the additional liability imposed by Rev. St. § 5151 (i. e., individual liability), a case is presented under the laws of the United States giving the Circuit Court jurisdiction independently of diverse citizenship. *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738.

The plaintiff maintains that, inasmuch as the Commercial National Bank has ceased to do business and has delivered its entire assets to the American National Bank, it is no longer to be regarded as a public agency, and is therefore subject to suit just as any other person, natural or artificial, under the same circumstances. We would agree with this contention if the subject-matter of the suit were based upon some established ground for equitable jurisdiction, and not excluded by the national banking act. In such cases equitable relief may be sought in any court, state or federal, which has equity jurisdiction. Thus, in *Merchants', etc., National Bank v. Trustees of Masonic Hall*, 63 Ga. 549, it was held that where judgment had been rendered in a state court against a national bank, and upon the execution issued a return of nulla bona had been made by the sheriff of the county where the bank was located, and the bank had ceased to discharge its functions as a fiscal agent of the United States, and was disposing, among its stockholders, of its assets which could not be reached by levy and sale under the common-law execution, thereby endangering the safety of those assets and the judgment debt of the creditor, equity would relieve by the grant of injunction and appointment of a receiver. The purpose of the bill in that case was not to wind up the affairs of a national bank, but to subject in equity assets of the bank which had been fraudulently taken possession of by its officers. In *Cogswell v. National Bank*, 76 Conn. 252, 56 Atl. 574, it was said:

"For winding up proceedings, in case of insolvency or certain other defaults on the part of the corporation, Congress has made special provision by means of a receiver appointed under authority of the United States." U. S. Rev. St. §§ 5141, 5191, 5201, 5205, 5208, 5234 (U. S. Comp. St. 1913, §§ 9678, 9746, 9762, 9767, 9770, 9821); Act June 30, 1876, c. 156, 19 U. S. St. L. 63; *Cook County Nat. Bank v. U. S.*, supra.

We are of the opinion that the allegations of the bill are too indefinite to make out any

case of fraud or misconduct on the part of the directors of the consolidated bank. It is not charged that the directors held less than two-thirds of the stock of the bank; and although the act of consolidation may have been ineffectual, in that there should have been a formal stockholders' resolution assented to by two-thirds of them (Rev. St. § 5220 [U. S. Comp. St. 1913, § 9806]), nevertheless, as there is no charge that the consolidated bank, which had all of the assets of the merged bank in its possession, will waste such assets, and as the only relief prayed for is to wind up the affairs of the liquidating bank, we think that the complaining stockholder is limited to the federal court to obtain that relief, if entitled to it upon the refusal of the comptroller of currency to act. Judgment affirmed. All the Justices concur.

(143 Ga. 632)

CARTER v. STATE. (No. 425.)

(Supreme Court of Georgia. June 30, 1915.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW — 250 — EMBEZZLEMENT — 2 — STATUTES — 76 — EQUAL PROTECTION — SPECIAL LEGISLATION.

The crime denounced in section 186 of the Penal Code of 1910 is embezzlement, and the statute does not collide with the constitutional guaranty of equal protection of the laws, nor with the constitutional inhibition against the enactment of a special law in a case for which provision has been made by a general law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 711-713; Dec. Dig. § 250; Embezzlement, Cent. Dig. § 2; Dec. Dig. § 2; Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.]

2. JURY — 59, 64, 66, 116 — JURY COMMISSIONERS — REMOVAL — DISCRETION — REVISION OF JURY LIST — FAIR REPRESENTATION — CHALLENGE TO ARRAY.

(a) The judge of the superior court may, in his discretion, remove jury commissioners and appoint their successors. The record does not show such abuse of discretion as will invalidate the removal of the commissioners and the appointment of their successors, under the facts narrated in the question certified by the Court of Appeals.

(b) The power of a judge of the superior court to order a revision of the jury list is limited to the failure of the jury commissioners to revise the jury list as provided by law. If the jury commissioners revise the list, their revision cannot be treated as a failure to act, unless the act of revision was in violation of the statute. The law does not require that jury commissioners shall give all political parties equal or pro rata representation on the jury list; and the predominance of adherents of one political party on the list who are otherwise eligible will not invalidate the revision. The opinion of the judge that jury lists do not give fair and just representation to the citizenship of the county from the basis of intelligence, experience, and uprightness does not authorize a vacation of the revision of the jury commissioners as having been done in violation of law.

(c) A defect which goes to the legality of the

selection of the panel of jurors is ground for challenge to the array.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268-272, 277, 542, 543; Dec. Dig. § 59, 64, 66, 116.]

3. CRIMINAL LAW — 97 — VENUE — PERSON IN ANOTHER JURISDICTION.

Where the president of a bank located in Georgia, while out of the state, with the intent to embezzle the property of the bank, telegraphs to the cashier to send to him certain stock certificates belonging to the bank, stating that he will return the certificates, and the cashier, in response to the telegram, sends by mail the stock certificates to the president, who receives them out of the state, and there disposes of them to his own use, the superior court of the county in this state where the bank is located, and where the telegram is received and the shares of stock are deposited in the mail, has jurisdiction to try him for the alleged embezzlement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177-189, 191; Dec. Dig. § 97.]

Certified Questions from Court of Appeals.

J. H. Carter was convicted of embezzlement, and brought error to the Court of Appeals, which propounds certain questions to the Supreme Court. Questions answered in the affirmative.

See, also, 14 Ga. App. 406, 81 S. E. 251.

F. B. Carter and W. A. Blount, both of Pensacola, Fla., B. L. Smith and O. R. Dupree, both of Blue Ridge, N. A. Morris and Geo. D. Anderson, both of Marietta, and King & Spalding, of Atlanta, for plaintiff in error. Herbert Clay, Sol. Gen., of Marietta, Wm. Butt, of Blue Ridge, and Geo. F. Gober, of Atlanta, for the State.

EVANS, P. J. This case comes to us upon the certification of certain questions propounded by the Court of Appeals.

[1] 1. The first involves the constitutionality of Penal Code, § 186. That section reads as follows:

"Any officer, servant, or other person employed in any department, station, or office in any bank or other corporate body in this state, or any president, director, or stockholder of any bank or other corporate body in this state, who shall embezzle, steal, secrete, or fraudulently take and carry away any money, paper, book, or other property or effects, shall be punished by imprisonment and labor in the penitentiary for not less than two years, nor longer than seven years."

The nature of the constitutional attack made upon it requires a construction of the section. It was urged in the Court of Appeals, by counsel for the plaintiff in error, that the statute rendered the stealing by an officer, servant, or stockholder of a corporation a felony, irrespective of the ownership of the property by the corporation. It was argued that the words of the statute do not confine its operation to property intrusted to the person stealing, because under the statute any stockholder, although not employed in any way and without access to the corporate assets, is equally guilty under this section with the president or other officer. This Code section was enacted many years

ago, and in the review of cases of persons convicted thereunder there has been no attempt toward such construction of it as is now sought. It will be found in the Penal Code of 1833 (Cobb's Digest, p. 795), along with the other sections defining the various kinds of larceny. Manifestly, the Legislature intended to denounce a crime other than larceny; otherwise it would be but bare surplusage. To constitute the crime of larceny at common law it is essential that the thing shall be taken by trespass. The original English statute was enacted in consequence of a decision that a bank's cashier who received money from a customer and appropriated it to his own use could not be convicted of larceny, on the ground that the money had never been in the employer's possession. Embezzlement was not a crime at common law, and the statute was intended to punish for the fraudulent appropriation of property by one lawfully in possession before it has been in the possession of the owner, or by one who has lawfully obtained possession from the owner. *Robinson v. State*, 109 Ga. 564, 35 S. E. 57, 77 Am. St. Rep. 392. In the case just cited it was said:

"It seems that it is necessary that the appropriation shall be made of property belonging to another, or, in case of a public officer, to the public, which rightfully came into the possession of the person charged with its appropriation, and that such person cannot be convicted unless it be shown that the money has been fraudulently appropriated by the officer to his own use."

We reaffirm the construction heretofore put on the statute by this court.

Thus construed, is the Code section open to the constitutional objections urged against it, viz., that it is opposed to the constitutional mandate that protection to person and property shall be impartial and complete, in that the Code section "does not give the same protection to the persons named therein as it does to other persons for stealing, and therefore is not impartial and uniform in its operation"; it is a special law enacted in a case for which provision has been made by an existing general law, to wit, that defining and punishing larceny; and, lastly, that it is violative of the fourteenth amendment of the federal Constitution, on the ground that it denies the equal protection of the laws to persons within the jurisdiction of the state? The constitutional assaults on this statute are palpably without merit. We do not understand that the guaranty of equal protection of the laws was intended to apply to this kind of a case, and, as is already pointed out, the offenses of larceny and embezzlement are different, although the latter embraces some of the elements of the former.

[2] 2. The plaintiff in error in the Court of Appeals was indicted for embezzlement. At the October term, 1913, the court passed the following orders:

"For good and sufficient cause to me manifest, C. A. Gates, D. L. Jarrett, Hugh Edmonson, J. F. Cook, R. L. Ayers, and W. V. Russell, the present jury revisers in and for said county, are hereby removed, and their authority as jury re-

visers is hereby revoked, and the clerk of the superior court is hereby ordered and directed to enter this order upon the minutes of court, and notify said parties of the action of court. This 18th day of October, 1913."

"In Gilmer Superior Court, October Term, 1913. The jury revisers in and for said county having been this day removed by me, and the positions of jury commissioners in and for said county made vacant, it is hereby ordered that W. H. Gudger and Jason Akin be, and they are hereby, appointed as jury commissioners to fill the unexpired terms of Hugh Edmonson and J. F. Cook, whose terms would have expired July 31, 1914; that W. A. Allen and B. L. Hensley be appointed to succeed R. L. Ayers and W. V. Russell, whose terms would have expired July 31, 1916; and that J. E. Kell and George Neeley be appointed to succeed C. A. Gates and D. L. Jarrett, whose terms would have expired July 31, 1918. It is further ordered that the clerk of this court enter this order upon the minutes of said court, and notify said parties of their appointment and to appear at once and be qualified in terms of the law to discharge the duties as such jury revisers. This October 18, 1913."

"In Gilmer Superior Court, October Term, 1913. It being made to satisfactorily appear to the undersigned judge of said court that the jury lists of said county were not properly revised in August, 1912, but that, in the selection of names among the taxpayers of said county, the jury lists were made up, or a large majority, of men of one political party, to the exclusion of names of citizens equally qualified in every respect of different parties, and the jury lists, as the same now appears, and the boxes as made up, do not give fair and just representation to the citizenship of said county, from the basis of intelligence, experience, and uprightness, it is therefore ordered that the jury commissioners of said county convene at the courthouse in Ellijay in said county, within ten days from this date, and proceed at once to revise the jury lists of said county, and prepare the box and list of jurors in compliance with the statute. It is further ordered that, upon the completion of their work, said commissioners, together with the ordinary of said county, at once draw 30 names from the grand jury box to serve at the adjourned term of this court to be held commencing on the second Monday in December next, and that they draw from the traverse jury box 36 names to appear and serve at said date as traverse jurors, and that, in addition thereto, they draw an additional panel of 18 jurors to be and appear at said court on Wednesday morning after the second Monday in December, at 8 o'clock. It is further ordered that the clerk of this court, immediately upon the drawing of the same, issue the usual venire and deliver the same to the sheriff, requiring him to summon said panels of jurors to be and appear and attend upon said court as hereinbefore stated. Those summoned to appear on Monday morning are required to be and appear at 9 o'clock a. m. on that date. This 18th day of October, 1913."

"It is now, at 10 o'clock a. m. on this the 18th day of October, 1913, ordered that the superior court of said county of Gilmer now in session take a recess until 9 o'clock a. m. on December 8, 1913, at which time said term of the court shall reconvene for the transaction of any business that may be there pending and undetermined in said court."

The plaintiff in error was put upon trial at the adjourned term, and he objected, by way of plea in abatement and by challenge to the array and to the poll, to being tried by a jury drawn from the jury box under the foregoing orders. The Court of Appeals requests an instruction as to the legality of

"the action of the judge of the superior court in discharging the jury commissioners and appointing new jury commissioners, and in directing the new commissioners to revise the jury lists of the county, and prepare the box and lists of jurors, and in directing at the same time the drawing and summoning of jurors after such revision," and as to whether the foregoing facts constitute a sufficient ground for a plea in abatement or for challenge to the jurors.

At common law the selection and summoning of the array of jurors for a particular session of court was confided almost wholly to the sheriff. He selected at discretion, from the body of freeholders in a county or from the body of citizens in a city, the persons whom he would have assembled for this purpose, and brought them into court under authority of a writ of venire facias in civil cases, or a precept in criminal cases, and entered the names of those summoned on a paper. "A jurie," says Lord Coke, "is said to be impanelled when the sheriff hath entered their names into the panel, or little piece of parchment, in panello assisæ." Co. Litt. 158 b; Thompson & Merriam on Juries, 107, note 1. There was no procedure at common law similar to what we call the making of the jury lists. Our statute is comprehensive upon that subject, and confides the selection of persons eligible to serve as jurors to a board of jury commissioners, who are appointed by the judge. This board consists of six discreet persons, who hold their appointment for six years. The judge of the superior court is given the right to remove these commissioners for cause at any time in his discretion, and to appoint their successors. Penal Code 1910, § 813. This statute confers on the judge the power of removal, when, in his discretion, he deems a change of commissioners to be advisable. The words "for cause" are simply admonitory to the judge, that his discretion shall not be oppressively or capriciously exercised. *Edge v. Holcomb*, 135 Ga. 765, 70 S. E. 644. Under the facts appearing in the record, it cannot be said that the judge's discretion was oppressively and capriciously exercised in the removal of the jury commissioners.

Did the judge have the authority to vacate the jury lists as prepared by the jury commissioners who were removed, and peremptorily order the new commissioners to prepare a new list, and draw a jury, under the recitals in his order? As has already been stated, our system of making up the lists of jurors is of statutory origin. The statute is comprehensive of the whole subject-matter, and is a substitute for the practice which prevailed at common law. The power of the judge to vacate the jury lists and to compel the preparation of new lists must be derived from the statute. The statute provides that biennially, or, if the judge of the superior court shall direct, triennially, on the first Monday in August, or within 30 days

thereafter, the jury commissioners shall revise the jury lists, except in certain counties where the revision may be annual. The clerk of the superior court is ex officio clerk of the board of commissioners. The jury commissioners are directed to select from the books of the tax receiver upright and intelligent men to serve as jurors, and to write the names of the persons so selected on tickets. From these they shall select a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county to be drawn for service as now provided by law. The clerk of the superior court shall make out, in a book, lists of the names respectively contained in the grand jury and traverse jury boxes, alphabetically arranged. "On failure of the commissioners of any county to revise the jury list as provided in this article, the judge of the superior court of such county, either in term time or at chambers, shall order the revision made at such time as he may direct." Penal Code 1910, § 813 et seq. The power of the judge to order a revision is dependent upon the failure of the jury commissioners to revise the jury lists as provided by the statute. The commissioners in the instant case made the biennial revision. Unless this revision was made in violation of the statute, the court had no power to set it aside. The law does not require that the jury commissioners shall give all political parties equal or pro rata representation on the jury lists. It has been held that the commissioners, in the exercise of their discretion, may omit from the jury lists all persons whose business or avocation is such that it is reasonably probable that an excuse from jury service would be granted, such as lawyers, ministers, doctors, etc. *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Dickens v. State*, 137 Ga. 523, 73 S. E. 826. It is not ground for setting aside a jury revision that the jurors selected owned a small percentage of the wealth of the county, or that a majority of them belonged to a particular religious set. *Davis v. Arthur*, 139 Ga. 74, 76 S. E. 676. The judge was of the opinion that the jury lists as now made up "do not give fair and just representation to the citizenship of said county from the basis of intelligence, experience, and uprightness." The law confers a discretion upon the jury commissioners in the selection of those as coming within the statutory qualification. The presumption is that they did their duty; and this presumption cannot be overcome by the bare ex parte order of the judge reciting that, in his opinion, the jury lists are not a fair representation of the intelligence of the county. If the jury was improperly impaneled at common law, and the objection went to the panel as a whole, the defect could be tak-

en advantage of by a challenge to the array. Likewise, under the system of selecting jurors by a board of jury commissioners, if the objection goes to the validity of the panel as a whole, it can be made by way of challenge to the array. *Thompson v. State*, 109 Ga. 272, 34 S. E. 579.

[3] 3. The Court of Appeals asks:

"Is the venue of the offense of embezzlement, under section 186 of the Penal Code of 1910, in the county in which a banking corporation from which the property is taken has its principal office and place of business, when the property taken consists of shares or certificates of stock, and the taking is by the president of the corporation, by means of telegrams sent by him while he is in another state, directing or requesting the cashier of the bank to send the stock to him, and stating that he will return it, in response to which the stock certificates are mailed to him by the cashier from the principal office in this state, and they are received by the president in the other state, and he there disposes of them?"

The question propounded assumes that the crime of embezzlement is committed in this state by the perpetration of the enumerated acts. If the fraudulent intent by the bank's official to convert the bank's property to his own use was first conceived and formed by the official while in another state and in possession of the bank's property, the crime of embezzlement would not be committed in the jurisdiction of this state. But, if the official in another state concocts the crime there, and executes it in this state, his actual presence in this state is not necessary in order to make him amenable to the laws of this state. A person in one jurisdiction may put in force an agency or force which does harm in another jurisdiction, and he will be considered constructively present at the place where by his command or authority his act is executed.

"The rule," said Beasley, C. J., "appears to be firmly established and upon very satisfactory grounds that, where the crime is committed by a person absent from the county in which the act is done, through the means of a merely material agency or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime but no responsible criminal." *State v. Wyckoff*, 31 N. J. Law, 69.

According to the facts hypothesized by the Court of Appeals, it is inferable that the bank president fraudulently represented to the cashier that he wished the stock certificates for an entirely innocent purpose, and that he intended to return the same, but, instead of returning the shares, he converted them to his own use. The fraud of the president in requesting the cashier to send to him the stock was his means of procuring the bank's property for a subsequent conversion. It is true that he was not personally within the state at that time, but he was here in purpose and design. When he employed the telegraph company to deliver his telegraphic request to the cashier in Gilmer county, he made that company his agent. *Western*

Union Tel. Co. v. Shotter, 71 Ga. 760. The telegraph company's delivery of the telegram to the cashier was the president's delivery, and the latter was constructively present with his agent in its delivery. If Gilmer county had been a border county, and the defendant, standing in the adjoining state, had requested the cashier to throw the shares to him over the state line, would it be doubted that he was amenable to the jurisdiction of the courts of Gilmer county? Furthermore, the defendant requested the cashier to send him the stock certificates. This general direction amounted to an instruction to the cashier to select any proper agency to convey the shares to him. When the cashier deposited the package with the stock certificates in the mail, he was acting according to the president's instruction. Thus another agency of the president's choosing delivered, in Gilmer county, the bank's stock to the mails. Certainly some offense was committed in Gilmer county; and it would be absurd to say that a crime was committed in Gilmer county if there was no one criminally responsible for it. The reasoning of Judge Beardsley in *People v. Adams*, 3 Denio (N. Y.) 190, 45 Am. Dec. 468, on the liability of a person concocting a crime in one state, and consummating it in another by innocent agents acting under his authority, to be prosecuted therefor in the courts of the latter, is unanswerable. He said:

"For all civil purposes a person out of this state may act by procuration within its limits, and thus, although absent at the time, he may become subject to the state law. Rights may thus be acquired by the absent party, as he may also become civilly liable under the law of this state, for what is done here by his authorization and procurement. The individual remedy in such case is perfect; and, if the criminal law of the state is thus violated, why should not the absent offender be responsible criminally, when afterwards found within the state? In authorizing another to act for him, the principal so far voluntarily submits himself to the law of the place where the authorized act is to be performed. This is confessedly so for all civil purposes. If an act thus authorized results in wrong to an individual, his right to redress against the principal, though absent, is undoubted. As to the person injured, the local law was violated by the absent wrongdoer; and, if the act done was also a violation of the local criminal law, is the author and procurer of the deed guiltless? Does the law hold him to have been within its jurisdiction so far as respects the civil remedy, but not for the purpose of punishment? I see no ground on which the distinction can be sustained. An absent party procures an act to be done within this state, and, so far as respects criminal or civil responsibility, I think he should not be allowed to say he is not amenable to the law. He clearly would be so if the act had been done by himself in person within the limits of the state, and it is precisely the same if done by an innocent agent."

We think, both on reason and authority, this question should be answered in the affirmative. See *Reg. v. Murdock*, 5 Cox's Cr. Cases, 360; *R. v. Taylor*, 3 Bos. & P. 596. All the Justices concur.

(148 Ga. 653)

BRAXLEY v. STATE. (No. 433.)

(Supreme Court of Georgia. July 8, 1915.)

*(Syllabus by the Court.)***1. INDICTMENT AND INFORMATION ⇐28—SUFFICIENCY.**

An indictment, containing two counts, was headed, "Georgia, Baldwin County. In the Superior Court of Said County." The first count began: "The grand jurors selected, chosen, and sworn for the county of Baldwin, to wit [jurors' names], in the name and behalf of the citizens of Georgia, charge and accuse," etc. The second count began: "And the jurors aforesaid, on their oaths aforesaid, do further charge and accuse," etc. *Held*, that the second count in the indictment should not be stricken on demurrer on the ground of the omission to state that the charge against the accused is made "in the name and behalf of the citizens of Georgia."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 117, 118; Dec. Dig. ⇐23.]

2. GRAND JURY ⇐7—DISCHARGE—SUMMONING.

Where the grand jurors regularly serving in the superior court have been discharged for the term, and the court has finally adjourned for the term, the judge has no jurisdiction to pass an order in vacation, requiring the attendance of such discharged grand jurors, so as to empower them, without being again sworn or charged, to prefer an accusation for crime.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 2, 16, 21; Dec. Dig. ⇐7.]

Atkinson and Hill, JJ., dissenting.

Certified Questions from Court of Appeals.

J. H. Braxley was convicted of being accessory before the fact to a burglary, and brings error to the Court of Appeals, which certified certain questions to the Supreme Court. First question answered in the negative, and second question in the affirmative.

John R. Cooper, of Macon, and Sibley & Sibley, of Milledgeville, for plaintiff in error. Ios. E. Pottle, Sol. Gen., John T. Allen, of Milledgeville, and J. R. Pottle, of Albany, for the State.

EVANS, P. J. The Supreme Court is asked by the Court of Appeals, whether—

"a count in an indictment, in which it is not stated, either literally or in substance, that the charge which is preferred is made 'in the name and behalf of the citizens of Georgia,' is subject to demurrer because of this omission."

The record accompanying the question discloses that the plaintiff in error was convicted of the offense of accessory before the fact, under an indictment containing two counts, the first charging him with the crime of burglary, and the second as being accessory before the fact to the burglary charged in the first count, the first count being as follows:

"State of Georgia, Baldwin County. In the Superior Court of Said County. The grand jurors selected, chosen, and sworn for the county of Baldwin, to wit [the jurors' names are here stated], in the name and behalf of the citizens of Georgia, charge and accuse John Braxley with the offense of burglary, for that," etc.

The second count begins:

"And the jurors aforesaid, on their oaths aforesaid, do further charge and accuse the said Jno. Braxley with the offense of felony, for that," etc.

Section 954 of the Penal Code is as follows:

"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury. The form of every indictment or accusation shall be as follows: 'Georgia, ——— County. The grand jurors selected, chosen, and sworn for the county of ———, to wit: ———, in the name and behalf of the citizens of Georgia, charge and accuse A. B., of the county and state aforesaid, with the offense of ———; for that the said A. B. (here state the offense, and the time and place of committing the same, with sufficient certainty), contrary to the laws of said state, the good order, peace, and dignity thereof.' If there should be more than one count, each additional count shall commence with the following form: 'And the jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said A. B. with having committed the offense of ——— (here state the offense as before directed); for that,' etc."

The plain intendment is that literalness of form is not demanded. Certainly it could never have been the legislative intent that a less strict observance of the demands of this section should apply to the description of the offense charged than to the mere form of the paper in which such charge is stated. The indictment is declared to be sufficiently technical which states the charge "so plainly that the nature of the offense charged may be easily understood by the jury," and it would be contrary to the spirit of the statute to require the mere formal parts of the indictment to be stated with literal exactness while its essence may be stated so as to be easily understood by the jury. *Lloyd v. State*, 45 Ga. 57. This court has held that the omission of a statement of the defendant's residence is not fatal. *Studdstill v. State*, 7 Ga. 2; *Tarver v. State*, 123 Ga. 494, 51 S. E. 501. Where an indictment was headed, "Georgia, Liberty County," this was held sufficient to show for what county the grand jurors were drawn and served and of what county they were, notwithstanding the omission to fill in the blank prescribed in the form that "the grand jurors selected, chosen, and sworn for the county of ———, to wit," etc. *Stevens v. State*, 76 Ga. 96. In *Horne v. State*, 37 Ga. 80, 92 Am. Dec. 40, it was ruled that an omission from an indictment of the words, "In the name and behalf of the citizens of Georgia" is not ground for arrest of judgment. There is an obiter remark that if the exception had been taken on demurrer, it would have been good. In *Hardin v. State*, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269, the indictment did not conclude with the words, "contrary to the laws of said state, the good order, peace, and dignity thereof," and it was held to be defective on that ac-

count. In the opinion in that case Judge Lewis used language suggestive that the statute should be strictly applied; but we do not understand that the court meant to apply the doctrine of absolute literalness in a matter of bare form.

[1] It is clearly apparent from the indictment that the grand jurors were chosen and sworn at the regular term of the superior court of Baldwin county; that they were acting as such in preferring a charge for a violation of a criminal statute. That they were preferring that charge "in the name and behalf of the citizens of Georgia" is manifest from the indictment as a whole. In the first count they expressly so state, and the whole proceeding, considered in connection with the law appertaining to indictments, indicates as much. It is urged that one count in a pleading cannot aid defects in another count. That rule of pleading prevents the allegation of a cause of action in one count from being projected into another count to supply the latter's deficiencies. We do not dispute the rule in this respect, but that rule has never been carried to the extent that such formal parts of the petition, as the address to the court, should be carried into each count. In the *Hardin Case*, supra, the concluding words of the statute were omitted, and no words of substitute were stated; there was nothing in the indictment that could be construed as taking their place. The case in hand is quite different, as the indictment is pregnant with the meaning that the charge is made by the grand jurors in the name and behalf of the citizens of Georgia. We accordingly answer the question propounded in the negative.

[2] 2. The second question is:

"Though a judge of the superior court may, during a term of court, recall a grand jury of the same term, which has been discharged for the term, and they may then legally indict one charged with crime (*Bird v. State*, 142 Ga. 596, 83 S. E. 238), has a judge of the superior court jurisdiction to pass an order in vacation, at a place not within the jurisdiction of the court, requiring the attendance of such discharged grand jurors, so as to empower them, without being again sworn or charged, to prefer an accusation for crime?"

It is suggested in the brief of counsel for the state that the term of court had not finally adjourned for the term, but had taken a recess to a later day, and that the question should be answered on the basis that there had been no adjournment for the term. That would not afford the information the Court of Appeals requests. On the doctrine of *Bird v. State*, supra, the Court of Appeals recognizes that if the court had not finally adjourned for the term, the grand jury could be reconvened, but asks the question on the basis that the court had adjourned for the term. The term will continue until it expires by operation of law, unless expressly adjourned in a manner provided by law. *Liverpool, etc., Insurance Co. v. Peoples' Bank of*

Mansfield, 143 Ga. 355, 85 S. E. 114. Treating the question as if there was a final adjournment of court for the term, it must be answered in the negative. After the adjournment of a term the grand jury became *functus officio*. "Judges of the superior courts 'cannot exercise any power out of term time, except the authority is expressly granted; but they may, by order granted in term, render a judgment in vacation.' Civil Code 1910, § 4854." *Tucker v. Huson Ice & Machine Works*, 142 Ga. 83, 82 S. E. 496.

There is no express provision of law authorizing a judge of the superior court, out of term time, to call together persons who were grand jurors at a former term, so as to act as grand juries, except at a special term. Civil Code, § 4876. All the Justices concur, except

ATKINSON and HILL, JJ. (dissenting). J. H. Braxley was indicted upon the charge of felony. The case was tried upon the hypothesis that the indictment contained two counts; the first charging the defendant as perpetrator of the crime of burglary, and the second as accessory before the fact, by counseling others to commit the offense. The jury returned a verdict as follows:

"We, the jury, find the defendant not guilty as charged in the first count in the indictment.

"J. E. Stenbridge, Foreman.

"We the jury, find the defendant guilty as charged in the second count in the indictment, and recommend that he be punished as for a misdemeanor.

"J. E. Stenbridge, Foreman."

A motion for a new trial was made, and the defendant excepted to the judgment overruling the motion. As necessary to a proper decision of the case, the Court of Appeals certified to this court two questions, the first of which refers to section 954 of the Penal Code of this state and the construction placed thereon in former decisions of this court; and it is asked, in view of the section of the Code and in the light of the decisions:

"Is a count in an indictment, in which it is not stated, either literally or in substance, that the charge which is preferred is made 'in the name and behalf of the citizens of Georgia,' subject to demurrer because of this omission?"

The words quoted were omitted from the alleged second count. In 1 Chitty's Criminal Law, § 249, it is said:

"It is frequently advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge, or charge precisely as laid, to insert two or more counts in the indictment. * * * Every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offense that the joinder of counts is admitted."

See, also, *State v. Longly*, 10 Ind. 482, 484; *Keech v. State*, 15 Fla. 591; *State v. Lyon*, 17 Wis. 237; *State v. Phelps*, 65 N. C. 450. Under the common law, though there might be several counts in an indictment, if the evi-

dence authorized a conviction under any one count and not under the others, the defendant could be convicted under the count that was supported by the evidence, notwithstanding his acquittal under all the other counts. See 1 Bishop's New Criminal Procedure, § 421 et seq., and cases cited. There was ample reason why each count should be as complete as if there were but one count in the indictment. While, by making special reference in one count to some material thing expressed in a preceding count, the necessity of repeating the exact matter so referred to might be avoided, yet, if there were no such express reference, the matter so alleged in the preceding count could not, by mere construction, be imported into the second count. This rule is still adhered to in this state, even as applied to civil cases, where pleadings are not so strictly construed as in criminal cases. *Watters v. Hertz*, 135 Ga. 814, 70 S. E. 343; *Train v. Emerson*, 137 Ga. 730, 74 S. E. 241. Section 954 of the Penal Code declares:

"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury. The form of every indictment or accusation shall be as follows: 'Georgia, _____ County. The grand jurors selected, chosen, and sworn for the county of _____, to wit: _____, in the name and behalf of the citizens of Georgia, charge and accuse A. B., of the county and state aforesaid, with the offense of _____; for that the said A. B. (here state the offense, and the time and place of committing the same, with sufficient certainty), contrary to the laws of said state, the good order, peace and dignity thereof.' If there should be more than one count, each additional count shall commence with the following form: 'And the jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said A. B. with having committed the offense of _____ (here state the offense as before directed); for that,' etc.

This is the identical language of division 14, § 1, of the act approved December 23, 1833 (Acts 1833, p. 203), and has been included in each of the several Penal Codes. The language of the Code section under consideration is therefore that of the statute; and if it varies in substance from the common law, the latter must be considered as changed to the extent of the variance. According to the language of this statute, the form of indictments is declared. According to the form in the event of there being a single count, it is essential that the offense should be stated, "in the name and behalf of the citizens of Georgia." These are words of substance, as much so as would be the name of a plaintiff in a civil case. If the words quoted are words of substance in an indictment in which there is but a single count, they are also words of substance in successive counts; and if each count is to be regarded as separate and distinct from the other, it is improper to omit them from the several counts. Being words of substance,

their omission could not be supplied by construction or imported by implication from some other count, for the reason, as indicated above, that the substance of one count cannot be embodied into a separate count by mere construction. We should not follow the ruling made in *Loyd v. State*, 45 Ga. 57. That was a case in which the second count omitted the words, prescribed in the form, "and the jurors aforesaid, in the name and behalf of the citizens of Georgia." There was a demurrer to the indictment, on the ground that the second count "did not begin and conclude in the form required by law." In the opinion, on this ground of demurrer, McCay, J., said:

"Our Code, even as to the substantial averments of an indictment, only requires that they should be stated so as to be easily understood by the jury. Code, § 4535. And it seems directly contrary to the spirit of this enactment to require that the merely formal parts of the indictment shall conform to the letter to a provision the sole object of which was to make unnecessary the cumbersome formality of the common-law proceedings."

This decision was by two judges, and not controlling. It was referred to and disapproved by Lewis, J., in the case of *Hardin v. State*, 106 Ga. 386, 32 S. E. 365, 71 Am. St. Rep. 269. The former case of *Horne v. State*, 37 Ga. 80, 92 Am. Dec. 49, by an entire bench of three judges, seems to have been overlooked by Judge McCay. That was a case where a motion was made in arrest of judgment. It was held that under section 4536 of the Revised Code of 1863, which declared, among other things, that exceptions which go merely to the form of the indictment shall be made before trial, and will not be good in arrest of judgment, the omission from the indictment of the words, "in the name and behalf of the citizens of Georgia" was not cause for arresting the judgment; but it was further said:

"If these words be omitted, on objection taken at the proper time the indictment will be quashed."

In the case of *Tarver v. State*, 123 Ga. 494, 51 S. E. 501, the indictment omitted to allege the place of residence of the defendant, in compliance with the form prescribed in section 954 of the Penal Code. A demurrer was filed to the indictment, on the ground that it omitted to state the residence of the defendant. The demurrer was overruled, and, on exception, this court affirmed the judgment of the trial court. The ruling was:

"The Constitution of Georgia requires that all criminal cases shall be tried in the county where the crime was committed. The residence of the defendant is wholly immaterial to the fixing of the venue. Although the form of the indictment prescribed in Penal Code, § 929, contains an averment of residence of the defendant, the omission of such averment in an indictment will not be ground for quashing the indictment, where it conforms in all other particulars with the prescribed form, and the offense is plainly described in the language of the statute."

The matter omitted in that case from the indictment was very different from the omission of matter of substance required by the form, such as stating the identity of the parties, so to speak, in behalf of whom the charge against the defendant was made. In the opinion, Evans, J., while discussing the case of Hardin v. State, supra, and other earlier cases, among which were mentioned the case of Loyd v. State, supra, used language to the effect that if the ruling in Hardin v. State, supra, was in conflict with the earlier decisions, it must yield to the older decisions. This expression could not have applied to the Loyd Case, which, although older, was rendered by only two judges. In the case of Hardin v. State, supra, it was held that an indictment which omitted words prescribed in the form, "contrary to the laws of the state, the good order, peace, and dignity thereof," was defective and subject to be quashed on demurrer. See, also, Bulloch v. State, 10 Ga. 47, 61, 54 Am. Dec. 369.

It follows that the first question propounded by the Court of Appeals should be answered in the affirmative.

(143 Ga. 728)

POWELL et al. v. HEYMAN et al.
(No. 462.)

(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

1. TRUSTS \Leftrightarrow 125—EXTENT—DEEDS — LIFE ESTATE.

A deed from Georgia S. Hookey, dated September 13, 1864, conveyed certain real estate in the city of Augusta to Louis A. Dugas, in trust for Catherine M. Hookey for life, with the power of appointment on her death to such person or persons or for such purpose or purposes as she should by her last will and testament execute, designate, and appoint. Held, that the trust thus created was limited to the life estate conveyed to Catherine M. Hookey.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 163; Dec. Dig. \Leftrightarrow 125.]

2. WILLS \Leftrightarrow 669—LEGAL ESTATE—CREATION.

The will of Catherine M. Hookey, dated April 11, 1883, created a life estate in her husband and her daughter, Helena S. Hookey (who afterwards married Frank Powell), and upon the death of these two the property was to be sold and the proceeds divided as follows: \$1,000 to Catherine M. Sweigan, and the remainder among the children of Helena, or, should Helena die without issue, the share devised to her was to be divided among the children of the testatrix in life at the date of the death of Helena. Held, that the estate thus created was a legal estate, and not an equitable one.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1575, 1576; Dec. Dig. \Leftrightarrow 669.]

3. INFANTS \Leftrightarrow 39—REMAINDERS \Leftrightarrow 16—SALE OF LEGAL ESTATE—SUPERIOR COURT—JURISDICTION IN CHAMBERS.

A judge of the superior court at chambers has no authority, on petition in vacation, to order a sale of the legal estate of minors, nor do the minors become wards in chancery. Webb

v. Hicks, 117 Ga. 635. 43 3. E. 738. Nor has a judge of the superior court authority in chambers to dispose of the property of adult contingent remaindermen.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 85-89; Dec. Dig. \Leftrightarrow 39; Remainders, Cent. Dig. § 11; Dec. Dig. \Leftrightarrow 16.]

4. INFANTS \Leftrightarrow 39—SALE OF LEGAL ESTATE—SUPERIOR COURT—JURISDICTION IN CHAMBERS.

The order of sale and reinvestment in this case, having been granted at chambers, is absolutely void.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 85-89; Dec. Dig. \Leftrightarrow 39.]

5. INFANTS \Leftrightarrow 39—SALE OF LEGAL ESTATE—VOID ORDER—CONFIRMATION.

Equity will not confirm a void order, unless it is made to appear that the rights of none of the parties interested will be injured; and therefore it was incumbent on the plaintiffs in the present action to show the propriety of the sale of the property in Richmond county and reinvestment of the proceeds in Atlanta, and to show that the minors and contingent remaindermen would not be injured thereby. There was no allegation in the petition to this effect.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 85-89; Dec. Dig. \Leftrightarrow 39.]

6. PETITION—DEMURRER.

There is no equity in the petition, and the same should have been dismissed on demurrer.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by C. B. Heyman and others against F. A. Powell, trustee, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

R. B. Blackburn, of Atlanta, for plaintiffs in error. Pierce Bros. and Irvin Alexander, all of Augusta, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(143 Ga. 689)

SEABOARD AIR LINE RY. v. McMICHAEL
(No. 441.)

(Supreme Court of Georgia. July 3, 1915.
Rehearing Denied July 21, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \Leftrightarrow 88 — EXISTENCE OF RELATION—CONDUCTOR OFF DUTY.

Where a freight train conductor of a railroad company, engaged in the handling and transportation of articles of interstate commerce, is compelled, under the operation of the 16-hour law, to take a side track, where his train is tied up until taken in charge by a conductor of another train, the two trains being there consolidated, and the conductor first referred to, under the terms of his employment by the company, has the right to travel deadhead on the consolidated train to the point of his destination, from which it is his duty to bring out another train as conductor to the initial point, and where, at a station between the point at which the first-mentioned train is tied up and its destination, the conductor thereof, at the request of the active conductor in charge of the consolidated train, undertakes to perform the work of a brakeman in coupling and uncoupling cars, which is necessary for the handling and switching of them, the conductor thus undertaking to do the work of a brakeman being in the pay of

the company at the time of rendering such services, he is not a mere volunteer; and if the work which he is attempting to do subserves the interest of the employer company, and he is injured while in the performance of such work through the negligence of the company's other employes, he can maintain a suit for damages against the company under the provisions of the federal Employers' Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. ☞ 88.]

2. TRIAL ☞252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

There being no evidence in this case to show that, in attempting to uncouple the cars for the purpose of switching, there was any emergency existing, the court erred in instructing the jury upon that subject and its effect upon the plaintiff's case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ☞252.]

3. TRIAL ☞253—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Both the plaintiff and the defendant introduced in evidence certain rules of the company. There was no question that the company had made and formulated rules. That being true, the court should not have submitted to the jury, as a question for them to decide, whether or not the company had made rules for the guidance and control of its employes.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. ☞253.]

4. MASTER AND SERVANT ☞291—INJURIES TO SERVANT—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A charge to the jury, "that those rules, so long as they are reasonable and lawful, are binding upon the employes of the company," does not necessarily import that the reasonableness of the rules is left to the jury for determination. If counsel for the movant had desired the court to pass explicitly upon the question whether the rules were reasonable or not, they should have so requested.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. ☞291.]

5. APPEAL AND ERROR ☞750—ASSIGNMENT OF ERROR — QUESTIONS RAISED — VERDICT CONTRARY TO CHARGE.

A complaint that the jury found contrary to a certain part of the court's charge amounts merely to the complaint that the verdict is contrary to law, and raises no other question for the determination by this court than that raised in the general ground that the verdict is contrary to law and contrary to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. ☞750.]

(Additional Syllabus by Editorial Staff.)

6. WORDS AND PHRASES—"EMERGENCY."

An "emergency" is a sudden or unexpected necessity, requiring immediate or at least quick action—citing Words and Phrases, First and Second Series, Emergency.

Error from Superior Court, Crisp County; W. F. George, Judge.

Action by W. B. McMichael against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

W. B. McMichael brought suit against the Seaboard Air Line Railway for personal injuries which he alleged he sustained in consequence of the negligence of the defendant's agents and employes. It was alleged in the petition that the plaintiff was the conductor of a freight train engaged in the handling of interstate shipments of freight between Atlanta, Ga., and Birmingham, Ala. On the 11th day of October, 1912, he left Atlanta for Birmingham in charge of a designated train, known as train No. 706; and when he reached Coal City, Ala., a station on the line of the defendant's railway between Atlanta and Birmingham, his train took a side track, where it remained tied up under the operation of the 16-hour law, and there awaited the arrival of another freight train, known as train No. 709, in charge of one S. I. Bigham as conductor. Upon the arrival of train 709 at Coal City, about five hours later, the two trains were consolidated, and this consolidated train proceeded with both engines attached in front; the engine of train 706, the dead train, being in the rear of the engine of train 709. With the train thus made up they proceeded to Alton, Ala., another station on the defendant's line of railway. At Alton it became necessary to do certain switching. The flagman of train 709 was sent back to guard the rear of the train. Bigham was crippled, and unable to efficiently discharge the duties of conductor and look after the coupling and uncoupling of cars. At the order and request of Bigham, and because of that conductor's physical condition, and because it was plaintiff's duty to do so, in order that defendant's property might be protected and its interests subserved, plaintiff undertook to uncouple cars, made necessary by having to leave some of the cars out of the train at Alton. After two switches had been made, and while plaintiff was between two of the cars, and while his presence there was known, or should have been known, to Conductor Bigham, and the engineers and firemen of both engines which were attached to the train, and without any signal being given by plaintiff (which signal should have been awaited by each and all of said train crew), and without any signal from any one having authority to give a signal, the cars were violently shoved back by the two engines; and the plaintiff, who was standing on the dead blocks between the two cars, in order to save himself from the impending danger brought about by the improper and negligent backing of the cars, tried to throw himself from the track, but his left foot was caught and mangled by the wheels of the train. The defendant filed its answer, denying the material allegations, including all charges of negligence contained in the petition. On the trial the jury returned a verdict for the plaintiff. A motion for a new trial was overruled, and the defendant excepted.

Whipple & McKenzie, of Cordele, and E. A. Hawkins, of Americus, for plaintiff in error. F. G. Boatwright, of Cordele, and J. E. Hall, of Macon, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. Error is assigned upon the following charge of the court to the jury:

"I charge you that if you believe it to be the truth of this case that on this particular occasion this plaintiff was engaged by the conductor, and was employed by the conductor to assist in cutting out and in switching cars at Alton, Ala., and if you believe it to be the truth of this case that this plaintiff did, in response to that request, or that demand, or that command, made upon him, actually engage in the work of cutting out, and switching out, and bleeding the air on those cars, performing the duties ordinarily required of a brakeman, if you believe that to be the truth of this case, and if you believe that in so doing it was necessary, on account of a certain emergency which the plaintiff contends was then and there existing, for him so to do, if you believe that to be the truth of this case, and if you further find it to be the truth of the case that in so doing he was subverting the interest of the master and promoting the work of the master, then I charge you that the plaintiff would not necessarily be a volunteer, and you would be authorized under those circumstances to find that the plaintiff was not a volunteer, within the meaning of the law defining such. Now, as to whether any emergency existed for a conductor to call any other employé to his assistance in cutting out and switching the cars at Alton, Ala., or as to whether or not he did call any other employé, or engage any other employé, or whether or not he did call on or engage the plaintiff, upon those questions, disputed issues of fact, nothing that I have said, or may say, is to be considered by you as any intimation whatever as to what is the truth of any issue of fact."

It is insisted that this charge was erroneous, because the conductor actively in charge of the train had no authority to employ the plaintiff to assist in switching cars, and if the plaintiff assisted in switching cars under said employment he was a volunteer, and because there was no evidence whatever of the existence of an emergency at the time the plaintiff undertook to do the work of a brakeman in coupling and uncoupling the cars, as the defendant had provided men and means for switching cars, and it was not for the plaintiff to say that he was serving the interests of the company in performing that work.

Those portions of the federal Employers' Liability Act of 1908, under the provisions of which this suit is brought and the defendant sought to be held liable to the plaintiff for the injuries received, are as follows:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, * * * and, if none, then of the

next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * *

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé."

Under the provisions of this act, and the testimony of the plaintiff relative to the circumstances under which he undertook to do the work in which he was engaged at the time he received the injuries complained of, we do not think that he could be called a mere volunteer. If he was a mere volunteer, he was not entitled to recover at all. The act is designed to afford remedies to employes who are injured in the service of the employer whose liability for injuries received in service is asserted. That McMicheal was the employé of the defendant company at the time of receiving his injuries can scarcely be questioned. He was a freight train conductor in active charge of the train running from Atlanta, Ga., to Birmingham, Ala., until he reached Coal City, where he was tied up by the operation of the 16-hour law, and where, under instructions, he took a side track with his train and awaited the arrival of a following freight train, upon which he was to travel deadhead to Birmingham, from which last-mentioned place it would then become his duty to bring out another train on his trip to Atlanta. But while it is true that he could travel deadhead (for the 16-hour law prevented his continuance in charge of a moving train) and receive, though travelling deadhead, his mileage as a conductor, he was still an employé of the railroad and the defendant company was his employer. He could have ridden and remained in the caboose during the remainder of the journey to Birmingham, and while riding in active in the caboose he might in some respects have occupied a position, relatively to the company and its liabilities, similar to that of a passenger on a passenger train; but he did not, by leaving the caboose, and by not standing upon his rights to travel in the caboose as a passenger, lose entirely his character of employé. If he saw fit, upon request of the conductor, to perform services for the company which were useful and necessary at the time under all the circumstances, he should not be treated as a mere

volunteer, or as a stranger who had been employed for the occasion by the conductor.

The conductor would not have had the right to engage a mere stranger who was not in the employment of the defendant company. The employer has the right to say who shall be one of its employés—has a right to consider the character, intelligence, and other qualifications of a man before he is permitted to enter upon his service. But this plaintiff had been taken into the employment of the company, and it was a question for the jury to say whether or not he was injured while in the service of the company, doing proper work for it under the circumstances, and whether he received injuries in consequence of the negligence of the defendant company or its employés. As to who are employés entitled to the protection of the statute under which this action is brought, see Thornton's Federal Employers' Liability and Safety Appliance Acts, § 35 et seq., and the authorities cited. See, also, Dougherty's Liability of Railroads to Interstate Employés, § 18, and authorities cited. Whether Conductor Bigham was physically able to perform the duties incumbent upon him in the position which he held with the company was, under all the evidence, a question for the jury; and if he was suffering from physical disabilities, that fact could be considered in connection with the question whether or not, at the time he received his injuries, the plaintiff was performing labor and service in the interest of the defendant company.

[2] 2. There is, however, one portion of this charge which we do not think was authorized by the evidence in the case; and that is the portion which submits to the jury the question as to whether there was an emergency, and as to whether or not the plaintiff attempted to perform the services undertaken by him in an emergency, and further instructs the jury as to the effect of this fact upon the case and the plaintiff's right to recover if they should find that an emergency existed. We do not think that there is any evidence to authorize the charge upon the subject of emergency. Relatively to whether or not there was an emergency, the plaintiff, after testifying that in compliance with the 16-hour law his train was ordered to be consolidated with Conductor Bigham's train at Coal City, and proceed from that point with Bigham and his crew in charge, further testified, as to the circumstances at the time he went between the cars where he received his injuries:

"We went on over to Alton, the first place there was any switching to be done, and Mr. Bigham asked me to help him do the switching, as these cars had been in my train, and I knew exactly where they stood, and his flagman had gone back, and he had nobody but a negro brakeman to help him, and so me and my flagman and his negro brakeman were switching the cars. I was doing the cutting of the cars in switching, and my flagman and his brakeman were riding

them, one the main line, and one the side track. We were kicking them into the brickyard track. Alton is right on the top of a hill; it is downhill in this brickyard, and it is downhill on the main line, and the cars had to be rode on both tracks; and the switching that was made I cut the cars and gave the signal; there were no signals made, except from me and Mr. Bigham; he took the signals from me, was standing about 15 or 20 feet from the railroad. We had kicked two into the brickyard track, and one I think back to the main line, and had kicked two more on the brickyard track, and then shoved down to cut off some on the main line, and his brakeman was cutting them on the main line; we had one more car to put in the brickyard, and I went to go into the brickyard, and they had dead blocks on these two cars; and in order to cut this air I had to get on these dead blocks on my knees, and I was reaching over to get the angle cock, and just as I reached over the engine gave a push back and caused me to either have to go out on my head or throw myself backwards, and I threw myself back that way [indicating], trying to throw myself from between the cars, and my left foot was caught under the wheel and was mashed all to pieces."

[8] This evidence might show that the departure of the train from Alton on its way to Birmingham could be expedited, so as to enable the train to arrive more nearly on time, if the plaintiff would give the assistance which he testified was requested of him; but there is nothing in this testimony to show that such a state or combination of circumstances existed as to amount to an emergency. The word "emergency" is thus defined in the Century Dictionary:

"A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. * * * A sudden or unexpected occasion for action; exigency; pressing necessity."

This definition is quoted in the case of *United States v. Sheridan-Kirk Contract Co.* (D. C.) 149 Fed. 809, 814. And in the case of *Mallon v. Board of Water Com'rs*, 144 Mo. App. 104, 128 S. W. 764, we find the following definition:

"The word 'emergency' signifies some sudden or unexpected necessity, requiring immediate or at least quick action."

And the following in the case of *Mayott v. Norcross*, 24 R. I. 187, 52 Atl. 894:

"An 'emergency' is a condition of things appearing suddenly or unexpectedly; that is, it is an unforeseen occurrence. As related to the law of negligence, it may properly be defined as any event or combination of circumstances which call for immediate action without giving time for the deliberate exercise of judgment or discretion; in short, an exigency."

Other similar definitions will be found under the head of "Emergency" in 3 Words and Phrases, 2361, and 2 Words and Phrases (2d Series) 255, 256.

[3-5] Headnotes 3, 4, and 5 require no elaboration. As the case is sent back for another trial, no opinion is expressed as to the sufficiency of the evidence.

Judgment reversed. All the Justices concur.

(143 Ga. 721)

STOKES v. ROBERTSON. (No. 456.)

(Supreme Court of Georgia. July 17, 1915.)

*(Syllabus by the Court.)***1. CONTRACTS — 327 — DAMAGES — 125 — BREACH — PAYMENT OF NOTE — MEASURE OF DAMAGES.**

A purchaser of an interest in real estate gave to the vendor two promissory notes for a part of the purchase price, and took a bond for title. Later he sold and transferred his interest to a third party, who entered into a written contract with him, in which the transferee agreed to pay off and discharge the notes given by the original purchaser, "and deliver the same" to him "as fast as they mature." The transferee paid one of the notes, but failed to pay the other at maturity. *Held*, that this constituted a breach of the contract, and the other party thereto could bring suit for such breach without first paying the note.

(a) In such a suit, the measure of recovery by the plaintiff would be the amount of the payment which should have been made, and for which the plaintiff was liable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1563-1570; Dec. Dig. — 327; *Damages*, Cent. Dig. §§ 339-343; Dec. Dig. — 125.]

2. PARTIES — 95 — PROCESS — 163 — AMENDMENT — REPRESENTATIVE CAPACITY OF DEFENDANT.

After such breach of the contract as just indicated, and after the death of the transferee, suit was brought against his administrator. The petition alleged that the administrator, as such, had injured and damaged, and was indebted to the plaintiff in the sum stated, by reason of a breach of the contract by the intestate. The prayer for process mentioned the individual name of the administrator, without referring to his representative capacity. The process stated that the defendant (naming the administrator) "administrator" was required to be and appear, etc. *Held*, that the petition and process were amendable, so as to show that the defendant was sued as administrator, and not as an individual.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 160-166; Dec. Dig. — 95; *Process*, Cent. Dig. §§ 224-238; Dec. Dig. — 163.]

3. CONTRACTS — 349 — BREACH — ACTIONS — ADMISSIBILITY OF EVIDENCE.

In a case of the character indicated in the first headnote, there was no error in admitting in evidence the unpaid note, which the intestate had agreed to pay.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. — 349.]

4. CONTRACTS — 328 — BREACH — ACTIONS — DEFENSES.

There was no error in rejecting evidence on behalf of the defendant, tending to show that the original payee of the note was claiming it, and that the defendant did not feel safe in paying it where it was claimed by more than one party, unless it was presented for payment. This was not an equitable petition in the nature of a bill of interpleader, but a suit on a breach of contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1571-1584; Dec. Dig. — 328.]

5. EXECUTORS AND ADMINISTRATORS — 222 — DEBTS OF DECEDENT — BREACH OF CONTRACT — KNOWLEDGE BY ADMINISTRATOR.

In such a case there was no error in rejecting from evidence the returns of the administrator of the person who agreed to pay the notes of

the plaintiff, when offered by the defendant for the purpose of showing that the administrator had distributed the entire estate before the note was presented for payment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 764-766; Dec. Dig. — 222.]

Error from Superior Court, Marion County; S. P. Gilbert, Judge.

Action by E. H. Robertson against J. R. Stokes, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

E. H. Robertson bought from W. B. Matthews an interest in certain property and gave in part for the purchase price two promissory notes, one for \$1,375, falling due January 1, 1909, and one for \$2,000, falling due January 1, 1910. On August 27, 1908, he sold such interest to R. H. Stokes. In consideration of the sale Stokes agreed "to pay off and discharge said notes of Matthews against Robertson, and to deliver the same to said Robertson as fast as they mature." Stokes paid the first-mentioned note, but failed and refused to pay the second. Robertson demanded that J. R. Stokes, as administrator of the estate of R. H. Stokes, pay the note. In February, 1913, Robertson brought suit against J. R. Stokes, as administrator of R. H. Stokes, deceased, alleging these facts, and that the plaintiff would be required to pay the remaining note "presently as a matter of legal duty." An amendment to the petition was allowed, over objection; and a demurrer to the petition was overruled, as was also a motion to dismiss. The presiding judge directed a verdict for the plaintiff. A motion for a new trial was overruled, and the defendant excepted. In the original suit it was alleged that J. R. Stokes, "as administrator" of the estate of R. H. Stokes, deceased, was indebted to the plaintiff in the sum of \$2,000. Process was prayed against J. R. Stokes. An amendment of this allegation and of the process was allowed.

W. D. Crawford and W. B. Short, both of Buena Vista, for plaintiff in error. Moore & Pomeroy, of Atlanta, and Guerry, Hall & Roberts, of Macon, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The contract on which suit was brought was not merely one of indemnity, but contained a direct agreement on the part of the decedent to pay off and discharge the notes given by Robertson as fast as they should mature. A failure to pay one of the notes at maturity constituted a breach of the contract, and the plaintiff could bring suit thereon. He was not obliged to pay the note before bringing suit. If he was thus entitled to sue, for what amount could he bring his suit? In *Thomas v. Richards*, 124 Ga. 942, 53 S. E. 400, where one person entered into a contract with another, by which he assumed the payment of certain notes made by the

latter, maturing at different dates, the failure to pay any single note was held to be a breach of the contract, and the other party to it was held to be entitled to recover. In *Gage v. Lewis*, 68 Ill. 604, it was said:

"Where a bond is given, intended as a bond of indemnity, but containing a covenant that the obligor will pay certain debts for which the obligee is liable, and the obligor fails to perform, an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damaged, unless from the whole instrument it manifestly appears that its sole object was a covenant of indemnity."

See, also, *Alderman v. Rivenbark*, 96 N. C. 134, 1 S. E. 644; 3 Elliott, Cont. § 2205.

[2] 2. If an action be brought against an administrator as an individual, the pleadings may be amended by inserting his representative capacity, and making the necessary averments showing that the debt is chargeable to the estate. Civil Code 1910, § 5690; *Poole v. Hines*, 52 Ga. 500. There was no error in allowing the amendment to the petition and to the process. The petition alleged that J. R. Stokes, as administrator of the decedent, was indebted to the plaintiff. The prayer was that process should issue against J. R. Stokes. The process referred to the defendant as "J. R. Stokes, administrator."

[3] 3. There was no error in admitting in evidence the unpaid note. Its production showed its existence, and tended to show that it had not been paid.

[4] 4. There was also no error in rejecting evidence on behalf of the defendant, tending to show that Matthews, the original payee in the note, was claiming it, and that the defendant did not feel safe in paying it, where more than one party was claiming it, unless the note was presented for payment, and that Matthews was demanding payment of the note. The suit was not based upon the note itself, but upon the agreement between Stokes, the decedent, and the plaintiff. If the case was a proper one for filing an equitable petition for interpleader, the defendant might have done so. But the mere fact that there was some difference as to who was the owner of the note was not a defense to the action upon the contract made by the defendant to pay it.

[5] 5. The defendant offered in evidence his returns as administrator, for the purpose

of showing a distribution of the entire estate before the note was presented for payment, and that more than 12 months had elapsed after his appointment before distribution. The returns were rejected from evidence. An administrator is allowed 12 months from the date of his qualification to ascertain the condition of the estate. Creditors failing to give notice within that time lose all right of equal participation with creditors of equal dignity to whom distribution is made before notice of such claim is brought to the administrator. Civil Code 1910, § 3997. See, also, *McMillan v. Toombs*, 79 Ga. 143, 4 S. E. 16; *Lanier v. Huguley*, 91 Ga. 791, 795, 18 S. E. 89. Here the defendant had actual notice of the note of Robertson, and the agreement by his intestate to pay it. He testified that he made inquiry in regard to it, and was informed by the plaintiff that the latter did not know where it was; that the defendant heard that Matthews had it, and wrote to Matthews, requesting that it be sent to a bank for inspection, but was informed that it belonged to the wife of Matthews, who had placed it in the hands of one Shivers as collateral security for a loan. The defendant further testified that he told the present plaintiff that he expected to sell the property, for a part of the purchase price of which this note had been given, and that if Robertson would find the note he would pay it, and also that Matthews told him that the note was not paid. Thus, according to his own evidence, the defendant knew of the existence of the note, and that it was not paid, though his intestate had contracted to pay it. He utilized, as a part of the assets of the estate, the land which his testator had purchased from the plaintiff. No question of priority of debts arises, but the administrator desires to escape from the obligation of the contract of his intestate, because the note made by Robertson to Matthews, which Stokes agreed with Robertson to pay, was not presented for payment promptly to the administrator of Stokes, and he did not know where it was. His evidence showed no such state of facts as would have authorized the jury to find in his favor. There was no error in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

(101 S. C. 387)

POOL v. CAROLINA TRACTION CO.
(No. 9144.)

(Supreme Court of South Carolina. July 26, 1915.)

1. MASTER AND SERVANT — INJURY TO SERVANT — ACTIONS — PROOF AND VARIANCE.

Under Code Civ. Proc. §§ 220, 221, 224, 227, providing that a variance shall not be deemed material unless it has actually misled the adverse party, and authorizing the court to order amendment during the trial to make the pleadings conform to the proof, the variance between the complaint, alleging that an employé was injured in a collision between two cars by the negligence of the employer, and the proof, that the cars came so close together as to injure plaintiff, is not material, and is not prejudicial to defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.]

2. APPEAL AND ERROR — HARMLESS ERROR — DEMONSTRATIVE EVIDENCE — PICTURES IN TEXT-BOOKS.

It is not prejudicial error to admit in evidence a picture in a text-book on anatomy, to give the jury some idea of the thing attempted to be described, and thereby make the picture no more than a diagram.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.]

Appeal from Common Pleas Circuit Court of York County; C. M. Efrd, Special Judge.

Action by J. C. Pool against the Carolina Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The proof tended to show that, instead of a head-on collision on a track, the cars came so close together as to injure plaintiff, an employé of defendant.

Wilson & Wilson, of Rock Hill, for appellant. Thos. F. McDow, of Yorkville, and J. Harry Foster, of Rock Hill, for respondent.

WATTS, J. This is an action for damages alleged to have been sustained by the plaintiff, an employé of the defendant, in a collision between two cars by the alleged negligence of defendant. The cause was tried before Special Judge C. M. Efrd, at York, S. C., in December, 1914, and resulted in a verdict in favor of the plaintiff for \$500. Defendant appeals and asks reversal.

[1] Appellant's first, second, and third exceptions allege error on the part of the presiding judge in refusing defendant's motion for a nonsuit on the ground that, while the complaint alleged that the plaintiff was injured by one car moving in collision with another car, there was not a scintilla of evidence to sustain this allegation, which was the sole alleged cause of the injury, and, as there was no evidence of any collision, the cause of action should have been nonsuited. These exceptions must be overruled, as the defendant could not have been misled to its

prejudice by the allegations of the complaint. It was advertised fully as to what it had to meet, and no substantial right of the defendant was effected to such an extent as to mislead it to its prejudice, and it was not made to appear to the court in what respects it had been misled, and the variance between the proof and allegation was regarded by the court as immaterial, and the court had full power to order an amendment during the trial, to have the allegations conform to the evidence, and at the same time protect as far as possible the substantial rights of the party prejudiced by such amendment. If a party is surprised and prejudiced by such amendment, and that satisfactorily appears to the court by affidavit or otherwise, the court granting the amendment should continue the case and give the party prejudiced by such amendment ample time to prepare to meet it, if not to proceed with the trial. The variance was not prejudicial to the defendant. Defendant could infer from the pleadings in the cause that plaintiff was injured by collision of cars. Whether the cars collided with each other or collided with the plaintiff, if they were negligently propelled by the defendant's agents and servants, and this negligence was the controlling cause of plaintiff being struck and injured by one car or both, it advertised the defendant substantially of the issue it had to meet, and under the allegations of the complaint defendant could not in any way have been misled. His honor had ample authority to rule as he did under sections 220, 221, 224, and 227 of the Code of Civil Procedure, and the cases of *Mew v. Railroad*, 55 S. C. 101, 32 S. E. 828, *Savings Bank v. Efrd*, 96 S. C. 21, 79 S. E. 637, *Koennecke v. S. A. L. Ry.*, 101 S. C. 86, 85 S. E. 374.

All issues of fact were submitted to the jury under proper instructions, and there was sufficient evidence to carry the case to the jury.

[2] Appellant's fourth and fifth exceptions allege error of the judge in admitting in evidence over objection of defendant page 527 of Gray's Anatomy and pictures represented thereon. The judge ruled and admitted it as a picture. It was admitted so as to make it no more than a diagram, and it was competent for what it was worth as such. It was introduced simply to give the jury some idea of the thing attempted to be described, and was for their consideration for what it was worth, and it is hard to conceive in what view it could be made to appear that it was prejudicial to the defendant, and if it could be in any manner thought to be erroneous it was harmless. These exceptions are overruled.

The sixth exception assigns error in the refusal of the judge to grant a new trial. The record fails to disclose that any such motion was made before the trial judge, or that he ruled thereon; and, as we are of opinion

that all exceptions should be overruled, the judgment is affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(101 S. C. 370)

DOUGHTY v. LIGHTSEY. (No. 9140.)
(Supreme Court of South Carolina. July 24, 1915.)

1. APPEAL AND ERROR \S 931—PRESUMPTIONS FAVORING COURT BELOW—REFUSAL OF LEAVE TO ANSWER.

In a suit on notes, where defendant's proposed answer set up that the notes were void for alteration, the court, on appeal from the trial court's refusal, after default, to give defendant leave to answer, because the proposed defense was not meritorious, would assume, unless the contrary was made to appear, that the refusal of the motion was based upon good reason, that the original notes were before the court, and that it appeared from inspection that no alteration had been made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3728, 3762-3771; Dec. Dig. \S 931.]

2. JUDGMENT \S 145—DEFAULT JUDGMENT—OPENING—MERITORIOUS DEFENSE—FUTURE DELIVERY CONTRACT.

Under Civ. Code 1912, \S 8421, 3425, making void contracts of sale for future delivery of cotton, unless there is a bona fide intention that the cotton shall be delivered in kind, and declaring notes based on such contracts to be void, the refusal of the trial court to allow defendant to answer, setting up the invalidity of the notes in suit under the statutes, on the ground that the defense was not meritorious, was improper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 271, 292-295; Dec. Dig. \S 145.]

Appeal from Common Pleas Circuit Court of Hampton County; H. F. Justice, Judge.

Action by James P. Doughty, Jr., against W. Fred Lightsey. From an order refusing to open defendant's default and allow an answer, he appeals. Reversed.

B. R. Hiers, of Hampton, for appellant.
E. F. Warren, of Hampton, and R. J. Southall, of Augusta, Ga., for respondent.

HYDRICK, J. This appeal is from an order refusing defendant's motion to be allowed to answer. The action is upon five promissory notes, upon which it is alleged there is now due \$8,426.66, with interest.

The defendant served, with the notice of the motion, a copy of his proposed answer, which was duly verified, and an affidavit of his attorney, setting out the reasons why he failed to serve his answer in due time, to wit: That the copies of the summons and complaint, served on defendant, were sent to him by defendant within the time, with request that he answer; that from information he received he was under the impression that the time to answer expired June 9, 1914; that on June 4th he mentioned the matter to one of plaintiff's attorneys, who told him that the time to answer expired on June 2d, and

refused to let him answer; that from information received from defendant, and from letters and written instruments in his possession, he believes that defendant has a good defense.

The defenses set up in the proposed answer are: (1) That the notes, as executed and delivered to plaintiff, did not bear interest; but that, after the execution and delivery thereof, plaintiff altered them, without defendant's knowledge or consent, by inserting in each the words "and interest at the rate of 8 per cent. per annum." (2) That the consideration of the notes was money lost on agreements to sell cotton for future delivery, it not being the intention of both parties to the contracts that the cotton should be actually delivered in kind.

The order follows:

"This matter comes before me on motion of defendant for leave to answer. After hearing argument of counsel, and the proposed answer read, and it appearing to my satisfaction that the proposed defense is not meritorious, I do not think it a case in which I should exercise my discretion."

The "case" contains a copy of a letter from plaintiff, to defendant, dated December 9, 1913, as follows:

"Dear Sir: After leaving your office I observed that the rate of interest on your notes had been inadvertently, on the part of both of us, omitted. I beg, therefore, to advise you that 'and interest at the rate of 8 per cent per annum' has been inserted, and will thank you for your confirmation."

It also contains what purport to be copies of the notes, but it is not stated whether the copies of the notes as originally given, or as they appeared at the hearing. Nor is it stated whether the originals were before the court. In these respects the "case" is defective.

[1] We must assume, unless the contrary is made to appear, that the refusal of the motion was based upon good reason. We assume, therefore, that the original notes were before the court, that the copies in the record are copies of them as they then appeared, and that it appeared from inspection of them that no alteration had in fact been made, notwithstanding the statement in plaintiff's letter to defendant, upon which, no doubt, the allegation in the answer was predicated. If that be so, of course, the court was right in holding that defense unmeritorious.

[2] But there is nothing in the record tending to show that the second defense is without merit. The statute (Civ. Code 1912, \S 3421), makes void contracts of sale for future delivery of cotton, unless it is the bona fide intention of both parties, at the time of making them, that the cotton shall be actually delivered in kind, and section 3425 declares notes based upon such contracts to be void. Therefore, according to the allegation of the answer, which was sworn to, and against which there was no rebutting testimony, there

was merit in the second defense. We must not be understood as expressing any opinion as to the truth of the alleged defense, for that question is not before us. We merely hold that, upon the showing made, the court erred in concluding that the defense was unmeritorious.

Order reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 360)

HARRIS v. GREENVILLE TRACTION CO.
(No. 9135.)

(Supreme Court of South Carolina. July 21, 1915.)

TRIAL \S 29 — EXPRESSION OF OPINION BY COURT—WHAT CONSTITUTES.

It is not a violation of Const. 1895, art. 5, \S 26, prohibiting the judge from expressing an opinion on the evidence in the presence of the jury, for the trial judge, in denying defendant's motion for directed verdict, to remark that: "If the conductor had reasonable grounds to apprehend that deceased was going to get off the train, it would be different, and I think it is one of the cases where I had better let the jury pass on it. I have got some doubt about it, so I am going to leave it to the jury"—the quoted expression not showing what the court's opinion was.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 80-83, 508; Dec. Dig. \S 29.]

Appeal from Common Pleas Circuit Court of Greenville County; S. W. G. Shipp, Judge.

Action by Georgia Harris, as administratrix, against the Greenville Traction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Robt. Martin, of Greenville, for appellant. Haynsworth & Haynsworth, of Greenville, for respondent.

GAGE, J. The appeal involves a single question of law, and it is whether the circuit judge expressed, in the presence of the jury, an opinion upon the material facts of the case, when the defendant moved for the direction of a verdict. Const. 1895, art. 5, \S 26. The judge then said:

"If the conductor had reasonable grounds to apprehend that he [meaning Clark Harris, the deceased] was going to get off the train, it would have been different. I think it is one of those cases where I had better let the jury pass on it. I have got some doubt about it, so I am going to leave it to the jury. It may be, however, that I have not caught some of the testimony in the case. Therefore the motion is refused. Go to the jury."

It would serve no good purpose to review the cases, which have already been decided under the provision of the Constitution, which prohibits a judge to "charge juries in respect to matters of fact." They speak for themselves. In the instant case, if the judge had simply denied the motion and said nothing more, there could have followed but one inference, to wit, the judge thought there was

testimony tending to prove the plaintiff's case, and from which the jury might reasonably conclude a verdict for the plaintiff. Yet the judge could surely have said that much, and in such a case the plaintiff manifestly could not complain. The expression of doubt about the weight of plaintiff's proof, and the inference to be drawn from it, was no more than would have been the inference if the judge had simply said, "The motion is refused." And it is not possible to tell by the reported expression upon which side the judge inclined, if he inclined at all.

We are of the opinion that the expression was not unlawful; and the judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(101 S. C. 358)

JACKSON v. DUCKWORTH. (No. 9134.)
(Supreme Court of South Carolina. July 21, 1915.)

1. APPEAL AND ERROR \S 231 — REVIEW — PRESENTATION OF OBJECTIONS.

Where an order of reference was made, over defendant's objection which stated no grounds therefor, the order could not be reviewed on appeal, since questions not ruled upon by the presiding judge are not before the appellate court for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1299, 1352; Dec. Dig. \S 231.]

2. APPEAL AND ERROR \S 924 — DECISIONS REVIEWABLE—ORDER OF REFERENCE.

An order of reference being administrative and discretionary, and not appealable unless depriving appellant of a mode of trial to which he is entitled by law, where one appealing from such an order did not object to it when made, on the ground that it deprived him of such right, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2899, 3726, 3727; Dec. Dig. \S 924.]

Appeal from Common Pleas Circuit Court of Anderson County; Frank B. Gary, Judge.

Action by R. A. Jackson against E. M. Duckworth. From an order of reference, defendant appeals. Appeal dismissed.

A. H. Dagnall, of Anderson, for appellant. Greene & Earle, of Anderson, for respondent.

WATTS, J. [1] This is an action for foreclosure of a mortgage of real property, and defendant appeals from an order of reference made by his honor, Judge Frank B. Gary, by which all issues of law and fact were referred to probate judge as special referee. Defendant's attorney opposed the order when it was granted but did not in any manner specify on what grounds he objected. After order was granted, defendant appeals, and by three exceptions, which practically raise but one question, seeks reversal:

"Was it error for the court to refer case over objection to the referee to take testimony in this case upon all material issues raised in the

pleadings and report the same, together with his conclusions of law and his findings of fact, to this court with all convenient speed?"

It being contended by the appellant that this deprived him of a mode of trial to which he was entitled, to wit, a trial by the court. The record shows when the order was granted by his honor that it was "over objection of defendant's attorney." The defendant's attorney did not state the grounds of his objection.

[2] The appeal on this point is conclusively decided against the appellant in *Goodlett v. Goodlett*, 88 S. C. 460, 70 S. E. 437. In that case the order of reference was made in precisely the same manner as made here. That is, it was passed "over the objection of counsel opposing," and this court said:

"It will thus be seen that the grounds stated in the exceptions were not relied upon by the appellant, in the circuit court, and the presiding judge did not rule upon them. They are, therefore, not properly before this court for consideration. * * * There is another reason why the exceptions cannot be sustained. An order of reference is administrative in its nature, ordinarily discretionary, and not appealable unless it deprives the appellant of a mode of trial to which he is entitled by law; and the appellant did not object to said order when the motion was made, on the ground that it deprived him of such right."

Appeal dismissed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(101 S. C. 362)

McCLURE v. GOODWIN. (No. 9137.)
(Supreme Court of South Carolina. July 21, 1915.)

APPEAL AND ERROR §1022—REVIEW—FINDINGS.

Findings of fact by a master, concurred in by the trial judge, will not be disturbed on appeal unless clearly shown to be wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.]

Appeal from Common Pleas Circuit Court, Abbeville County; Thos. S. Sease, Judge.

Action by Paul W. McClure against C. T. Goodwin. From a judgment of foreclosure, defendant appeals. Affirmed.

Wm. N. Graydon, of Abbeville, for appellant. Grier, Park & Nicholson, of Greenwood, for respondent.

WATTS, J. This was an action to foreclose a mortgage on real property. The defendant by answer sets up payment. The case was referred to the master to hear and determine all issues of law and fact and report the same to the court. He found and reported at the date of his report there was due the plaintiff the sum of \$281.05. Exceptions were taken to this report, and upon these exceptions the case was heard by his honor, Judge Sease, who confirmed the report of the master, and from his honor's de-

cree defendant appeals upon questions of fact. The main contention in the case is as to when the mortgage, called the Aldrich mortgage, was credited on the mortgage held by the plaintiff, or whether it was ever credited, and also as to the credit of \$120, shown by a passbook, introduced in evidence by the defendant, and as to various other credits, which defendant claims should go as a credit on the mortgage in suit.

By reference to the exceptions it will be seen that not a single question of law is raised. The exceptions raise purely questions of fact which have been passed upon by the master concurred in by the trial judge. This court has often held that, in questions of fact found by the master and concurred in by the trial judge, it is incumbent upon the appellant to satisfy this court by the preponderance of the evidence that the finding of the circuit judge was erroneous. The appellant's counsel has so earnestly and seriously argued his exceptions that the findings of the master concurred in by the circuit judge were wrong, that the court has studied with the very greatest care his contentions and scrutinized carefully all of the testimony and calculations, and we fail to find that there was any error in the finding of the circuit court that the Aldrich mortgage was taken into consideration and credited at the time the new mortgage was given, and in his findings that credit had been given to the defendant for all payments made by him to which defendant was entitled, and the evidence conclusively warrants the master's findings concurred in by the trial judge. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, J., concur.

(101 S. C. 381)

SANDERS v. STANDARD WAREHOUSE CO. et al. (No. 9143.)

(Supreme Court of South Carolina. July 24, 1915.)

1. APPEAL AND ERROR §901 — REVIEW—FINDINGS—BURDEN OF SHOWING ERROR.

An appellant has the burden of showing that a finding of the referee, concurred in by the circuit judge, is against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. § 901.]

2. WAREHOUSEMEN §15 — WAREHOUSE RECEIPTS—NATURE OF—"NEGOTIABLE INSTRUMENT."

While a warehouse receipt is "negotiable" in the sense that, as between the warehouseman and successive holders, indorsement and delivery operates to transfer title to the property therein described if title was in the person to whom it was issued, yet the true owner cannot be deprived of his property because it has been deposited in a warehouse by another and the receipt has been negotiated to a third person, the

same rule applying in case of liens where the deposit is made by the true owner.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 31-34, 37; Dec. Dig. ¶ 15.]

For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

3. HUSBAND AND WIFE ¶129 — SEPARATE PROPERTY OF WIFE—RIGHT TO.

A wife may permit her husband to so use her lands that the crops grown thereon will be held to belong to him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 283, 468-470; Dec. Dig. ¶129.]

4. LIENS ¶15—SALE OF CROPS—EFFECT.

Where title to crops subject to a lien was claimed from different sources, the question is not one of notice, actual or constructive, but of which had title.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 20; Dec. Dig. ¶15.]

Appeal from Common Pleas Circuit Court of Orangeburg County; Ernest Moore, Judge.

Action by Preston B. Sanders against the Standard Warehouse Company and others and the Bank of Denmark and the Citizens' Exchange Bank. From the judgment in favor of plaintiff and the Bank of Denmark, the Citizens' Exchange Bank appeals. Affirmed.

J. Wesley Crum, Jr., of Denmark, S. C., for appellant. Glaze & Herbert, Moss & Lide, and Raysor & Summers, all of Orangeburg, for respondents.

HYDRICK, J. The questions presented by this appeal involve the rights and equities between the plaintiff the Bank of Denmark and the Citizens' Exchange Bank, of Denmark, in the funds arising from the sale of 16 bales of cotton, which was raised, in 1911, on three tracts of land, as follows: Seven bales, on a tract of 125 acres, owned by the Bank of Orangeburg, and rented by it to Mary I. Dewitt; four bales, on an adjoining tract of 35 acres, owned by Mary I. Dewitt; and five bales, on a tract rented from one Robinson by John Gary Dewitt. L. S. Dewitt is the husband of Mary I. Dewitt, and John Gary Dewitt is their son. L. S. Dewitt formerly owned the tract now owned by the Bank of Orangeburg. It is not stated how or when the bank acquired the title; but it seems that, after the bank acquired the title, Dewitt continued to live on it, renting it from the bank. At least, it is stated in the record that he so rented it in 1910, and that he lived on it in 1911. For reasons not stated, the bank refused to rent it to him in 1911, but rented it to his wife; the agent of the bank telling her that the bank would look to her for payment of the rent. The lease does not appear to have been in writing or recorded. L. S. Dewitt cultivated and managed it as his own, as he had done before. He made the contracts

with the subtenants and share croppers in his own name, and furnished the stock, fertilizers, and supplies for making the crops, telling them and others that the crops belonged to him, which, to all outward appearances, was true. On January 11, 1911, he gave the Bank of Denmark a mortgage on the crops to be grown thereon that year to secure his note for \$300 borrowed money. This mortgage was given with the knowledge and consent of Mary I. Dewitt. On February 14, 1911, he gave plaintiff a mortgage on the crops to be grown that year on a tract, described as "containing 125 acres, known as Mrs. L. S. Dewitt's," to secure his note for \$618 for fertilizers and supplies. On May 10, 1911, he gave plaintiff a mortgage on the crops to be grown that year on 15 acres, known as lands of the Bank of Orangeburg, to secure his note for the additional sum of \$102. These mortgages were all duly recorded and rank according to their date. There are certain details concerning them in the record which need not be noticed, as they are not material to the issues considered. On October 2, 1911, the 16 bales above mentioned were put in the warehouse of the Standard Warehouse Company by John Gary Dewitt, and the receipt therefor was taken in the name of Mary I. Dewitt. The son told the warehouseman that five bales of the cotton belonged to him and the balance to his mother; but, for convenience and to save bookkeeping, he consented that the whole receipt for the lot should be issued in his mother's name. On October 2, 1911, L. S. Dewitt took this receipt, which his wife indorsed, and pledged it to the Citizens' Exchange Bank, as security to his note for \$617.25 loaned him by the bank at that time. He also indorsed the receipt. Mary I. Dewitt and John Gary Dewitt released all claims to the cotton on condition of being released from any liability in this case. The referee to whom the issues were referred concluded that the mortgages to Bank of Denmark and plaintiff had priority—in the order named—over the claim of Citizens' Exchange Bank to so much of the fund as arose from the sale of cotton raised on lands of the Bank of Orangeburg, and plaintiff's mortgage for \$618 on the cotton raised on land of Mary I. Dewitt had priority over the claim of Citizens' Exchange Bank to that cotton, and overruled the defense of Citizens' Exchange Bank that it was a bona fide purchaser of the cotton for value, without notice of the prior mortgages, holding that the facts and circumstances known to the Citizens' Exchange Bank, at the time it made the loan and accepted the receipt, were sufficient to put it upon inquiry as to the ownership of the cotton and the mortgages thereon which, if pursued, would have revealed the truth. The circuit court concurred in and confirmed the findings and con-

clusions of the referee, and, from this judgment, Citizens' Exchange Bank appealed.

There are twenty exceptions, but appellant's attorney treated them, in his argument, as raising only four points for decision, and we shall consider these as stated by him.

[1] 1. "Mortgage of L. S. Dewitt to plaintiff, bearing date February 14, 1911, was intended to cover crops raised on the Bank of Orangeburg land, and not Mrs. Dewitt's."

This is a question of fact. The burden is therefore upon appellant to show that the concurrent finding of the referee and circuit judge is against the weight of evidence. The principal fact relied upon by appellant is that the land is described in the mortgage as containing 125 acres, which is the acreage of the tract owned by the Bank of Orangeburg, while the tract owned by Mrs. Dewitt contains only 35 acres. While this is true, the land is also described in the mortgage as a tract "known as Mrs. L. S. Dewitt's." The tract owned by the Bank of Orangeburg could hardly have been "known as Mrs. L. S. Dewitt's," for there is no testimony that it was ever owned by her, nor that it was even known, except by those immediately interested in the transaction, that she had rented it for that year. There is no testimony that the plaintiff knew it. Therefore the false description of the acreage does not outweigh the more certain description of the name of the owner.

[2] 2. "To defeat the rights of a bona fide holder for value of a negotiable instrument, something more is required than proof of facts and circumstances which merely give rise to suspicion, or which may be sufficient to put a prudent man on inquiry."

Appellant's error is in assuming that a warehouse receipt is a negotiable instrument, such as a negotiable promissory note or bill of exchange, and that the holder thereof is entitled to the same rights and presumptions as the holder of commercial paper. Such a receipt is negotiable in the sense that, as between the warehouseman and the successive holders of it, indorsement and delivery of it operates to transfer the title to the property therein described, if the title was in the person to whom it was issued. But certainly the true owner cannot be deprived of his property by the mere fact that it has been deposited in a warehouse by another to whom a receipt therefor has been issued. Nor will the mere fact of such deposit, even by the true owner, disturb existing liens thereon.

The purchaser of such a receipt occupies no better position than one who should buy the property described in it from one in possession of it. He gets no better title than the seller has. The ultimate question, then, is: Whose cotton was it? The circuit court found that it belonged to L. S. Dewitt, except the five bales of John Gary Dewitt, the proceeds of which appellant was held to be entitled to.

[3] Appellant errs in assuming that, because part of the cotton was raised on land of Mary I. Dewitt, the title thereto was in her. It does not always follow, either in law or in fact, that the owner of land is the owner of crops grown thereon. A wife may permit her husband to so use her lands that the crops grown thereon will be held to belong to him (*Reeder v. Flinn*, 6 S. C. 216; *McLure v. Lancaster*, 24 S. C. 273, 58 Am. Rep. 259; *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807); and this was done in this case.

[4] 3. "The mortgages given by L. S. Dewitt to plaintiff and the Bank of Denmark, even though recorded, are not constructive notice to the Citizens' Exchange Bank, because a record is only constructive notice to subsequent purchasers deriving titles from the same grantor."

The principle invoked is not applicable. To be sure, the record of a mortgage given by L. S. Dewitt of the property of Mary I. Dewitt would not be notice to the purchaser of the latter's property. But plaintiff and Bank of Denmark do not claim under Mary I. Dewitt. They claim under L. S. Dewitt, while appellant claims under Mary I. Dewitt. Where parties derive title from different sources, the question is not one of notice, actual or constructive, of the conflicting claims; but it is: Who has the title? Appellant's claim is equitable—by way of estoppel against the owner, but it cannot prevail over the legal title previously acquired from the true owner.

4. "Plaintiff and the Bank of Denmark, defendant, are estopped to claim the cotton stored in the warehouse as against the defendant Citizens' Exchange Bank."

This contention is based upon the assumption that Mary I. Dewitt was the owner of the cotton, which has already been disposed of.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 350)

BETHEA v. ALLEN. (No. 9132.)

(Supreme Court of South Carolina. July 16, 1915.)

1. MORTGAGES \Leftrightarrow 33—CONSTRUCTION OF INSTRUMENT.

A written instrument reading: "I, H., * * * in consideration of \$270.84 * * * paid by A., * * * do bargain, sell, and release all my right, title, and interest, together with the right of homestead, in the tract of land where I now live, * * * to the said A. and his heirs, until the above-named \$270.84, with interest from date, shall be returned to the said A. or his heirs," the obligation then to be void, and of no effect; "but, not paid during my natural life, the overplus of the value of the land to be equally divided between my two sisters"—was a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 67-82; Dec. Dig. \Leftrightarrow 33.]

2. WILLS \Leftrightarrow 88—CONSTRUCTION OF INSTRUMENT—DEED OR WILL.

An instrument providing that H., in consideration of her love and affection for her sisters, gave to them at her decease all the property that came to her from their parents, and if the sisters should die leaving no children, then, after paying for a set of tombstones at the grantor's grave, and all other debts and funeral expenses, H. gave the property to B., and to his children at his death, binding the grantor's heirs, administrators, and assigns "to warrant and defend the same with the above-described parties," was a deed, and not a will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 208-217; Dec. Dig. \Leftrightarrow 88.]

3. EJECTMENT \Leftrightarrow 139 — IMPROVEMENTS — RECOVERY—STATUTE.

Civ. Code 1912, § 3526, enacted in 1870, entitles a purchaser of lands and tenements which have been recovered from him to recover the value of improvements made by him or those under whom he claimed, if he or they supposed, at the time of purchase, that the title was good in fee, and provides that the recovery shall be had by separate action, which must be commenced within 48 hours after final judgment recovering the property, or during the term of court in which the same shall be rendered. Civ. Code 1912, § 3531, enacted in 1885, provides that a defendant in an action for the recovery of land, who may have made improvements believing that his title was good in fee, may set up in his answer his claim for betterments. Defendant in ejectment set up in his answer a claim for improvements made by those under whom he claimed. *Held*, that he could not recover therefor, since the act of 1885, providing that such a defendant might set up in his answer his claim for betterments made by himself, merely supplements, but does not supersede, the act of 1870 (14 St. at Large, p. 313), which regulated the matter of a claim for betterments made by the defendant's grantors, which provides for recovery only in separate action.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 468, 470-475, 477, 479-481; Dec. Dig. \Leftrightarrow 139.]

4. ACTION \Leftrightarrow 35—STATUTORY ACTION—EXCLUSIVENESS.

Where a new right is created by a statute, which also prescribes the remedy or method of enforcement, the statutory method is exclusive.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 273-294; Dec. Dig. \Leftrightarrow 35.]

Appeal from Common Pleas Circuit Court of Dillon County; R. W. Memminger, Judge.
Action by Benjamin P. Bethea against J.

Furman Allen. Judgment for plaintiff, and defendant appeals. Affirmed.

The instruments referred to in the opinion as a mortgage and deed, dated, respectively, April, 1872, and January, 1871, were, in order, as follows:

"State of South Carolina, Marion County.

"Know all men by these presents, that I, Elizabeth E. Henderson, of the state and county aforesaid, for and in consideration of the sum of two hundred and seventy and $\frac{84}{100}$ dollars to me in hand paid by Joel Allen, in making the shares of the estate land equal, do bargain, sell, and release all my right, title, and interest, together with the right of homestead, in the tract of land where I now live, containing one hundred and twenty-five acres, to the said Joel Allen and his heirs, until the above-named two hundred seventy and $\frac{84}{100}$ dollars (\$270.84), with interest from date, shall be returned to the said Joel Allen or his heirs, there the obligation to be void and of no effect; but, if not paid during my natural life, the overplus of the value of the said land to be equally divided between my two sisters, Laura J. Bethea and Maria L. Bethea.

"This the tenth day of April, 1872.

"Elizabeth E. Henderson. [L. S.]

"Signed, sealed and delivered in the presence of

"Elmore Allen.

"Maria L. Bethea."

"State of South Carolina, County of Marion.

"Know all men by these presents, that I, Elizabeth E. Henderson, for and in consideration of the natural love and affection I bear to my two sisters, Laura Jane Bethea and Maria L. Bethea, I give at my decease all the real and personal property that came to me from the estate of the late Parker Bethea and Elizabeth Bethea, his wife, and in case the said Laura Jane Bethea and Maria L. Bethea die leaving no children, then, after paying for a set of tombstones to be put to my grave and all other debts and funeral expenses, I give the above-described property to Benjamin P. Bethea, and to his children at his decease, to have and to hold, and I bind each and every one of my heirs and administrators and assigns to warrant and defend the same with the above-described parties.

"Given under my hand and seal this the 6th day of January, 1871.

"Elizabeth E. Henderson. [Seal.]

"Witness:

"Elmore Allen.

"G. W. Miles."

W. F. Stevenson, of Cheraw, for appellant.
Sellers & Moore, of Dillon, for respondent.

HYDRICK, J. On the first trial of this case on circuit and on the first appeal to this court (95 S. C. 479, 79 S. E. 639) the instruments executed by Elizabeth Henderson, dated January 6, 1871, and April 10, 1872, both of which will be reported, were assumed to be and treated as a deed and mortgage, respectively, by all parties, by the circuit court, and by this court. There was no allegation or suggestion that either should have any other construction. But, when a new trial was ordered by this court, defendant obtained leave on circuit to amend his answer, and allege that the instrument of January, 1871, was a will, and void for the want of proper attestation, and that the instrument of April, 1872, which he had, in his first answer, set

up as a mortgage, and sought foreclosure of it, was a deed of trust, under which his grantors, Laura Jane and Maria L. Bethca, were vested with the equitable title in fee to the land therein described, after payment by them of the debt which it was given to secure, and that he was entitled to be subrogated to their rights. The circuit court overruled both contentions, and held the instruments to be a deed and mortgage, and directed a verdict for the plaintiff on the issue of title, but submitted to the jury the issues of rents and improvements.

[1, 2] As respondent consented to the order allowing defendant to amend his answer, he waived his right to insist that the previous construction of the instruments of January, 1871, and April, 1872, as a deed and mortgage, is *res judicata*. We are nevertheless of the opinion that they were rightly so construed. While the instrument of January, 1871, has some features of a will, the more controlling features show that it was intended to operate as a deed. *Watson v. Watson*, 24 S. C. 228, 58 Am. Rep. 247, and authorities cited. The facts and circumstances were sufficient to show, *prima facie*, that this deed was delivered, and there was nothing to rebut this showing. There is no doubt that the paper of April, 1872, was intended as a mortgage. The provision therein that, in case of failure to pay the debt during the life of the mortgagor, the overplus of the value of the land was to be divided between her sisters in case of foreclosure, was intended out of abundance of caution to secure to them their rights under the deed of January, 1871, in the event of the foreclosure of the mortgage. This provision was not intended to convey to the sisters any interest in the land, after payment of the mortgage debt, but only in "the overplus of the value of the said land," and by its terms the instrument was "to be void and of no effect" upon payment of the debt, and the debt was paid.

[3] Defendant set up in his answer a claim for betterments, alleging that he believed, when he bought the land and when he made the improvements, that his title was good in fee. The court instructed the jury that he was entitled to recover for only such improvements as were made by him in good faith, believing at the time he made them that he had a good title in fee. In this there was no error. The right to recover for betterments is statutory, and the procedure prescribed by the statute must be followed. Our betterment acts were passed at different times, and they provide for the recovery of betterments under different circumstances, and each prescribes the manner in which the right therein given shall be enforced.

The act of 1870 (14 St. at Large, p. 313), now section 3526, Civ. Code 1912, entitles the purchaser of lands and tenements, which have been recovered from him, to recover the val-

ue of all improvements made by him, or those under whom he claims, if he or they supposed, at the time of the purchase, the title to be good in fee. Under the terms of this statute, one from whom lands and tenements have been recovered can recover, not only for all improvements made by himself, but also for such as were made by those under whom he claims, and even for such as were made after knowledge of title in another, provided he or his grantors supposed, at the time of the purchase, that the title was good in fee. *Templeton v. Lowry*, 22 S. C. 389. But that statute expressly prescribes that such recovery shall be had "in the manner hereinafter provided," and then it provides in detail the manner of recovery, to wit, by separate action, which must be commenced within 48 hours after final judgment recovering the lands and tenements, or during the term of court in which the same shall be rendered. It has been held, therefore, that a defendant could not set up in his answer, in an action to recover lands and tenements from him his claim for betterments, made by those under whom he claimed. *Aultman v. Utsey*, 41 S. C. 304, 19 S. E. 617. But the same claim, prosecuted by separate action according to the provisions of the act of 1870, was sustained. *Salinas v. Aultman*, 45 S. C. 283, 22 S. E. 889.

The statute of 1885 (19 St. at Large, p. 343), now section 3531, Civ. Code 1912, provides that the defendant in an action for the recovery of land, who may have made improvements thereon, believing at the time he made them that his title was good in fee shall be allowed to set up in his answer his claim for betterments. This statute did not supersede that of 1870, but supplemented it (*Tumbleston v. Rumph*, 43 S. C. 275, 21 S. E. 84), and therefore under it a defendant, in an action to recover land, cannot set up in his answer a claim for improvements made by those under whom he claims (*Aultman v. Utsey*, supra); but by the terms of the statute he is allowed to set up in his answer his claim only for such improvements as he himself made, believing at the time he made them that his title was good in fee (*McKnight v. Cooper*, 27 S. C. 94, 2 S. E. 842; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706). If a defendant would set up a claim for improvements made by those under whom he claims, or by himself, under the supposition at the time of the purchase that the title was good in fee, he must do so by separate action, under the provisions of the act of 1870 (section 3526 et seq., Civ. Code 1912).

[4] There may be no sound reason for this apparently technical distinction between the different claims and the methods of enforcing them, and it may be conceded that it is difficult to see why a defendant should not be allowed to set up in his answer all the claims to betterments to which he may be entitled under either statute; but the law was so

written by the lawmakers, and it has been so construed by this court in the decisions above cited. The power to amend or extend a statute rests solely with the Legislature. The general rule is that, where a new right is created by a statute, which also prescribes the remedy or method of enforcing the right, the method prescribed by the statute is exclusive. *Kennedy v. Reames*, 15 S. C. 548.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 364)

PEIPER v. SHAHID. (No. 9133.)

(Supreme Court of South Carolina. July 21, 1915.)

1. GUARDIAN AND WARD §118—ACTION BY GUARDIAN — FORM OF SUMMONS AND COMPLAINT.

An action by the guardian of an infant for personal injuries to his ward must be brought in the name of the infant by his guardian.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 411-418; Dec. Dig. §118.]

2. PARTIES §95—PLEADING—AMENDMENT.

Where the guardian of an infant brought an action for personal injuries to his ward improperly in his own name as guardian ad litem, the trial court could have allowed amendment of the caption of the summons and complaint to render them proper.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 160-166; Dec. Dig. §95.]

3. APPEAL AND ERROR §1178—DISPOSITION — REVERSAL ON TECHNICAL GROUNDS.

Where the guardian of an infant sued for personal injuries to his ward, improperly styling the action as brought by him as guardian, instead of by the ward by him as guardian, on appeal from overruling of defendant's demurrer to the summons and complaint, the court, instead of dismissing the case on the technical ground, would reverse and remand in order that the plaintiff might apply for amendment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. §1178.]

Gary, C. J., and Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Charleston County; Frank B. Gary, Judge.

Action by W. H. Pieper, as guardian ad litem of Violet A. Pieper, against Joseph Shahid. From an order overruling his demurrer to the complaint, defendant appeals. Reversed and remanded.

Huger, Wilbur & Guerard, of Charleston, for appellant. Hagood & Rivers, of Charleston, for respondent.

WATTS, J. This was an action for damages for personal injuries commenced by service of a summons and complaint, and attachment of an automobile under the law in such cases made and provided. After service of summons and complaint, defendant's attorney filed a demurrer thereto on the ground that it did not state facts to constitute a

cause of action, in that it does not appear on the face of the complaint that plaintiff suffered any damages by reason of the acts of negligence alleged in the complaint. Upon the hearing of the demurrer, the circuit judge overruled the same, and defendant appealed.

The contention of the defendant in substance being that the title of the cause, instead of being W. H. Pieper as guardian ad litem for Violet A. Pieper, should have been Violet A. Pieper by her guardian ad litem W. H. Pieper, and because of this difference in form, notwithstanding the fact that the body of the complaint clearly shows in what capacity W. H. Pieper is connected with the suit, and also shows that Violet A. Pieper was the party injured, and because of difference in form of title of the cause, the substance set out in the complaint must be overlooked, and demurrer sustained and complaint dismissed.

[1] We are of opinion that the exceptions must be sustained. As was said in *McCreight & McCreight v. Aiken*, 3 Hill, 338:

"The legal relation of a committee to a lunatic is analogous to that of a guardian to his ward. For any trespass to the person or property of a minor, an action must be brought in his name by his guardians, and why should not an action be brought in the same way for a trespass on the person or property of a lunatic?"

"It seems to be settled in South Carolina that in an action at law for the recovery of the property of a lunatic, or damages for its detention, the action must be brought in the name of the lunatic by his committee, as in such action he only can recover who has the legal title." *Cathcart v. Sugenhimer*, 13 S. C. 128.

On the same principal and analogous thereto are the decisions:

"That in making a deed under power of attorney it must be made in the name of the principal and not in the name of the attorney." *Pryor v. Coulter*, 1 Bailey, 517; *Welch v. Parish*, 1 Hill, 155; *Welch v. Usher*, 2 Hill, Eq. 167, 29 Am. Dec. 63; *Webster v. Brown*, 2 S. C. 428; *De Walt v. Kinard*, 19 S. C. 287; *Johnson v. Johnson*, 27 S. C. 311, 3 S. E. 606, 13 Am. St. Rep. 636.

[2] At the same time, we are of the opinion that, if an application had been made to the circuit judge to amend the captions of summons and complaint, he would have allowed the amendment, and he certainly had the power to do so under *Bank v. Eford*, 96 S. C. 18, 79 S. E. 637.

[3] The spirit of this court is opposed to dismissals of cases on technical grounds and at the sacrifice of substance and substantial rights of parties litigants involved, and for this reason, while the judgment must be reversed, the cause will be remanded in order that the plaintiff may be allowed to apply for an amendment to her pleadings and by a simple transposition of words make the pleadings Violet A. Pieper by her guardian ad litem, W. H. Pieper, instead of W. H. Pieper, as guardian ad litem of Violet A. Pieper, the ends of justice will be attained by this, and the defendant will be fully advertised that

he is to contest an alleged claim for injuries inflicted upon Violet A. Pieper, by alleged acts of negligence on his part.

Reversed and remanded.

HYDRICK and GAGE, JJ., concur.

GARY, C. J. (dissenting). This is an appeal from an order overruling a demurrer to the complaint. The action is for damages alleged to have been sustained by Violet A. Pieper through the wrongful acts of the defendant. The complaint alleges:

"That W. H. Pieper aforesaid was duly appointed the guardian ad litem of Violet A. Pieper, a minor, by the clerk of the court of common pleas for Charleston county, and authorized to bring this action in her behalf."

It also alleges that Violet A. Pieper is the daughter of the said W. H. Pieper, and that both were injured, especially the daughter, through the negligence and recklessness of the defendant in operating his automobile.

The defendant demurred to the complaint on the sole ground:

"That it appears upon the face of the complaint that the same does not state facts sufficient to constitute a cause of action, in that it does not appear that the plaintiff suffered any damage by reason of the acts of negligence alleged in the complaint."

His honor, the presiding judge, made the following order:

"This matter came on to be heard by me on a demurrer to the complaint, on the ground that said complaint did not state facts sufficient to constitute a cause of action. After hearing arguments by Messrs. Huger, Wilbur & Guerard, attorneys for the defendant, and Messrs. Hagood & Rivers, attorneys for the plaintiff, it is ordered that the demurrer be, and the same is hereby, overruled, and that the defendant have ten days from the date of this order, in which to answer."

The defendant appealed upon the following exceptions:

First. "Because his honor, the presiding judge, erred in overruling the demurrer, because it appears upon the face of the complaint that the complaint states no cause of action against the defendant in favor of the plaintiff, in that the complaint alleges that the acts of defendant's negligence caused damage to a person not a party to this action, and not that the said acts of negligence caused damage to the plaintiff."

Second. "Because his honor, the presiding judge, erred in not holding that a guardian ad litem has no power to maintain an action in his capacity as guardian, on behalf of an infant for personal injuries done to said infant, whereas he should have held that such action should have been brought in the name of the infant, appearing by her guardian ad litem."

Third. "Because his honor, the presiding judge, erred in not holding that the infant, Violet A. Pieper, the person who, according to the allegations of the complaint, suffered all the damages complained of, was not a party to the action."

Section 194 of the Code of Civil Procedure is as follows:

"The defendant may demur to the complaint when it shall appear upon the face thereof, either: (1) That the court has no jurisdiction of the person of the defendant or the subject of the action; or (2) that the plaintiff has not legal

capacity to sue; or (3) that there is another action pending between the same parties, for the same cause; or (4) that there is a defect of parties, plaintiff or defendant; or (5) that several causes of action have been improperly united; or (6) that the complaint does not state facts sufficient to constitute a cause of action."

Section 195 of the Code of Civil Procedure provides that:

"The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so it may be disregarded."

The only ground of demurrer upon which the defendant relied in the circuit court was that it did not appear that the plaintiff suffered any damage by reason of the acts of negligence alleged in the complaint.

As we have already stated, the complaint not only alleges that Violet A. Pieper, but also her father, W. H. Pieper, sustained injury, at the same time, through the negligence and recklessness of the defendant. Furthermore, it does not appear from the record that his honor, the circuit judge, was requested to rule, or that he made any ruling, upon the objections specified in the exceptions. Therefore they are not properly before this court for consideration. Nor does it appear anywhere in the record that the defendant relied upon the fourth ground of demurrer, to wit, "that there was a defect of parties plaintiffs," nor that the circuit judge was requested to rule upon such objection. As this objection was not specified, it was waived.

The appeal is based upon an exceedingly technical ground, and it is very probable that, if a motion had been made to amend the complaint, the irregularity in question would have been cured, and the delay in the administration of the law been thereby prevented.

For these reasons I dissent.

FRASER, J. I concur. It seems to me that section 227, Code of Civil Procedure 1912, is broad enough to cover this case.

(101 S. C. 373)

DUNCAN v. McDUGAL. (No. 9141.)
(Supreme Court of South Carolina. July 24, 1915.)

TRIAL \S 29—CONDUCT OF COURT AND COUNSEL—PRIVATE CONFERENCE.

Where the court, at the close of plaintiff's evidence, the defendant announcing that he would go to the jury on the plaintiff's testimony, retired to the judge's room with a stenographer to read over the evidence to him, while considering plaintiff's motion for directed verdict, and thereafter called defendant's attorney into the room, stating that it appeared to him, after refreshing his memory on the evidence, that probably he should direct a verdict for plaintiff, whereupon counsel for the defendant asked that he be allowed to make a motion to put in evidence for the defendant, which was done upon the court's return to the bench, such private conference between the court and counsel for the defendant, while a practice not to be followed,

did not entitle plaintiff to a directed verdict at the close of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.]

Appeal from Common Pleas Circuit Court of Berkeley County; C. J. Ramage, Special Judge.

Action by John Duncan against John M. McDougal. Verdict for defendant, and plaintiff appeals. Case remanded, with instructions.

Smythe & Visanska and Octavus Cohen, all of Charleston, for appellant. W. A. Holman, of Charleston, and E. J. Dennis, of Moncks Corner, for respondent.

GARY, C. J. This is an action to recover damages for trespasses upon land, of which the plaintiff alleges he was seized and possessed, containing 288 acres, which was purchased in 1867 by David McDougal, who died in 1900, leaving a last will and testament which was duly probated, whereby he devised the said tract of land to John Duncan, the original plaintiff in this action. The complaint contains the following allegations:

"That previous to the death of the said David McDougal, and at the time of his death, the said David McDougal was living on, and occupying, the said property, and that the defendant, John M. McDougal, his son, was living with him in the house on the said property, as a member of his family. That after the death of the said David McDougal, the plaintiff entered into possession of the said property, and still continues in such possession, planting a portion of the same. That plaintiff is a brother-in-law of the defendant, having married his sister, and out of kindness to the said defendant permitted him to occupy the house on the said property, and to cultivate a small portion of the land. That this permissive occupation by the defendant of part of the said land continued until about the year 1910, at which time plaintiff learned that defendant had been trespassing on said property, cutting down timber, making it into cross-ties, converting it to his own use, and selling the same without the permission of the plaintiff, and without accounting to him for the value thereof."

The prayer of the complaint is as follows:

"That the defendant do account for the number of trees cut and converted by him to his own use from said property, as aforesaid, and the value thereof, and that upon such accounting being had, plaintiff have judgment against defendant for the value of said timber so cut and removed from said property. (2) That the defendant be enjoined from further trespassing on the said property, or from continuing in occupation of any part of it."

The defendant, in his answer, denies certain allegations of the complaint, and says that he admits that he has occupied the premises in question for a number of years past, and is now in possession of same, doing as he has done all during his occupation of same, exercising all rights of ownership over the property, and denies that his said occupation was permissive. He then interposes the following as a defense:

"That he, together with the other heirs of the late David McDougal, are the owners in fee

of the property in dispute; that he has been in the adverse possession of the said premises for more than 10 years, claiming the same as the property of the heirs of the said David McDougal, exercising all rights of ownership over the same for said 10 years or more, paying the taxes in the name of the estate of David McDougal, cultivating and otherwise using the same as the property of John M. McDougal, and generally as the property of the heirs of the late David McDougal."

The jury rendered the following verdict:

"We find a verdict for the defendant, John M. McDougal, and the heirs"

—and the plaintiff appealed.

The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing to direct a verdict in favor of the plaintiff, at the close of the testimony. The record contains the following statement:

"At the conclusion of plaintiff's testimony, the defendant announced that he would offer no evidence, but would go to the jury on the testimony as offered by the plaintiff; that the plaintiff then made a motion to direct a verdict upon the grounds set out in the record, and argued said motion; his honor, the presiding judge, announced that he would take the matter of direction of verdict under advisement during the presentation of the case by the plaintiff's attorney, Mr. A. T. Smythe, Jr. The presiding judge during the argument retired to the judge's room and called the stenographer with him. The stenographer read over the testimony to the judge. Mr. Holman was asked into the room and the judge stated that it appeared to him, after refreshing his memory on the evidence, that probably he should direct a verdict, whereupon Mr. Holman asked that he be allowed to make a motion, to put in evidence for the defendant. The judge returned to the bench, and Mr. Holman made a motion in open court to be allowed to introduce testimony, whereupon Mr. Smythe objected to the granting of this motion. The judge ruled that in his discretion he had a right to open the case and allow the testimony to be submitted, and did so, after hearing argument on the matter. The defendant then offered testimony as set out in the brief, plaintiff offered testimony in reply, and thereafter the case was fully argued and discussed before the jury, and the judge, at the conclusion of argument on both sides, delivered his charge, and the jury found a verdict for the defendant."

We proceed to the consideration of the question whether there was error on the part of his honor, the circuit judge, in refusing to direct a verdict in favor of the plaintiff, by reason of the fact that the stenographer and the defendant's attorney were present in his room by his invitation, but without the invitation being also extended to the plaintiff's attorneys to be present during the consideration of said question. His honor, the circuit judge, who was presiding in that case by special appointment, and the defendant's attorney are well known to the court, and it has no hesitation in stating that they are of high character, and that there was no intention on the part of his honor, the circuit judge, to give the defendant's attorney any advantage whatsoever over his opponent, nor was there any intention on the part of the defendant's attorney to transcend, in any re-

spect, the ethics of the profession, when he answered the call of the circuit judge to come to his room. It was a mere inadvertence on the part of his honor, the presiding judge, and, of course, such a practice is not to be followed. While the plaintiff was not entitled to a directed verdict on this ground, nevertheless, after careful consideration of the exceptions, our conclusion is that the plaintiff was entitled to a directed verdict on the other facts in the case. *Pee Dee Naval Stores Co. v. Hamer*, 92 S. C. 423, 75 S. E. 695.

It is the judgment of this court that the case be remanded, with instructions to the clerk of the court of Berkeley county to enter up judgment in favor of the plaintiff, for the land sued for without any damages, if plaintiff so desires, or that it be remanded to the circuit court with instruction that the circuit court direct a verdict in favor of the plaintiff, for land sued for, and that the question of damages be submitted to a jury.

WATTS, FRASER, and GAGE, JJ., concur.
HYDRICK, J., concurs in the judgment.

(101 S. C. 378)

HOLLIDAY v. PEGRAM et al. (No. 9142.)
(Supreme Court of South Carolina. July 24, 1915.)

1. APPEAL AND ERROR ¶870 — QUESTIONS REVIEWABLE—ORDER REFUSING TO STRIKE MATTER FROM PLEADING.

An order refusing to strike redundant matter from a pleading, while not immediately appealable, will be reviewed on appeal from the final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3487-3489, 3491-3512; Dec. Dig. ¶870.]

2. USE AND OCCUPATION ¶8—PLEADING—“QUANTUM MERUIT.”

Where all the terms of a contract of rental are agreed upon except the rent, in a suit to recover the rental, necessarily on a “quantum meruit,” a contract implied by law, it is proper to allege the terms of the contract so far as agreed upon.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 24; Dec. Dig. ¶8.

For other definitions, see Words and Phrases, First and Second Series, Quantum Meruit.]

3. USE AND OCCUPATION ¶9—EVIDENCE.

Where defendants were sued for the rental of a tobacco warehouse, the suit being on a quantum meruit because through the parties' failure to agree on details no completed contract of lease was made, it was proper to admit defendants' letters agreeing to pay \$850 as rent, as tending to prove one of the elements of the contract agreed upon.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 25; Dec. Dig. ¶9.]

4. EVIDENCE ¶222—ADMISSIONS.

Where defendants were sued for the rental of a tobacco warehouse, the suit being on a quantum meruit because through the parties' failure to agree on details no completed contract of lease was made, it was proper to admit defendants' letters agreeing to pay \$850 as rent,

as admissions tending to prove a reasonable rent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 786-800, 803-808; Dec. Dig. ¶222.]

Appeal from Common Pleas Circuit Court of Florence County; C. J. Ramage, Special Judge.

Action by J. W. Holliday against G. H. Pegram and C. W. Payne, copartners as G. H. Pegram & Company. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 94 S. C. 292, 77 S. E. 1014.

J. W. Ragsdale and Whiting & Baker, all of Florence, for appellants. Willcox & Willcox, of Florence, for respondent.

HYDRICK, J. At first, plaintiff sued on contract to recover the rent due for the use of a warehouse. A directed verdict for plaintiff was reversed on the ground, besides others, that the court erred in holding that the letters introduced to prove the contract made a complete contract. 89 S. C. 73, 71 S. E. 367, Ann. Cas. 1913A, 33. The case was remanded for a new trial, which was had without amendment of the complaint; plaintiff still suing upon contract. On the second trial, the court directed a verdict for defendants on the ground that the evidence failed to prove a contract. This was affirmed, with leave to plaintiff to amend his complaint and set up a cause of action based on quantum meruit. 94 S. C. 292, 77 S. E. 1014. Accordingly, plaintiff amended, alleging, in paragraph 2, that he and defendants entered into negotiations for the lease of the warehouse, “and that as a result of such negotiations plaintiff agreed to lease the property in question for the tobacco warehouse season of 1910, and defendants agreed to occupy same and to pay plaintiff therefor on September 1, 1910, as rent for the period mentioned, the sum of eight hundred and fifty (\$850.00) dollars.” In paragraph 3, he alleged that, pursuant to such negotiations, defendants took possession of and used the warehouse for the season of 1910, but, on account of their failure to agree upon certain details, no completed contract was made; and, in paragraph 4, he alleged that the reasonable rental value of the warehouse was “the price agreed upon in the negotiations aforesaid, to wit,” \$850, for which sum he demanded judgment. Defendants moved to strike out the words in quotations in paragraphs 2 and 4 as irrelevant and redundant. The motion was refused. From judgment for plaintiff, defendants appealed.

[1] Respondent objects to the consideration of the first ground of appeal—the refusal of the motion to strike out—on the ground that the refusal of such a motion is not appealable. The authorities cited by him show that, while an order refusing to strike out is not immediately appealable, it will be reviewed on appeal from the final judgment.

[2] But there was no error in refusing the motion. It frequently happens that some of the terms of an incomplete contract are agreed upon, for instance, all the terms of a contract of rental or sale, except the price. In such case, the action could not be upon contract, because a complete contract was not made; but it would have to be on quantum meruit—a contract implied by the law—in which, however, it is proper to allege the terms of the contract so far as they were agreed upon.

[3, 4] Nor was there error in admitting defendants' letters in which they agreed to pay \$850 as rent for the warehouse. They tended to prove one of the elements of the contract that had been agreed upon; and, even if the price had not been agreed upon, they would have been admissible as admissions of defendants tending to prove a reasonable price.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(143 Ga. 711)

ALMAND et al. v. PATE et al. (No. 455.)
(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1078—ASSIGNMENTS OF ERROR—ABANDONMENT.

Assignments of error, which are not urged in the brief of counsel for the plaintiff in error, will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. \S 1078.]

2. CONSTITUTIONAL LAW \S 46—CONSTITUTIONALITY OF STATUTE—DETERMINATION.

Grounds of attack upon the constitutionality of a statute, which do not point out the provision of the Constitution alleged to have been violated, will not be considered.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. \S 46.]

3. DRAINS \S 67—DRAINAGE DISTRICT ASSESSMENTS—VALIDITY OF STATUTE—"TAX."

The act approved August 19, 1911 (Acts 1911, p. 108), authorizing the creation of drainage districts, in which lands are to be drained, where necessary to the public welfare, and the appointment of commissioners, and conferring authority on them to levy assessments on the property specially benefited, to defray the cost of the improvement, does not contemplate the levy of a tax within the meaning of the Constitution, and is not unconstitutional for the reasons specified in the third division of the opinion, which are predicated on the assumption that the act authorizes the levy of a tax.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 73, 76, 91; Dec. Dig. \S 67.]

For other definitions, see Words and Phrases, First and Second Series, Tax.]

4. DRAINS \S 2—DRAINAGE DISTRICTS—POLICE POWER—VALIDITY OF STATUTE.

The statute mentioned in the preceding note contemplates the drainage of lands only in instances where it is necessary to the public welfare. It is within the police power of the state to enact such a law.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17; Dec. Dig. \S 2.]

5. DRAINS \S 67—DRAINAGE DISTRICTS—ASSESSMENTS—BONDS—VALIDITY OF STATUTE.

In so far as the act mentioned in the preceding notes authorizes assessments against property specially benefited by the improvement, and after such assessments to issue bonds payable only from the proceeds of such assessments, the act does not offend the provision of the Constitution restricting the power of political divisions of this state to create debts.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 73, 76, 91; Dec. Dig. \S 67.]

6. QUESTION OF ESTOPPEL.

The rulings announced in the preceding notes render it unnecessary to deal with the question of estoppel.

Error from Superior Court, Gwinnett County; Geo. L. Bell, Judge.

Action by A. J. Almand and another against T. A. Pate and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

An act of the Legislature was approved August 19, 1911, providing for the establishment of a system of drainage, and means for carrying into effect the requirements of the act. Acts 1911, p. 108 et seq.; Park's Code, § 439 (a) et seq. Under the provisions of the act a drainage district was established, which embraced portions of two counties. Assessments were made upon the several properties to be benefited by the improvement, for the purpose of raising funds to pay the cost of making the improvement. Some of the landowners having failed to pay their assessments, bonds were issued and sold under the provisions of the act. Levees and drains were constructed for the drainage of lands within the district. The commissioners were proceeding to enforce collection of the assessments, when A. J. Almand and T. O. McElroy, owners of property within the district, instituted an action against the commissioners and the tax collector, to enjoin collection of the assessment. Numerous grounds were relied on for the grant of the relief, among them being that the provisions of the act in regard to the establishment of the district and of the execution of the bonds had not been complied with, and that the act was unconstitutional. The defendants filed a demurrer and an answer. In the latter it was urged that on account of certain conduct upon the part of the plaintiffs they were "estopped from raising any question as to the legality of said act or as to the constitutionality of said act, and * * * from raising any of the questions sought to be raised in their petition in this case." On an interlocutory hearing the case was submitted to the judge, without evidence, upon the following agreement, signed by the respective counsel for the parties:

"It is agreed that the constitutionality of the Drainage Act of 1911 (Acts 1911 p. 108), and the question of estoppel, under the pleadings in this case, be submitted to and passed on by the court at the present time, eliminating all other questions for the present, except the constitutionality of the act and the defense of estoppel."

The judge rendered a decision as follows:

"This case coming on to be heard, and after hearing and considering the same, and counsel agreeing that only two questions be submitted to the court at this time, to wit, the constitutionality of the act of 1911, known as the Drainage Act, approved August 19, 1911, and the question of estoppel: It is ordered and adjudged by the court that said act is valid, and does not violate or contravene the Constitution of the United States, nor the Constitution of the state of Georgia, as contended by the plaintiff, and that the defendants may plead estoppel. This interlocutory injunction is denied, and the restraining order heretofore granted dissolved."

The plaintiffs excepted.

Section 2 of the act—Park's Code, § 439

(b)—relates to procedure for the establishment of drainage districts. It is required that application for the establishment of the drainage districts be filed, and that the application describe the specific body or district of land in the county and adjoining counties in such way as to convey an intelligent idea as to the location of the land, and show that the land is subject to overflow or too wet for cultivation, and that—

"public benefit, or utility, or the public health, convenience, or welfare will be promoted by draining, ditching, or leveeing the same, or by changing or improving the natural watercourses, and setting forth therein, as far as practicable, the starting point, route, and terminuses, and lateral branches, if necessary, of the proposed improvement."

After the filing of the application, other procedure is prescribed, in section 2 and subsequent sections, for the establishment of the district and for draining the lands in the district. In section 12—Park's Code, § 439 (l)—it is provided:

"It shall be the duty of the engineer and viewers to personally examine the land in the district and classify it with reference to the benefit it will receive from the construction of the levee, ditch, or watercourse, or other improvement. In case of drainage, the degree of wetness of the land, its proximity to the ditch or a natural outlet, and the fertility of the soil shall be considered in determining the amount of benefit it will receive by the construction of the ditch. The land benefited shall be separated in five classes. The land receiving the highest benefit shall be marked 'Class A,' that receiving the next highest benefit 'Class B,' that receiving the next highest benefit 'Class C,' that receiving the next highest benefit 'Class D,' and that receiving the smallest benefit 'Class E.' The holdings of any one landowner need not * * * be all in one class; but the number of acres in each class shall be ascertained, though its boundary need not necessarily be marked on the ground or shown on the map. The total number of acres owned by one person in each class, and the total number of acres benefited, shall be determined. The total number of acres of each class in the entire district shall be obtained and presented in tabulated form. The scale of assessment upon the several classes of land returned by the engineer and viewers shall be in the ratio of five, four, three, two, and one; that is to say, as often as five mills per acre is assessed against the land in 'Class A,' four mills per acre shall be assessed against the land in 'Class B,' three mills per acre in 'Class C,' two mills per acre in 'Class D,' and one mill per acre in 'Class E.' This shall form the basis of the assessment of benefits to the lands for drainage."

This is followed by provisions for hearings to be afforded any property owners who may not be satisfied with the classifications of their property, or who may claim that their property is not benefited by the improvement. Section 31—Park's Code, § 439 (ee)—of the act provides:

"After the classification of the land and the ratio of assessment of the different classes to be made thereon has been confirmed by the court, the drainage commissioners shall prepare an assessment roll or drainage tax duplicate, giving a description of all the land in said drainage district, the name of the owner, so far as can be ascertained from the public records, and the amount of assessment, against each of the several tracts of land. In preparing this assessment roll the board shall ascertain the total costs of the improvement, including the damages awarded and to be paid to the owners of land, and all incidental expenses, and deduct therefrom any special assessment made against any railroad or highway, and the remainder shall be the amount to be borne and paid by the lands benefited. This amount shall be assessed against the several tracts of land according to the benefit received, as shown by the classification and ratio of assessment made by the viewers and confirmed by the board of drainage commissioners. This drainage tax roll shall be made in duplicate, signed by the chairman and secretary, and one copy filed with the drainage record and the other delivered to the sheriff or other county tax collector. There shall be appended an order to collect the said assessments, and the same shall have the force * * * of a judgment as in the case of state and county taxes."

Section 32—Park's Code, § 439 (ff)—provides:

"If the total cost of the work is less than an average of twenty-five cents per acre on all the land in the district, the assessment made against the several tracts shall be collected in one installment, by the same officer and in the same manner as state and county taxes are collected, and payable at the same time. In case the total assessment exceeds the average of twenty-five cents per acre on all lands in the district the said board of drainage commissioners may give notice of three weeks by publication in some newspaper of general circulation in the district, if there be one, and also by posting a written or printed notice at the door of the courthouse and at five conspicuous places in the drainage district, that they propose to issue bonds for the construction of said improvement, giving the amount of bonds to be issued, the rate of interest they are to bear, and the time when payable. Any landowner having lands assessed in the district and not wanting to pay interest on the bonds may, within thirty days after the publication of said notice, pay the county treasurer the full amount of his assessment and have his land released therefrom."

Section 33—Park's Code, §§ 439 (gg), 439 (hh)—provides:

"Each and every person owning land in the district, which is assessed for the construction of an improvement, who shall neglect or fail to pay the full amount of his assessment to the county treasurer within the time specified, shall be deemed as consenting to the issuing of said drainage bonds, and in consideration of the right to pay his assessment in installments he thereby waives his right to any defense against the collection of said assessment because of an irregularity, illegality, or defect in the proceedings prior to this time, except in the case of an appeal as heretofore provided, which is not affected by this waiver. The term 'person,' as

used in this act, includes any firm, company, or corporation."

Section 34—Park's Code, § 439 (11)—provides:

"At the expiration of the thirty days after the publication, the board of drainage commissioners may issue bonds for the full amount of the assessment not paid in to the county treasurer, together with * * * interest thereon, costs of collection, or incidental expenses. These bonds shall bear six per cent. interest per annum, payable annually, and shall be paid in ten annual installments. The first installment of the principal shall mature at the expiration of three years from the date of issue, and one installment each succeeding year for nine additional years. The commissioners may sell these bonds at not less than par, and devote the proceeds to the payment of the work as it progresses. In no case shall bonds be issued until the tax levy has been made to meet them as they come due. The bonds issued shall be for the exclusive use of the levee or drainage district specified on their face, and should be numbered by the board of drainage commissioners, and recorded in the drainage record, which record shall set out specifically the lands embraced in the district on which the tax has not been paid in full, and which land is assessed for the payment of the bonds issued and * * * interest thereon. This assessment shall constitute the first and paramount lien, second only to the state and county taxes, upon the lands assessed for the payment of said bonds and the interest thereon as they become due, and shall be collected in the same manner by the same officers as the state and county taxes are collected. If any installment of principal or interest represented by * * * said bond shall not be paid at the time and in the manner when the same shall become due and payable, and such default continue for a period of six months, the holder or holders of such * * * bonds, upon which default has been made may have a right of action against said drainage district or the board of drainage commissioners of said district, wherein the court may issue a writ of mandamus against the said drainage district, its officers, including the tax collector and treasurer, directing the levying of a tax or special assessment as herein provided, and the collection of same, in such sum as may be necessary to meet any unpaid installments of principal and interest and costs of action; and such other remedies as are hereby vested in the holder or holders of such bond or bonds in default as may be authorized by law; and the right of action is hereby vested in the holder or holders of such bond upon which default has been made, authorizing them to institute suit against any officer on his official bond, for failure to perform any duty imposed by the provisions of this act. The official bonds of the tax collector and county treasurer shall be liable for the faithful performance of the duties herein assigned them. Such bonds may be increased by the board of county commissioners."

The other material facts appear in the opinion.

L. B. Norton, of Lithonia, J. T. Moore, of Jackson, and O. M. Duke, of Flowilla, for plaintiffs in error. I. L. Oakes, of Lawrenceville, for defendants in error.

ATKINSON, J. [1, 2] 1, 2. The grounds of attack upon the constitutionality of the act are set forth in the petition. Some of them are not urged in the brief of counsel for the plaintiffs in error. Under the practice in this court, these will be treated as abandoned.

Others do not point out what provision of the Constitution is violated. These will not be considered. *Morton v. Nelms*, 118 Ga. 786 (45 S. E. 616).

[3] 3. The act authorizes the establishment of drainage districts throughout the state, under certain circumstances, and provides for the appointment of commissioners who are clothed with authority to carry into effect the provisions of the act. Among the powers conferred was the power to levy assessments against property to be benefited by the drainage, for its pro rata amount of the cost of the improvement. Assessments of this character are radically different from ad valorem taxes, and are not taxes within the meaning of the Constitution. *Hayden v. Atlanta*, 70 Ga. 817; *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; *City of Atlanta v. First Presbyterian Church*, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852; *Georgia Railroad Co. v. Decatur*, 137 Ga. 537, 73 S. E. 830, 40 L. R. A. (N. S.) 935. It is said that the act is unconstitutional, for the following, among other, reasons:

(a) It "is in conflict with the Constitution of this state, which provides that the taxation shall be uniform, because it is not the levy of a tax by a county, nor any municipal corporation in a county, or within any political division recognized or pointed out by the Constitution of the state."

(b) It is in violation of article 4, § 1, par. 1, of the Constitution which declares: "The right of taxation is a sovereign right, inalienable, indestructible, is the life of the state, and rightfully belongs to the people in all republican governments, and neither the General Assembly, nor any nor all other departments of government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts whatsoever, by said government or any department thereof, to effect any of these purposes, shall be and are hereby declared to be null and void for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the state, notwithstanding any gift, grant, or contract whatsoever by the General Assembly."

(c) It "is unconstitutional," because the Constitution "only permits the levying and collecting by counties of a tax for 'necessary sanitation,' whereas section 3 of the act authorizes the assessing of the property, levying and collecting a tax or assessment, for the benefit of the public health, or any public highway, or be conducive to the general welfare of the community, whether the improvements proposed will benefit the lands sought to be benefited; all save the public health being without the purview of sanitary legislation, and without the authority to tax granted to counties by the Constitution."

It will be perceived that all of these grounds of attack depend on the assumption that the act authorizes the levy of a tax within the meaning of the Constitution. As the act does not authorize the levy of such a tax, it follows, without the necessity of considering other reasons urged for and against the validity of the act, that it is not subject to any of the foregoing objections.

[4] 4. It is also said that the act falls under no provision of the Constitution author-

izing the levy of an assessment upon private property without the consent of the landowner, and that it is in violation of article 1, § 1, par. 2, of the Constitution, which declares:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete." Civil Code, § 6358.

The validity of the enactment rests in the police power of the state. By reference to section 2 of the act, it appears that the law is not intended to apply unless, among other things:

"Public benefit, or utility, or the public health, convenience, or welfare will be promoted by draining, ditching, or leveeing" the land.

It thus appears that the act is founded on the principle of public benefit. *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225. There are decisions dealing with drainage, and with its kindred subject, irrigation, which hold, in effect, that, in determining whether the improvement contemplated by the statutes is for private or public benefit, it is not absolutely necessary that the public at large should be benefited. 2 *Kinney on Irrigation and Watercourses*, § 1068, and citations; *Lewis v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Coster v. Tidewater Co.*, 18 N. J. Eq. 54; *O'Relley v. Kankakee Valley Drainage Co.*, 32 Ind. 169. If the use and benefit be common to all who are assessed, and not for particular individuals, it will be sufficient. 1 *Lewis on Eminent Domain* (3d Ed.) § 254, and citations. These and other authorities recognize that drainage, such as is contemplated by the statute under consideration, may amount to a public benefit. Statutes of the above character just referred to, for promotion of the public welfare, have been recognized as a valid exercise of the police power of the state. In *re Hegne-Hendrum Ditch No. 1*, 80 Minn. 58, 82 N. W. 1094; *Mound City Land Co. v. Miller*, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, and notes, 94 Am. St. Rep. 727; *Donnelly v. Decker*, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637; *Fallbrook Irr. District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; 10 Am. & Eng. Enc. Law, 222; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. In the case last cited it was held:

"It is within the discretion of the Legislature of California to prescribe a system for reclaiming swamp lands, when essential to the health and prosperity of the community, and to lay the burden of doing it upon the districts and persons benefited."

We think the act under consideration was a valid exercise of the police power of the state.

[5] 5. Another attack upon the act was on the ground that it was in conflict with article 7, § 7, pars. 1 and 2, of the Constitution (Civil Code, §§ 6563, 6564), which provide:

"The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this Constitution pro-

vided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this Constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation." "Any county, municipal corporation, or political division of this state, which shall incur any bonded indebtedness under the provisions of this Constitution, shall, at or before the time of so doing, provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness."

Under this ground of attack it is insisted that the statute amounted to an unauthorized attempt to empower the commissioners to issue bonds, which, in effect, without the sanction of two-thirds of the voters at an election duly held, amounted to the creation of a debt. Under the terms of the Drainage Act, the bonds which it is provided the drainage commissioners may issue are not a general liability upon the drainage district, or payable out of any general funds it may have; but they are payable solely out of assessments previously made upon property benefited by the local improvement, as provided by the act. In other words, the assessment is made upon property for a local improvement. The owners of the property have the privilege of paying the assessments within a specified time; and for the balance unpaid at that time what are called bonds may be issued by the commissioners. But, taking the act as a whole, these bonds are only payable from the collection of the unpaid assessments; and if there is a default for a certain time in the payment of the bonds, provision is made for compelling the officers to collect such assessments, so as to pay the amount of installments due. It has been held by a number of authorities that such a bond or certificate, so payable, does not constitute an indebtedness against the political division, within the meaning of clauses of state Constitutions quite similar to our own. It has sometimes been suggested that the issuance of such bonds amounted to a quasi assignment of the assessments or its proceeds to the extent necessary for payment. Sometimes what is called the special fund doctrine has been invoked—a doctrine, however, which one or two courts have carried so far as practically to render ineffectual the constitutional limitation. It might be suggested that, under the terms of the act before us, the drainage commissioners do not possess property derived from various sources, or levy general taxes, but stand in a peculiar relation to the bondholder, which might be anal-

ogized to that of agents in the collection of the assessments and payment of the bonds from only the one source from which they are payable.

In view of the terms of the act and the construction we have given to it, we are of the opinion that it does not violate the clause of the Constitution which prohibits municipal corporations, counties, or political divisions of the state from incurring an indebtedness without an election first being held therefor. Gray on Limitations of Taxing Power, §§ 2101-2109, and citations; 2 Dillon on Municipal Corporations (5th Ed.) §§ 893, 827; *Sanderlin v. Luken*, supra; *Elliott v. McCrea*, 23 Idaho, 524, 130 Pac. 735. The case differs from the class of cases in which a municipality assumes a general and primary liability to pay the cost of the improvement, among which cases are *Sanders v. Gainesville*, 141 Ga. 441, 81 S. E. 215; *Martin v. Tyler*, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838; *McAleer v. Seattle*, 2 Wash. 653, 27 Pac. 557; *City of Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

[8] 6. Having held that the grounds of attack upon the constitutionality of the act are not meritorious, it is unnecessary to deal with the question of estoppel, which was submitted to the trial judge for decision. The statute being authority for the collection of the assessments which it was sought to enjoin, it was not erroneous for the judge to refuse to grant the interlocutory injunction.

Judgment affirmed. All the Justices concur.

(143 Ga. 725)

LIFE INS. CO. of VIRGINIA v. FITZGERALD. (No. 458.)

(Supreme Court of Georgia. July 17, 1915.)

(Syllabus by the Court.)

1. INSURANCE — 342 — POLICY — CONSTRUCTION — FORFEITURE — EXCESSIVE INSURANCE — INCONTESTABLE POLICY.

An insurance policy, issued in favor of a father on the life of his child, had printed on the back, and referred to as a part of the policy, certain conditions and agreements, one of which was as follows: "This policy shall be void if the insured is now or shall hereafter become insured in this or any other company or society and the total amount of insurance (including this policy) shall exceed the amounts in the following table." Then followed a table of ages at "next birthday," and opposite each age was a stated amount. Opposite the figure 8 (the age apparently applicable to the child in question) the amount stated was \$164. Another of these conditions or agreements on the back of the policy was as follows: "Incontestable.—If the insured shall die after this policy shall have been in force for one or more years, and full proofs of death shall be presented within three months thereafter, and after all due premiums have been received by the company, the claim shall not be disputed, except for misstatement of age." Held, that the condition first mentioned was not one providing for a diminished payment if there should be additional insurance on the life of the insured, but for an avoidance of the policy if there

should be such insurance in excess of a stated amount. The second clause above quoted provided that after the policy should have been in force for one or more years, and upon the other terms therein stated, the claim should not be disputed, except for misstatement of age. Construing the two clauses together, upon the happening of the events stated in the second clause, the policy could not be declared void because of insurance in excess of the stated amount mentioned in the first.

(a) This is not altered by the fact that there was another provision to the effect that, if the policy should for any reason become void, all premiums paid thereon should be forfeited to the company, "except as provided herein."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 882; Dec. Dig. 342.]

2. EVIDENCE — 518 — EXPERT TESTIMONY — CONSTRUCTION OF INSURANCE POLICY.

There was no error in refusing to allow an expert in the insurance business to testify that a certain clause in a policy was a material provision, and that all policies written upon the lives of infants contained the same or a similar provision.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2326; Dec. Dig. 518.]

3. VERDICT APPROVED.

There was no error in the rulings complained of. The evidence authorized the verdict. The policy is somewhat vague as to the amount due; but, in view of the evidence and the admissions in the answer, the verdict will not be disturbed.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by H. H. Fitzgerald against the Life Insurance Company of Virginia. Judgment for plaintiff, and defendant brings error. Affirmed.

Etheridge & Etheridge, of Atlanta, for plaintiff in error. F. L. Haralson and B. L. Milling, both of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 763)

WALKER ROOFING CO. v. CLARK.

(No. 476.)

(Supreme Court of Georgia. July 21, 1915.)

(Syllabus by the Court.)

NEW TRIAL — 161, 163 — ORDER GRANTING — CONDITION.

The plaintiff sued the defendant on an open account for \$258.53 principal. The defendant pleaded that he owed only \$78. The jury found for the plaintiff the latter amount. The plaintiff moved for a new trial. The presiding judge decided that there had been a miscalculation, by which the verdict was for \$10.40 too little. He ordered that if the defendant, or any one for him, should on a certain day tender that amount, with interest, to the plaintiff, a new trial be refused, and, if not, that a new trial be granted. Held, that the presiding judge ruled in effect that the verdict was erroneous to the extent of \$10.40, and refused a new trial only on the condition mentioned. Where a new trial is granted or refused upon a condition of the character indicated above, it should be one the performance or nonperformance of which will appear of record; and the grant or refusal of a new trial should not be made to

depend on a tender by the defendant, or any one for him, of an amount "exclusive of the amount of the verdict and cost," so that the fulfillment or nonfulfillment of the requirement, and accordingly the grant or refusal of a new trial, will depend upon parol, and possibly conflicting, evidence.

(a) Under the circumstances stated, and in the light of the evidence, this court will reverse the judgment, so that a new trial may be had.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 321-323, 330-332; Dec. Dig. ☞161, 163.]

Error from Superior Court, Newton County; C. S. Reid, Judge.

Action between the Walker Roofing Company and C. A. Clark. From the judgment, the Roofing Company brings error. Reversed.

C. C. King, of Covington, for plaintiff in error. Rogers & Knox, of Covington, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(143 Ga. 764)

FLANDERS, Ordinary, v. SUTTON et al. (No. 478.)

(Supreme Court of Georgia. July 21, 1915.)

(Syllabus by the Court.)

DISMISSAL AND NONSUIT ☞73—EXECUTORS AND ADMINISTRATORS ☞537—JUDGMENT ☞470—ACTION ON BOND.

The ordinary of Emanuel county, for the use of two named persons, "heirs of the estate of W. M. Sutton, deceased," brought suit against the principal and sureties on the bond of the administrator of Sutton's estate. It was alleged that the two persons named as heirs had brought suit against the administrator in the court of ordinary for a settlement, and had recovered a judgment against him as administrator and personally for a stated sum; that execution had issued, and the sheriff had returned an entry of nulla bona, both as to the property of the estate and as to the property of the administrator individually; and that the defendants were due to the two persons named the stated sum as principal, and interest, which the defendants refused to pay, and for which judgment was prayed. Held, that it was error to dismiss the action, on oral motion, "for the want of proper parties plaintiff."

(a) The provision of Civil Code 1910, § 4082, that, when an administrator shall fail to settle an account with any distributee of the estate he represents, such distributee may institute suit on the bond of the administrator in the first instance, without a suit against the administrator in his representative capacity, confers a privilege upon such distributee, but does not prevent the bringing of a suit upon the bond in the name of the ordinary for the use of such distributee. Mathis v. Fordham, 114 Ga. 364, 40 S. E. 324.

(b) The bill of exceptions alleged, by way of recital, that the uses were the illegitimate children of the widow of the intestate, and that she survived him, but died prior to the citation of his administrator for a settlement. It also alleged that the defendants moved to dismiss the present action, "for want of proper parties plaintiff, contending that the administrator of the deceased mother only had the right to sue." There is nothing on the face of the petition to show that the uses were illegitimate children of the widow of the intestate, or that she was dead, or that she had any administrator. It

was not stated that any evidence was introduced, but the motion to dismiss was apparently made in the nature of a general demurrer to the petition. Accordingly, the statements above set out cannot be considered in connection with the motion to dismiss.

(c) The petition alleged that the uses were heirs of the intestate, and that they had cited the administrator to a settlement in the court of ordinary, and had obtained judgment fixing the amount due them. If they had been adjudged distributees of the estate, and the amount due to them had been settled, such a judgment could not be thus collaterally attacked.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 167, 168; Dec. Dig. ☞73; Executors and Administrators, Cent. Dig. §§ 2453, 2485-2581; Dec. Dig. ☞537; Judgment, Cent. Dig. § 907; Dec. Dig. ☞470.]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by J. R. Flanders, Ordinary, for use, etc., against J. J. Sutton and others. From the judgment, Flanders brings error. Reversed.

T. N. Brown and Walter F. Grey, both of Swainsboro, for plaintiff in error. Saffold & Jordan and Williams & Bradley, all of Swainsboro, for defendants in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(143 Ga. 755)

MERCHANTS' & MECHANICS' BANK v. BOYD CO. et al. (No. 473.)

(Supreme Court of Georgia. July 21, 1915.)

(Syllabus by the Court.)

1. CORPORATIONS ☞123—PLEDGE OF STOCK—LIQUIDATION—RIGHT TO DIVIDENDS—PAYMENT BEFORE NOTICE.

If a transferee of stock, having authority himself to transfer and assign the same, becomes the debtor of another, and pledges the stock to secure the payment of the debt, the pledgee would have the right to collect the dividends paid upon this stock in liquidation of the affairs of the corporation and in effecting a dissolution of the corporation, upon giving notice to the corporation issuing the stock. But if such dividends had been paid out to the original holder of the shares of stock, and in whose name the shares stood upon the books of the company, before the corporation or its officials received notice of the change of ownership or of the transfer, it would not be liable to the pledgee or assignee of the stock. And in so far as the petition in this case seeks to recover dividends of the character indicated, paid out before notice of the pledgee's rights, it is demurrable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. ☞123.]

2. PLEADING ☞204—PETITION—DEMURRER.

But in so far as the petition seeks an accounting and the establishment of the pledgee's right to participate in the undistributed property and assets of the corporation, not subject to claims of higher dignity, it is not demurrable; and the court erred in dismissing the case generally.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. ☞204.]

Error from Superior Court, Calhoun County; E. E. Cox, Judge.

Action by the Merchants' & Mechanics' Bank against the Boyd Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Hatcher & Hatcher, of Columbus, for plaintiff in error. Pope & Bennet and Pottle & Hofmayer, all of Albany, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(143 Ga. 678)

KNIGHT v. STATE (No. 438.)

(Supreme Court of Georgia. July 10, 1915.
Rehearing Denied July 21, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 829 — INSTRUCTIONS — CORROBORATION OF ACCOMPLICE.

The court's charge upon the subject of the kind and degree of corroboration of the testimony of an accomplice required in the trial of one charged with a felony before a verdict of guilty would be authorized amply covered the subject, and the refusal of the request to charge upon that subject is not ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

2. CRIMINAL LAW § 829 — REQUESTED INSTRUCTIONS—CHARGE ALREADY GIVEN.

The request to charge upon the subject of admissions and confessions, so far as the same was material and pertinent, was sufficiently covered by the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

3. CRIMINAL LAW § 761 — INSTRUCTIONS — ADMITTED FACTS.

The statement of the contentions of the accused, criticized in the motion for a new trial, was substantially in accord with that presented in his statement made upon the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771, 1853; Dec. Dig. § 761.]

4. CRIMINAL LAW § 789 — INSTRUCTIONS — ALIBI.

The court's charge upon the subject of the defense of alibi was substantially correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.]

5. CRIMINAL LAW § 823 — INSTRUCTIONS — ALIBI—REASONABLE DOUBT.

Where the court had properly instructed the jury upon the subject of reasonable doubt, it was not error to fail to restate the law as to reasonable doubt in connection with the following charge relative to the defense of alibi: "If you do believe, weighing it all and considering the evidence on the subject of alibi and all the other evidence within the rules of law that I have given you with reference to corroboration, that his guilt has been established, then it would be your duty to convict."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.]

6. CRIMINAL LAW § 1043 — APPEAL — PRESENTING QUESTIONS BELOW—OBJECTIONS TO EVIDENCE.

Where evidence is offered in mass, and parts of it are competent, an objection going to

the entire evidence, without specifically pointing out that which is incompetent, will not avail the objecting party in the reviewing court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.]

7. CRIMINAL LAW § 338—EVIDENCE—ADMISSIBILITY.

The court properly excluded the testimony of the accomplice jointly indicted with this defendant, which testimony was given in the trial of another criminal case against a person not implicated in the crime with which the present defendant was charged, in which testimony the accomplice of this defendant narrated the circumstances under which he and certain other parties had blown open a safe.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.]

8. CRIMINAL LAW § 913 — NEW TRIAL — GROUNDS—QUALIFICATION OF JUDGE.

The ground of the motion for a new trial based upon the alleged disqualification of the judge is without merit. If the facts alleged really constituted a disqualification of the judge, counsel for the defendant had knowledge or notice of the facts constituting disqualification before the verdict, and should then have raised the question as to the disqualification of the judge by way of a motion for a mistrial or otherwise, and should not have waited until after the verdict to insist upon disqualification as a ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2145; Dec. Dig. § 913.]

9. CRIMINAL LAW § 945 — NEW TRIAL — GROUNDS—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence relied upon as ground for a new trial, where not merely cumulative and impeaching, was not of such character as probably to cause a different result upon another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.]

10. CONVICTION—EVIDENCE—SUFFICIENCY.

The evidence authorized the verdict.

Error from Superior Court, Polk County; Price Edwards, Judge.

Will Knight was convicted of murder, and he brings error. Affirmed.

John A. Boykin and Philip Weltner, both of Atlanta, and Bunn & Trawick, of Cedartown, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, Warren Grice, Atty. Gen., A. L. Henson, of Calhoun, I. F. Mundy, of Rockmart, and W. W. Mundy, of Cedartown, for the State.

BECK, J. Will Knight and Jerry Farlow were jointly indicted for the murder of J. D. Freeman in Polk county, which murder was alleged to have been committed on the 29th day of April, 1914. On the trial of Will Knight the jury returned a verdict of murder, with a recommendation that he be imprisoned for life. The accused made a motion for a new trial, which was overruled, and he excepted.

[1] 1. Counsel for the defendant requested the court in writing to charge as follows:

"It is not sufficient that the accomplice is corroborated as to the time, place, and cir-

cumstances of the transaction, if there is nothing in this corroborating testimony to connect the defendant with the crime; and the corroborating circumstances must be such as to connect the defendant on trial with the offense, and, independently of the testimony of the accomplice, must be sufficient to raise the inference that the defendant on trial is guilty of [as] an accomplice. The corroborating circumstances should be such as, independently of his testimony, to lead to the inference that the defendant is guilty. Facts which merely cast on the defendant a grave suspicion of guilt are not sufficient."

This request was refused by the court. While the language of the request is somewhat confusing, it states substantially the law upon the subject dealt with therein (*McCalla v. State*, 66 Ga. 346; and see, in connection therewith, *Hargrove v. State*, 125 Ga. 270, 54 S. E. 164); but the refusal to give it is not error in view of the court's actual charge upon the same subject. Upon the subject of corroboration the court charged the jury as follows:

"It is not sufficient that the accomplice is corroborated as to the time, place, and circumstances of the transaction, if there is nothing in the corroborating testimony to connect the defendant with the crime—and the corroborating circumstances must be such as to connect the defendant on trial with the offense, independently of the testimony of the accomplice. It must be sufficient to cause the inference that the defendant on trial is guilty of the offense. To warrant a conviction based on the testimony of an accomplice, the corroborating circumstances should be such as, independently of the testimony of the accomplice, to lead to the inference that the defendant is guilty. Now, gentlemen of the jury, this is a matter that is addressed to the sound judgment of the jury. As I say, it is conceded that Jerry Farlow is an accomplice in this offense; that he and some other person committed the offense. Before any other person and before the accused could be convicted upon his testimony alone, there must be some circumstance shown which, independent of the evidence of Jerry Farlow, points to the guilt of the accused. You take all the evidence on that subject, all the surroundings, and judge of the conduct of the accused, if any conduct on his part is shown in connection with this matter, as you would with matters of the highest importance with which you have to deal in life. You judge of it as sensible men, seeking to discover the truth; you bring to bear your experience in life, and determine whether, independently of the testimony of Jerry Farlow, you believe there has been circumstances shown which points to the guilt of the accused. As I say, before any conviction could be had, these circumstances must be shown; whether, when shown, taken altogether, the case is of that character as convinces you beyond a reasonable doubt, is a question for you to determine."

In view of these ample instructions contained in the court's charge to the jury upon the subject of the testimony of an accomplice and the degree and kind of corroboration required, it could hardly be insisted that the refusal to give the requested instruction is ground for reversal of the judgment in this case.

[2] 2. The request to charge upon the subject of admissions and confessions, so far as the same was material and pertinent, was sufficiently covered by the charge given.

[3] 3. Error is assigned upon the following charge of the court:

"Now, gentlemen of the jury, this is a matter that is addressed to the sound judgment of the jury. As I say, it is conceded that Jerry Farlow is an accomplice in this offense; that he and some other person committed the offense."

This charge is criticized in the motion upon the ground that it contains an intimation of opinion by the court upon the facts of the case, and on the ground that it tended unduly to prejudice the defendant's case by instructing the jury that the defendant had conceded that Jerry Farlow had committed the crime, contrary to the theory of the defense, which was to the effect that Jerry Farlow and his entire gang of confederates, who had been with him in another robbery, were the guilty parties in the murder. Whether or not this court will assume, in the absence of a certificate to the contrary, that the statement in the charge of what were the contentions was true, this ground of the motion is without merit, because it substantially presents a theory of the defense as contained in the defendant's own statement made during the trial. In that statement the defendant said, in connection with a description of how he went out to where Jerry Farlow was on the day after the homicide:

"Walt Cline came up to me. This was on Wednesday, April 29, 1914. He said that I was just the fellow he wanted to see. I asked him what he wanted with me. He says: 'Jerry Farlow and me were in Inman Yards last night, and Jerry got shot in the leg. He is out there in an old burnt house on the left-hand side of Marietta street, near Howell station. He needs help; go get him.' He reached in his pocket and got out a five-dollar bill and handed it to me. I went up Marietta street and stopped and hired a horse and buggy and went after Jerry. The reason Walt Cline gave for not going was because he claimed to be done up and scared. I found the old burnt house all right, and just as I got up to Jerry—about that time, Jerry hollered at me from the inside. I helped him to the buggy, and got him, and started to town. On the way he told me what had happened. This was the first I ever heard of the killing of the night watchman at Aragon Mill Store. He said he was going to tell the truth, for he needed me to help him get a doctor who I could trust. That is the way he told it, and says, 'Walt Cline and me went to Aragon last night to blow the safe in the mill store; there was a watchman in the store asleep, and we woke him up. The watchman was lying on the bed, and he jumped up and grabbed Walt; they got into a scuffle, and Walt tried to get the watchman's gun away from him; it looked like he was about to get the best of him; he was a great big fellow. I heard a pistol fire, and I thought he got Walt. I got scared my time was next, and started to shooting. I do not know how many times I shot, but Walt shot four or five times.' Jerry said he had his automatic pistol and Walt had Luther Whitmire's Smith and Wesson. * * * They must have wanted to lay it on me, instead of Walt Cline, because they was afraid I would turn them up. So Jerry and Walt framed it up, so Walt would be left out. That was so—if Jerry should have to do any time—Walt would be on the outside to help him make his getaway. I have heard Bob Cline say that he and Jerry and Walt Cline had a scheme to get out of the penitentiary if all of them got caught."

Taking the quoted extract from the statement of the defendant, the court cannot be

fairly criticized for presenting to the jury, as a theory of the defense, that it was Farlow, a codefendant of Knight, and one Walt Cline, who committed the murder.

[4] 4. On the subject of the defense of alibi the court charged the jury as follows:

"Another rule of law is that, although you may not be satisfied of the truth of the plea of alibi or that it has been established, yet if, taken in connection with all the other evidence in the case, the evidence on the subject of alibi has the effect of raising a reasonable doubt in your minds as to whether he was present at the scene of the crime at the time of its commission, then if that raises, when all of the evidence is considered, a reasonable doubt under the rule of law I have given you, no conviction could result."

If this charge is open to criticism at all, the criticism should be directed to the verbiage merely, and not to the substance of the charge.

[5] 5. Where the court had properly instructed the jury upon the subject of reasonable doubt, it was not error to fail to restate the law as to reasonable doubt in connection with the following charge relative to the defense of alibi:

"If you do believe, weighing it all and considering the evidence on the subject of alibi and all the other evidence within the rules of law that I have given you with reference to corroboration, that his guilt has been established, then it would be your duty to convict."

[6] 6. The admission in evidence of certain parts of a pistol, and certain tools, implements, and other materials which, in his evidence, a confessed accomplice of the defendant on trial indicated as being the articles with which he and the accused were equipped on the night of the murder, and some of which the accomplice stated had been concealed at certain places where they, or a part of them, were afterwards found, was not error. These articles thus offered in evidence were quite numerous, and were tendered in mass. While some of them were irrelevant, others were clearly relevant as evidence in the case; and inasmuch as they were objected to in mass, as they had been tendered, their admission was not error. Under a number of decisions by this court, where a part of evidence offered in mass is admissible, and a part of it is incompetent, the judgment will not be reversed for admitting it all, where the objections were urged to the entire mass of testimony, and not specifically to that which was objectionable.

[7] 7. The defendant offered in evidence the testimony of Jerry Farlow, the accomplice, which was given upon the trial of the case of *State v. Fields*, in which testimony Farlow had narrated the circumstances under which he and certain of his accomplices had blown open and rifled a safe in Griffin, Ga., at a date prior to the murder with which he and the defendant were charged. This evidence was properly rejected. It was

immaterial upon the trial of the accused in this case.

[8] 8. The ground of the motion for a new trial, based upon the alleged disqualification of the judge, is without merit. If the facts alleged really constituted a disqualification of the judge, the counsel for the defendant had knowledge or notice of the facts constituting disqualification before the verdict, and should then have raised the question as to the disqualification of the judge, by way of a motion for a mistrial or otherwise, and should not have waited until after the verdict to insist upon disqualification as a ground for a new trial. They could not take their chances on a verdict of acquittal, and, after an adverse verdict, insist upon the alleged disqualification.

[9] 9. There was no error in refusing a new trial upon the ground of alleged newly discovered evidence. The alleged newly discovered evidence, where not merely cumulative and impeaching, was not of such character as probably to cause a different result upon another trial.

[10] 10. The evidence authorized the verdict.

Judgment affirmed. All the Justices concur.

(143 Ga. 756)

ROWE v. HENDERSON NAVAL STORES CO.

(Supreme Court of Georgia. July 21, 1915.)

(Syllabus by the Court.)

1. EVIDENCE \S 372—ANCIENT DOCUMENTS—ADMISSIBILITY.

Where a deed attested by unofficial witnesses is offered in evidence as an ancient document, its existence for more than 30 years must be made to appear. The purporting date is, of itself, insufficient to show the antiquity of the document.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613-1627; Dec. Dig. \S 372.]

2. PARTITION \S 94—RETURN OF PARTITIONERS—RECORD—JUDGMENT OF CONFIRMATION.

A judgment of confirmation by the ordinary is a prerequisite for the record of the return of partitioners dividing the real estate of a decedent among his distributees, made by virtue of an order of the ordinary under Civ. Code 1910, §§ 4058, 4059.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 287-299, 305; Dec. Dig. \S 94.]

3. EXECUTORS AND ADMINISTRATORS \S 377—POWERS \S 30, 35—SALE OF LAND—RATIFICATION—EXERCISE OF POWERS.

A testator authorized the sale of his wild land "at such time and place as may be to the best interest of my estate, at the discretion of my executors and the ordinary of this county." Three executors were nominated and qualified. They sold and conveyed a lot of wild land. The ordinary of the county did not join in the conveyance, nor did it appear that he assented to the sale. *Held*: (a) A power conferred on a person, who, at the time of the exercise of the power, may hold a particular office, attaches to the individual filling the office, and not to the office. (b) The concurrence of the ordinary was necessary for the proper exercise of this power. (c) The subsequent passing by the or-

dinary of an order empowering the executors to sell the wild land of the testator at their discretion is not a ratification of the prior sale of a particular lot of wild land by the executors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1543; Dec. Dig. ¶¶ 377; Powers, Cent. Dig. §§ 82-98, 133-136; Dec. Dig. ¶¶ 30, 35.]

4. PARTITION ¶94—RETURN OF PARTITIONERS—DESCRIPTION—SUFFICIENCY.

The return of the partitioners of W. W. Gaskins sufficiently identified the land as located in the county of Berrien.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 287-290, 305; Dec. Dig. ¶94.]

5. ADVERSE POSSESSION ¶75—PRESCRIPTIVE TITLE—RETURN OF PARTITIONERS.

An administrator of a decedent applied to the court of ordinary for partition of the land of his intestate between his two heirs at law. Partitioners were appointed and made their return, but no judgment confirming the same appeared to have been entered upon such return. The return was recorded, and the heirs entered into possession of their respective moieties as assigned by the partitioners. *Held*, that the return of the partitioners, adopted by the distributees, constitutes color of title, upon which a distributee may base a prescriptive title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 448-450; Dec. Dig. ¶75.]

6. ADVERSE POSSESSION ¶101—CONSTRUCTIVE POSSESSION—RETURN OF PARTITIONERS.

Where, in such a partition proceeding, the partitioners in their return assigned to a distributee several distinct lots of land, two of which are contiguous, but not described as a single body of land, the possession of one of the contiguous lots will not be extended by construction over the other, so as to make such constructive possession adverse to the true owner of the lot.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-589; Dec. Dig. ¶101.]

7. ASSIGNMENTS OF ERROR.

Other assignments of error are controlled by the foregoing rulings.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by the Henderson Naval Stores Company, a partnership composed of J. A. J. Henderson and another, against M. Rowe. Judgment for plaintiff, and defendant brings error. Reversed.

Knight & Chastain, of Nashville, and N. Gaskins, of Hazlewood, for plaintiff in error. Denmark & Griffin, of Valdosta, and H. J. Quincey, of Ocilla, for defendant in error.

EVANS, P. J. The Henderson Naval Stores Company, a partnership composed of J. A. J. Henderson and Resin Henderson, brought their action to restrain M. Rowe from cutting, destroying, or otherwise injuring the timber on lot of land No. 508 in the Sixth district of Berrien county. The defendant denied the plaintiff's title to the timber on the land, and by way of cross-action set up title in the land to himself, and alleged that the plaintiffs were cutting the timber on the lot of land, and prayed an

injunction against them. A verdict was directed by the court for the plaintiffs, and the defendant moved for a new trial, which was refused.

[1] 1. Both sides deraigned title from John Reynolds, to whom the land was granted by the state in November, 1839. The plaintiffs offered in evidence a deed purporting to have been made by John Reynolds to James M. Davidson on December 12, 1839. The deed was attested by unofficial witnesses, and had never been recorded. Objection was made to its being received in evidence, on the ground that its execution was not proved, and that it was not shown to have come from the proper source or that it had been in existence for 30 years. The statute declares that a deed more than 30 years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence without proof of its execution. Civil Code 1910, § 4190. When a deed is offered as an ancient document, its existence for 30 years must be made to appear. "The purporting date is of itself nothing, for anybody may have forged the written date but yesterday." 3 Wigmore on Evidence, § 2138 (3). In *Pridgen v. Green*, 80 Ga. 737, 7 S. E. 97, the deed offered as an ancient document had indorsed thereon an affidavit for probate by one of the subscribing witnesses, made shortly after the deed purported to have been executed, and this was deemed a sufficient circumstance to show that the deed had been in existence since the making of the affidavit of probate, which was more than 30 years, to admit the deed in evidence. There was nothing tending to show the age of the deed, and the court erred in receiving it in evidence.

[2] 2. The plaintiffs introduced in evidence an exemplification of the record of an application to the court of ordinary by the administrator of James M. Davidson, to divide his estate in kind, the order of the ordinary appointing appraisers, and their return. Attached to the petition was a long list of land lots owned by the intestate. There was no land lot described as 508, but there was a lot described as 568. Accompanying the application was an order of the ordinary appointing freeholders to divide the wild land among the distributees of James M. Davidson; and the return of the appraisers shows lot 508 assigned to James Davidson. Objection was made that, inasmuch as there was no lot described as 508 in the application, the appraisers appointed to divide the land had no authority to include that lot in the division of the estate, and that there was no order confirming the return of the appraisers. With reference to the first objection, it is a palpable clerical error. The administrator's intestate did not claim lot 568; indeed, there is no such lot as 568 in the Sixth district of Berrien county. The ap-

praisers did not undertake to apportion lot 568, but did apportion 508. They discovered the mistake in the number and corrected it in their return; and it amounts to only an irregularity, and will not vitiate the division.

The second objection is that the exemplification does not disclose any order making the return of the commissioners the judgment of the court. The statute provides for a division in kind of the land of a deceased person among his distributees. The procedure is that, on application by the representative of the estate or a distributee, the ordinary shall appoint appraisers, who shall make a written return. Any party in interest may file objections to such return before it is made the judgment of the court of ordinary. If such objections be sustained, the ordinary shall order a new division by the same or other partitioners. Civil Code 1910, §§ 4058, 4059. There was testimony of an attorney at law that he had examined the records of the ordinary of Greene county, and could not find any judgment upon the book of minutes or other record in that office. Compliance with the statute requires that the ordinary shall make the return of the commissioners his judgment before it is entitled to be recorded in his office. His failure in this respect did not authorize the record of the return of the commissioners. While Civil Code 1910, § 4815, makes it the duty of the ordinary to record the proceedings of the court of ordinary in proper books kept for that purpose, a return of partitioners, which has not been made the judgment of the court, is improperly recorded. The return of the commissioners is made effective by the judgment of the ordinary, and without such judgment neither the return nor other proceedings are entitled to record. Whether the return itself, or a certified copy of it, will serve as a color of title on which to base prescription, will be considered in another part of this opinion.

[3] 3. James Davidson died testate. His will was duly probated, and his executors, three in number, qualified. The seventh item of his will was as follows:

"It is my will and desire that my wild land be sold at such time and place as may be to the best interest of my estate, at the discretion of my executors and the ordinary of this county."

The three named executors joined in a conveyance of the land in controversy to W. W. Gaskins. This conveyance was dated October 8, 1880, properly executed, and recorded. When this deed was offered in evidence, it was objected to on the ground that the deed was not executed pursuant to the power in the will, inasmuch as it did not appear that the ordinary of Greene county had joined in or assented to the conveyance. All of the executors joined in the execution of the deed, and its validity depends upon the necessity of its appearing that the ordinary approved the sale by the executors. It is

contended that the testator's attempt to confer a discretionary power on the ordinary is invalid, because, whenever a power is conferred on a donee as a matter of discretion, it cannot be exercised by a court. On the other hand, it is contended that, where a power is conferred on a person who may, for the time being, fill a particular office, the power attaches to the individual filling the office at the time of the exercise of the power, and not to the office, and therefore that the concurrence of the ordinary was essential to the exercise of the power of sale by the executors.

We are inclined to take this latter view as applicable to the facts of this case. The testator's intention was to authorize the sale of his wild land at such times and places as, in the joint discretion of his executors and the incumbent of the office of ordinary at the time of the exercise of the power, might be deemed to be to the best interest of his estate. In connection with the deed the plaintiffs also introduced a certified copy of the order granting to the executors of James Davidson power to sell, at their discretion, at private sale, all of the wild land belonging to their testator. The date of this order was 26 days after the execution of the deed by the executors. It is contended that this order cured the omission of the ordinary to assent to the execution of the deed. We do not think so. It does not purport to be a ratification of a past transaction, but grants authority for a future transaction, and therefore, by its own terms, can give no sanction to what has already been accomplished.

[4] 4. It was shown that W. W. Gaskins died a resident of Berrien county, leaving a widow and one son as his sole heirs at law. The plaintiffs offered in evidence a certified copy of an application by the administrator of W. W. Gaskins to divide a number of lots of land, described as lying in Berrien county, between the widow and son of his intestate, the order of the ordinary thereon, and the return of the commissioners. The exemplification appears to be a certified copy of the original papers, and not an exemplification from the record. Included in the land sought to be partitioned are lots 508 and 509, described as located in the Sixth district of Berrien county. The order to the appraisers directed them to make an equal distribution of the land of the estate of W. W. Gaskins between his distributees, and the return of the appraisers dividing the lots between the widow and her son awarded lots 508 and 509, as well as other lots, to P. H. Gaskins. Objection was made to the return, on the ground that it did not disclose that lots 508 and 509 were located in Berrien county. The reply to this objection is that they are described as being in the Sixth district and embraced within the lands which the appraisers were directed to divide between the distributees of W. W. Gaskins, and in the application the land was described as being

in Berrien county. The entire partition proceedings sufficiently identify the lots of land as being in Berrien county.

[5] 5. Another objection was that there was no order of the court of ordinary confirming the return of the commissioners in the matter of the division of the estate of W. W. Gaskins, and without this order there was no evidence of any valid division. As pointed out in a former part of this opinion, a judgment of confirmation is essential to the validity of the division of the estate according to the statute. But it further appeared that the distributees went into possession of their respective moieties, treating the division as valid, and have so remained for more than 20 years. It has been held that a written agreement to divide lands claimed in common, though made by the administrator of one of the tenants in common without an order of court for the partition thereof, is good color of title. *Shiels v. Lamar*, 58 Ga. 590, 591. Likewise the return of commissioners assigning to each distributee his interest in the estate will serve as color of title, when the respective moieties are sufficiently described, although such return has not been made the judgment of the court. In the partition proceeding land lots 508 and 509 in the Sixth district, and other lots in the Fifth and Tenth districts, were assigned to P. H. Gaskins. Lots 508 and 509 are contiguous lots. It was admitted that P. H. Gaskins was in actual possession of lot 509, and had been so since the partition of his father's estate in 1882. No actual possession of lot 508, except the occasional cutting of timber, was shown. It is contended that P. H. Gaskins' possession of lot 509 extended over the contiguous lot 508, and that he was constructively in possession of that lot under the partition allotment. The plaintiffs having connected themselves with that possession, the question is whether, under these facts, they show a prescriptive title.

[6] 6. The Code declares that:

"Constructive possession of land is where a person having paper title to a tract of land is in actual possession of only a part thereof."

In such a case the law construes the possession to extend to the boundary of the tract. Civil Code 1910, § 4166. Where several lots of land are conveyed in one deed under several descriptions of each, and not under one general description including them all in a single tract, the actual possession of one of them will not give constructive possession of the balance of the lots. *Griffin v. Lee*, 90 Ga. 224, 15 S. E. 810. In cases where several lots are so described as constituting a single tract, the possession of one of them will constructively extend over the whole tract described in the deed. *Johnson v. Simerly*, 90 Ga. 612, 16 S. E. 951. Where the description in a deed grouped several lots together by numbers, then proceeded, "also" another distinct lot and fraction of lot, and finally, "also" certain oth-

er lots described by numbers, it was held that where such a description as a whole did not include a single body of land, or a number of lots which by their contiguity in substance formed a single tract, it did not meet the requirement of the above-quoted Code section. *Durham Coal & Coke Company v. Wingfield*, 142 Ga. 725, 83 S. E. 683.

But it is contended that another Code section (4167) provides that "possession under a duly recorded deed will be construed to extend to all the contiguous property embraced therein," and that, inasmuch as a partition allotment is the substantial equivalent of mutual deeds by joint owners to each other conveying their interests in severalty, this section will also apply to a partition by the ordinary, where such partition is recorded. Whatever may be the holding with respect to the effect of the record of a deed to lots not described as a single tract, the Code section has no application to the record of a partition proceeding, and especially where that proceeding is improperly recorded for lack of a judgment of confirmation of the return of the commissioners. Inasmuch as the land assigned to P. H. Gaskins in the partition consisted of several distinct lots of land, two of which were contiguous, the possession of one of them, namely, 509, will not be constructively extended to the other lot, 508, so as to give him prescriptive title to lot 508, which was not in his actual possession.

[7] 7. Other points made in the record are involved in and controlled by the foregoing rulings, and for that reason specific discussion of them is omitted. Inasmuch as the evidence was insufficient to show complete title in the plaintiffs from the state's grantee, and is also insufficient to show a good prescriptive title to the land lot embracing the timber in dispute, it was error for the court to direct a verdict for the plaintiffs.

Judgment reversed. All the Justices concur.

(143 Ga. 753)

CENTRAL OF GEORGIA RY. CO. v.

JAMES. (No. 472.)

(Supreme Court of Georgia. July 21, 1915.)

(Syllabus by the Court.)

1. EVIDENCE \Leftrightarrow 132—NEW TRIAL \Leftrightarrow 41—EXCLUSION OF EVIDENCE—OPINION—SERVICES OF CHILD—VALUE.

Under the ruling of this court when the case was here on a former occasion, the question as to the ability of the child to render services of value was for decision by the jury. The trial judge properly excluded testimony stating the opinion of certain witnesses, to the effect that a child of similar age, and mental and physical development, to the plaintiffs child, was incapable of rendering services of value.

(a) The testimony referred to in the preceding note was introduced by the defendant without objection, and the opposing counsel proceeded to cross-examine the witnesses relatively to the matter, and did not move to exclude the evidence until after the conclusion of all the evi-

dence. *Held*, that the exclusion of the evidence on the motion of the plaintiff's counsel at the close of the evidence furnished no cause for the grant of a new trial on account of the conduct of counsel for the plaintiff in cross-examining the witnesses and in failing to object to the admissibility of the evidence at the time it was offered.

(b) Nor did the ruling afford the defendant cause for new trial on the ground that it was delivered in indefinite language and was confusing as to what evidence was excluded.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 132; New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.]

2. APPEAL AND ERROR § 232—PRESENTATION BELOW—ADMISSION OF EVIDENCE.

Certain grounds of the motion for new trial complain of rulings admitting evidence over the objection of defendant's counsel. Another complained of a ruling in which the judge refused to exclude evidence on motion of counsel for defendant. In neither instance was it stated affirmatively that the ground of objection alleged in the motion for new trial was stated to the judge and urged against the admission of the evidence at the time of the ruling complained of. Owing to this omission, the assignments of error based upon such grounds of the motion for new trial present no question for decision. *McFarland v. Darien & Western R. Co.*, 127 Ga. 97, 56 S. E. 74; *Chambers v. State*, 141 Ga. 652, 81 S. E. 880; *Dunn v. Evans*, 139 Ga. 741, 78 S. E. 122.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.]

3. DEATH § 18, 95—TRIAL § 296—RIGHT OF ACTION—DAMAGES RECOVERABLE—INSTRUCTION.

If the child was capable of rendering services of value at the time of the homicide, the plaintiff could maintain an action for loss of its services during the remainder of its minority. *James v. Central of Georgia Ry. Co.*, 138 Ga. 415, 75 S. E. 431, 41 L. R. A. (N. S.) 795, 29 Ann. Cas. 1913D, 468. Having the right to sue, the jury might also take into consideration the probable future increase of earning capacity of the child. *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 504; *Betts Co. v. Hancock*, 139 Ga. 198-208, 77 S. E. 77. Therefore a mere comparison of the value of the services of the child, at the time of the homicide, with the cost of supporting it at that time, and striking a balance, would not be a test of the amount of the damages to the plaintiff.

(a) While instructing the jury in the first part of the charge as to the right of the plaintiff to maintain an action for the loss of services of the child, after instructing them in effect that unless the child, at the time of the homicide, was capable of rendering services of value, the plaintiff could not recover for such services, it was not erroneous to charge, in connection therewith, that the jury need not consider whether, at the time of the homicide, the cost of supporting the child "was equal to or greater than the pecuniary value of the services rendered."

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 20, 108, 109, 111-115, 120; Dec. Dig. § 18, 95; Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.]

4. APPEAL AND ERROR § 1064—HARMLESS ERROR—INSTRUCTION.

In the latter part of the charge, while giving rules for determining the amount of recovery in the event the jury should determine that the plaintiff was entitled to recover anything for the loss of the services of the child, the

judge charged, among other things, that they should take into consideration "what would be the expense of the father for the maintenance, protection, and education of the child." *Held*, that this charge was beneficial to the defendant, and, when considered in connection with the entire charge and its context, afforded the defendant no cause for a new trial on the ground that it was confusing to the jury and contradictory to that part of the charge alluded to in the preceding note.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.]

5. DEATH § 104—ACTION FOR DAMAGES—INSTRUCTION—PLEADING AND PROOF.

The request to charge, "that unless it is shown by the evidence what is the age and probable expectancy as to the life of the plaintiff, that is, that he would probably live the period of the child's minority, then the plaintiff cannot recover," was not properly adjusted to the pleadings and evidence, for at least the following reasons: The suit was to recover for the loss of services of the child during minority, and also for designated burial expenses, concerning which there was evidence to support the allegations of the petition. The language of the request tended to exclude from the consideration of the jury the element of damages relating to burial expense. Also, if it otherwise stated a correct principle of law, the request omitted to make any allowance for recovery of loss during the expectancy of life of the father in the event it should be less than the remaining part of the child's minority.

(a) As the request to charge was properly refused on the grounds above indicated, the question whether in any case the expectancy of the life of the father should be taken into consideration by the jury in determining the value of the services of the child will not be decided.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142-148; Dec. Dig. § 104.]

6. INSTRUCTIONS COVERED.

Other requests to charge, in so far as they might have contained correct principles of law applicable to the case, were covered by the general charge.

7. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

Under the principle rule when this case was before the Supreme Court on demurrer (*James v. Central of Georgia Ry. Co.*, supra), the evidence was sufficient to authorize a verdict for the plaintiff. The amount of the verdict was not excessive, and the discretion of the trial judge in refusing a new trial will not be disturbed.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by B. F. James against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

.See, also, 138 Ga. 415, 75 S. E. 431, 41 L. R. A. (N. S.) 795, 29 Ann. Cas. 1913D, 468.

Battle & Hollis, of Columbus, and McLaughlin & Jones, of Greenville, for plaintiff in error. Lawton Nalley, of Atlanta, and N. F. Culpepper, of Greenville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

LUMPKIN, J. (concurring specially). Under the special facts of this case, I concur in

the judgment; but I do not concur in all that is said by the majority of the court, especially in headnotes 1 and (a). The suit was brought to recover damages for the loss of the services of a child, who was nearly three years old when killed, from that time until it would have arrived at majority. The capacity of the child to perform services, and the value of its services, involved a question of opinion. While the question was as to the services of a particular child, yet, where there was evidence to the effect that the child was one of average development mentally and physically, persons qualified to do so could give an opinion as to the ability to perform services by a child of a similar age and mental and physical development, and the value of such services. In the present case the witnesses whose testimony was ruled out probably did not lay a sufficient foundation for giving the testimony excluded. I am not prepared to say that the facts disclosed in the record require a reversal, and I accordingly concur in the judgment specially.

FISH, C. J., and BECK, J. We concur in the judgment of affirmance, being bound by the ruling in the same case, when it was here before, to the effect that the question as to the ability of the child, alleged to have been killed, to render services of value, was for decision by the jury.

(143 Ga. 762)

GIRVIN v. GEORGIA VENEER &
PACKAGE CO.
GEORGIA VENEER & PACKAGE CO. v.
GIRVIN.
(No. 475.)

(Supreme Court of Georgia. July 21, 1915.)

(Syllabus by the Court.)

1. TRIAL \S 139—NONSUIT—PLEADING—EVIDENCE.

Having held, when this case was before the Supreme Court on a former occasion, that the allegations of the petition showed a cause of action, and evidence having been introduced on the trial which would have authorized the jury to find that the material and essential allegations of the petition had been sustained, the court should not have taken the case from the consideration of the jury by granting a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341, 365; Dec. Dig. \S 139.]

2. EVIDENCE \S 125, 269—INJURY TO SERVANT—RES GESTÆ—ASSUMPTION OF RISK.

It being inferable from the evidence as to the exclamation made by the decedent, "Oh, my God! I didn't want to go out there!" that it was made immediately after receiving the painful and fatal injuries, and under circumstances which excluded all idea of device or afterthought, it should have been admitted in evidence as a part of the res gestæ, and as tending to illustrate the material question as

to whether he voluntarily left the place in the mill at which he was engaged, and went to work at the place where he received his injuries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 369-371, 1063-1067; Dec. Dig. \S 125, 269.]

3. EVIDENCE \S 103—AGE OF EMPLOYÉ—MANNER OF DRESS.

While of slight materiality, evidence as to the way in which the youth was dressed was not entirely immaterial and irrelevant, as it might be considered by the jury on the question as to whether the superintendent, the alter ego of the defendant company, was put on notice of the youth of the deceased.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 157-159, 161, 162, 165-168; Dec. Dig. \S 103.]

4. PLEADING \S 207—ALLEGATION ON KNOWLEDGE AND BELIEF—SPECIAL DEMURRER.

An allegation of certain material facts as true "to the best of the plaintiff's knowledge and belief" is not a proper allegation in common-law pleading; and the special demurrer criticizing the paragraph containing this allegation should have been sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 511, 512; Dec. Dig. \S 207.]

5. MASTER AND SERVANT \S 256—DEATH OF SERVANT—PETITION—AMENDMENT.

The allegations contained in the amendment offered at the trial, which attempt to set forth with greater particularity the circumstances leading up to and resulting in the injuries which resulted in the death of the plaintiff's son, are in certain material respects contradictory of the allegations as to the way and manner in which the injuries were inflicted as stated in the original petition; and while these allegations might have been properly set forth in another count, they cannot be appropriately incorporated by amendment in the original petition, as, for the reason just stated, they render the pleadings uncertain and duplicitous; and it was error to allow the amendment over objections duly made by the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 809-812, 815; Dec. Dig. \S 256.]

6. SPECIAL DEMURRERS.

Except as to the grounds of demurrer dealt with in the last two headnotes, and which relate to assignments of error contained in the cross-bill of exceptions, the special demurrers were properly overruled.

Error from Superior Court, Glynn County: C. B. Conyers, Judge.

Action by K. E. Girvin against the Georgia Veneer & Package Company. From the judgment, plaintiff brings error, and defendant files cross-bill of exceptions. Reversed on both bills of exception.

F. H. Harris and D. W. Krauss, both of Brunswick, for plaintiff in error. Bennet, Twitty & Reese and A. J. Crovatt, all of Brunswick, and Ryals & Anderson, of Macon, for defendant in error.

BECK, J. Judgment reversed on both bills of exceptions. All the Justices concur, except ATKINSON, J., disqualified.

(143 Ga. 742)

LOUISVILLE & N. R. CO. et al. v. BARRETT.
(No. 470.)

(Supreme Court of Georgia. July 21, 1915.)

*(Syllabus by the Court.)*1. MASTER AND SERVANT \Leftrightarrow 264—PLEADING
 \Leftrightarrow 381—DEATH OF RAILROAD EMPLOYE—
PROOF—INTERSTATE COMMERCE.

Where a widow institutes an action against a railroad company for the homicide of her husband, and the petition alleges facts sufficient to show a cause of action under the state law, and makes no reference to any engagement of the deceased person in interstate commerce, and the defendant files an answer which merely denies "as untrue" the several paragraphs of the petition, such denial does not extend beyond a denial of the facts specifically alleged.

(a) Where in such an action the defendant desires to defeat the widow's right to sue, by proof of facts tending to show that at the time of the catastrophe her husband was engaged in interstate commerce under his employment by the defendant, it is incumbent upon the defendant to specifically plead such new facts.

(b) In the absence of such a plea it is not erroneous to repel evidence relied on to show that the plaintiff's husband was engaged in interstate commerce under his employment by the defendant, on the ground that the plea does not raise such question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. \Leftrightarrow 284; Pleading, Cent. Dig. §§ 1238, 1253-1279; Dec. Dig. \Leftrightarrow 381.]

2. MASTER AND SERVANT \Leftrightarrow 276—DEATH OF
RAILROAD EMPLOYE—INTERSTATE COMMERCE
—SUFFICIENCY OF EVIDENCE.

In this case it was shown that at the time of the homicide the plaintiff's husband was on duty, under his employment by the defendant, as a watchman at a grade crossing where the railroad tracks crossed a street in a city. The only duty of the watchman appears to have been to protect travelers on the street from the danger of injury by trains on the crossing. At the time of the catastrophe he was engaged in warning travelers on the street of the approach of a freight train coming from the south, when a passenger train on a parallel track approaching unobserved by him from the north, struck and killed him. The passenger train plied between Tate, Ga., and Atlanta, Ga. The freight train plied between Atlanta, Ga., and Etowah, Tenn., and carried freight for intermediate points in Georgia, but it was not shown to have carried freight to points beyond the limits of the state. *Held*, that the evidence was insufficient to show that the plaintiff's husband was engaged in interstate commerce; and there was no error in refusing to charge the jury that as a matter of law he was so engaged, and that for such reason the plaintiff could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. \Leftrightarrow 276.]

3. APPEAL AND ERROR \Leftrightarrow 1066—HARMLESS
ERROR—SUBMISSION OF ISSUES—ASSUMPTION
OF RISK.

The evidence concerning the employment of the watchman and his duties was not of such character as to demand a finding that he assumed the risk of danger to himself from the defendant's negligent operation of its trains at the crossing; and the charge, which in effect submitted to the jury the question whether the watchman assumed the risk of the danger which resulted in his death, constituted no error of which the defendant could complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. \Leftrightarrow 1066.]

4. MASTER AND SERVANT \Leftrightarrow 284—DEATH OF
RAILROAD EMPLOYE—NONSUIT—EVIDENCE.

The evidence was sufficient to make out a prima facie case, and there was no error in overruling the motion for nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. \Leftrightarrow 284.]

5. MASTER AND SERVANT \Leftrightarrow 293—DEATH OF
RAILROAD EMPLOYE—INSTRUCTION—PROV-
INCE OF JURY.

The blow-post law being applicable, an instruction that "You are to take into consideration all the facts and circumstances in the case, the place where the occurrence took place, its publicity, the amount of travel across the railroads at that place, the amount of care and caution which these required of the defendants, that they be on the lookout and to have their locomotives under control, the diligence or want of diligence shown to have been exercised in respect to these matters at this time and place"—was not erroneous on the ground that it invaded the province of the jury, in that it instructed them that it was the duty of the defendants to "be on the lookout and to have their locomotive under control."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. \Leftrightarrow 293.]

6. MASTER AND SERVANT \Leftrightarrow 293—DEATH OF
RAILROAD EMPLOYE—INSTRUCTIONS—PRE-
SUMPTION.

This being an action against a railroad company for the homicide of one of its employes, alleged to have been committed by the negligence of the servants of the defendant in the operation of one of its trains, it was erroneous to charge the jury, as applicable to the case, the provision of Civ. Code 1910, § 2780, relating to the statutory presumption against railroad companies arising in such cases upon proof of injury.

(a) The evidence did not demand a verdict for the plaintiff, and the error in the charge was sufficient to require the grant of a new trial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. \Leftrightarrow 293.]

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

Action by Mattie Lou Barrett, administratrix, against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

D. W. Blair and C. H. Griffin, both of Marietta, for plaintiffs in error. Clay & Morris, of Marietta, for defendant in error.

ATKINSON, J. [1] 1. In this case a widow instituted an action against a railroad company for damages on account of the homicide of her husband, who was alleged to have been killed by a train on the defendant's railroad while he was engaged as watchman at a grade crossing in a city, under employment of the defendant, to warn travelers on the highway of the approach of trains. A verdict having been rendered for plaintiff, the defendant made a motion for new trial, and excepted to the judgment denying the motion. In one ground of the motion complaint is made of the exclusion of certain evidence offered by defendant and relied

on to show that at the time of the catastrophe the defendant, as a common carrier, was engaged in interstate commerce, and that when plaintiff's husband was killed he was, under his employment by the defendant, engaged in such commerce. Whether the excluded evidence would have been sufficient to show that he was so engaged need not be decided. The evidence was repelled on the ground that the plea of defendant did not authorize the introduction of evidence on that subject. There was no error in this ruling. When the case was before this court on a former occasion (*Barrett v. Louisville & Nashville R. Co.*, 137 Ga. 572, 73 S. E. 837), it was held that the petition set forth a cause of action. That decision dealt with the petition under the viewpoint of the statute. There was no allegation in the petition to the effect that defendant was engaged in interstate commerce, or that plaintiff's husband was so employed. The facts relied on as a basis for the cause of action were set forth in separate and distinct paragraphs, as required under prescribed rules of practice for that court. Civil Code, § 5539. The answer contained no reference to the first paragraph of the petition, but mentioned all of the other paragraphs by number, and, with reference to them merely said they "are each and all denied as untrue." In Civil Code, § 5634, it is declared:

"In all cases when the defendant desires to make a defense by plea or otherwise, he shall therein distinctly answer each paragraph of plaintiff's petition, and shall not file a more general denial, commonly known as the plea of 'general issue.' He may in a single paragraph deny any or all of the allegations, or in a single paragraph admit any or all of the allegations in any or all of the paragraphs of the petition."

Under this law the plea by defendant did not extend beyond a denial of the truth of the allegations of fact made in the petition. To hold otherwise would be to declare of no effect the provision prohibiting the filing of a "general denial, commonly known as plea of 'general issue.'" While a widow is authorized to sue under the state law, the right to sue under the federal Employers' Liability Act (Act April 22, 1908, 35 U. S. Stat. 65, c. 149 [U. S. Comp. St. 1913, §§ 8657-8665]) is in the legal representative of the deceased person. There are other differences between the state law and the federal law, which need not be mentioned. The court, having jurisdiction to try a case against a railroad company for the homicide of one of its employes, would apply the state law or the federal law accordingly as it might legitimately appear that the employe, at the time of the injury, was engaged in intrastate or interstate commerce. *Illinois Cent. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31; *Mo., Kan. & Tex. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, 32 Ann. Cas. (1914B) 134. In the case of *Gainesville Midland Railway v. Vandiver*, 141 Ga. 350, 80 S. E. 997, it was said:

"In pleading a cause of action, where a domestic statute or that of the United States is relied on, it is unnecessary to incorporate in the pleadings a statement of the law upon which the cause of action is based. If it is incorporated, the reference thereto may be stricken as surplusage."

Also:

"In an action for damages against a railroad company for personal injuries to an employe, where the petition sets forth the relation between the injured person and the railroad company, and describes the circumstances under which the injury occurs, making out a case of negligence upon the part of the defendant, but contains no allegation that the defendant was engaged in interstate commerce at the time of the injury, the petition is amendable by setting forth allegations to that effect."

While it was ruled, in the case cited above, that it was unnecessary under the circumstances to specially plead the statute, it was not ruled that it was unnecessary to plead facts which might be relied on to show that the case fell within the operation of one statute or the other. Owing to the difference between the state statute and the federal statute and the circumstances under which the one or the other should be applied, facts of this character go to the substance of the case, and cannot be judicially recognized as can be the substance of the statutes. Upon examination of the allegations of the petition in connection with the denial set up in the answer, as already observed, while there was an issue between the parties as to liability under the state law, there was no suggestion of an issue as to liability under the federal law. But in view of the differences in the state law and the federal statute on the subject of injury to employes of railroad companies, and considering how one law or the other might be applicable exclusively according to the facts of the case, the mere introduction of new facts into the case, being tried, as it was, under the state law, to the effect that plaintiff's husband was engaged in interstate commerce, would show that the plaintiff was not a proper party to sue, and result in a defeat of her recovery. Such result would not be for lack of evidence to sustain the allegations of the petition, which were denied by the plea, but wholly on account of new facts. In effect, the new facts would furnish ground for avoiding a case for the plaintiff, properly made out, based on allegations in the petition and denials in the answer. Under the circumstances, the fact that the employe might have been engaged in interstate commerce would be matter of avoidance. *Greaves v. Middlebrooks*, 59 Ga. 241 (2). In Civil Code, § 5636, it is declared:

"Under a denial of the allegations in the plaintiff's declaration, no other defense is admissible except such as disproves the plaintiff's cause of action; all other matters in satisfaction or avoidance must be specially pleaded."

Under the circumstances there was no error in repelling the evidence on the subject of engagement in interstate commerce. See *Bradbury v. Chicago, etc., R. Co.*, 149 Iowa, 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684; *Rob-*

erts, *Injuries to Interstate Employés*, § 161, p. 280. In the case of *St. Louis, etc., R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, 33 Ann. Cas. (1914C) 156, evidence was admitted, without objection, to the effect that the injured person was engaged in interstate commerce at the time of the catastrophe; and the court held that, as the federal statute superseded the state law, "the case pleaded was not proven, and the case proven was not pleaded," and, the point having been duly made on the trial, the objection did not come too late. That case did not involve the statutes of this state in regard to requirements and effect of pleadings, nor was the decision based on any ruling on the admissibility of evidence, as in the case now under consideration, where, at the threshold, the evidence was repelled. This may also be said of the ruling in *Toledo, etc., R. Co. v. Slavin*, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. Ed. —.

[2] 2. Notwithstanding the exclusion of the evidence referred to in the preceding division, other evidence was admitted without objection, which defendant contended was sufficient to show that plaintiff's husband was engaged in interstate commerce at the time he was killed. Based on such contentions, a request was made to charge:

"In this case I charge you, under the facts in evidence, the defendant railroad company was engaged in interstate commerce, and the deceased, Charles Newton Barrett, was employed in interstate commerce at the time of the alleged killing, and the plaintiff has no right to any recovery against the railroad company, but that the right of action is against the railroad company, if any, would be in the personal representative of the deceased, and your verdict would be in favor of the company."

It appeared from the evidence that the plaintiff's husband was employed by the defendant and the Western & Atlantic Railroad Company as a watchman at a grade crossing in the city of Marietta, where the railroad tracks of both companies cross Kennesaw avenue, and that it was his duty "to protect the crossing—to protect the people who were crossing there from being injured by the passing of trains." Immediately before the homicide, as one of the defendant's freight trains approaching from the south was about to pass over the crossing, the watchman who was on duty gave a signal of warning to a traveler on the street, who, approaching from the west, was about to pass over the crossing. He then turned to warn another traveler on the street, who was approaching the crossing from the east, and, as he did so, a passenger train of defendant on a different parallel track, coming unobserved from the north, struck and killed him. The freight train was going from Atlanta, Ga., to Etowah, Tenn., and carried freight between points in Georgia, but whether it had freight for points beyond the state of Georgia does not appear. The passenger train was one operated between Tate, Ga., and Atlanta. This evidence was insufficient to show that the plaintiff's

husband was engaged in interstate commerce, within the meaning of the federal Employers' Liability Act, at the time of the catastrophe; and there was no error in refusing to charge as requested. In the case of *Pedersen v. Delaware, etc., Ry.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, 33 Ann. Cas. (1914C) 153, the following appears from the statement of facts embodied in the opinion delivered by Mr. Justice Van Devanter (three of the Justices dissenting):

"The defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks at or near Hoboken, N. J. On the afternoon of his injury the plaintiff and another employé, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the 'Duffield Bridge,' some bolts or rivets which were to be used by them that night, or very early the next morning, in 'repairing that bridge,' the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James avenue bridge, on his way back to the Duffield bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer negligently failed to give any warning."

It was held that at the time of the injury the plaintiff was engaged in interstate commerce within the meaning of the federal Employers' Liability Act. In the course of the opinion it was said:

"That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of the injury."

In the discussion it was mainly argued by the majority that the bridge in which the bolts were to be used was an indispensable instrumentality for the conduct of the defendant's business in carrying on interstate commerce, and that the work of carrying bolts to repair the bridge was so closely connected with defendant's engagement in interstate commerce as to become a part of it. In *Louisville & Nashville R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558, the injured employé was foreman of a force of section hands in charge of a section of defendant's railroad. His duties required him to inspect and maintain the tracks and roadway upon his section, over which trains engaged in both interstate and intrastate commerce were accustomed to run. While on a tour of inspection of the tracks he was confronted with an emergency produced by the sudden appearance of a freight train carrying interstate freight, and, in an effort to remove the hand car on which he was riding from the track and avoid the impending danger to himself and his hand car, as well as to the freight train, he was injured. Following the decision in the case of *Pedersen v. Delaware, etc., R. Co.*, supra, it was held that the plaintiff, at

the time of receiving the injury complained of, was engaged in interstate commerce. To make a similar ruling in the case now under consideration would require an extension of the rulings in the cases cited. In the first place the duties of the watchman, under his employment, were primarily for the safety of the public, and do not appear to have extended to any control of the movements of the train, or to have extended to repairs or physical maintenance of any of the defendant's indispensable instrumentalities of commerce, such as a railroad bridge, tracks, or the like. In the second place it does not appear that the freight train, on account of the approach of which the watchman was warning pedestrians not to come upon the tracks, was engaged in carrying freight to points beyond the limits of this state, or that the passenger train which inflicted the injury was engaged in interstate commerce. On these facts the case is not controlled by the ruling in the cases cited, and the doctrine of those cases will not be extended. See *Erie R. Co. v. Jacobus*, 221 Fed. 335, — C. C. A. —.

[3] 3. Other grounds of the motion for new trial complain of the ruling of the court admitting in evidence a copy of the ordinance of the city of Marietta, prohibiting railroads, on pain of being fined, from running trains within the city limits at a greater rate of speed than 10 miles per hour, and of a charge to the effect that the city had authority to pass ordinances of such character, and that, as to persons other than employees of the company, it would be negligence to violate the ordinance, but submitting to the jury the question whether as to an employee the violation would be negligence. The objection urged to the admissibility of the evidence was that it was irrelevant, especially in view of the relation existing between the deceased and the defendant. Ordinarily it is negligence for a railroad company to operate its trains within the limits of a city at a greater rate of speed than that prescribed by a valid municipal ordinance. *Central of Georgia Railway Co. v. Tribble*, 112 Ga. 863, 38 S. E. 356. But it is urged that the ordinance was irrelevant because the watchman, by reason of his relation to the defendant, assumed the risk of danger from the speed of the trains at the crossing, and consequently that the defendant was under no duty to him to observe the requirements of the ordinance. Other evidence was introduced on the subject of the speed of the train at the time the injury was inflicted, which would have authorized a finding that the train was running at an unusual rate of speed, in a negligent manner, in violation of the city ordinance. Under such circumstances it cannot be held as a matter of law that the watchman assumed the risk. See *Central of Georgia Railway Co. v. Allen*, 140 Ga. 333, 78 S. E. 1052. The effect of the charge on this subject was merely to submit to the

jury the question whether, under the evidence, the watchman assumed the risk of the danger which resulted in his death. It is not necessary to decide whether the evidence demanded a finding that the watchman did not assume the risk of the employment; but, even if it did not demand such a finding, yet, being sufficient to authorize a finding to that effect, it was not error against the defendant to charge as already indicated. Similar objections were urged, in the motion for new trial, to a charge on the subject of the statutory duty of railroad companies in operating their trains at public crossings. The ruling above announced applies also to this ground of the motion, and further reference thereto is not required.

[4] 4. Error was assigned upon a ruling refusing to grant a nonsuit upon the conclusion of the plaintiff's evidence. As the case will go back for another trial, the evidence will not be discussed. A careful examination, however, shows that there was no error in overruling the motion for nonsuit.

[5] 5. Another ground of the motion for new trial complains of the charge:

"As to whether or not the defendants were negligent in this case, or whether or not the negligence of the defendants was the cause of the death of the plaintiff's husband, are questions solely for you to determine from the evidence in the case, as well as the question of negligence or want of ordinary care and diligence on the part of the deceased. In determining these questions you are to take into consideration all the facts and circumstances in the case—the place where the occurrence took place, its publicity, the amount of travel across the railroads at that place, the amount of care and caution which these required of the defendants, that they be on the lookout and to have their locomotives under control, the diligence or want of diligence shown to have been exercised in respect to these matters at this time and place."

The criticisms upon the charge were: (a) that it was an inaccurate statement of the law; (b) it invades the province of the jury, and in effect tells them that it was the duty of the defendants to "be on the lookout and to have their locomotives under control." It was urged in the brief of counsel for the plaintiff in error that the first criticism upon the charge was meritorious, for the reason that, as the watchman had assumed the risk of danger, the company did not owe him any duty to look out for him at the crossing. This contention is disposed of by the ruling announced in the third division of this opinion. In support of the second criticism upon the charge, counsel for plaintiff in error rely upon the decision announced in the third headnote in the case of *Louisville & Nashville R. Co. v. Biggs*, 141 Ga. 562, 81 S. E. 900, where it was held that a charge on the subject of the duty of the engineer and fireman of a railroad train at public crossings was erroneous. There was a substantial difference, however, in the charge there held to be erroneous and the one involved in this case. In the former the jury were instructed:

"I charge you that it is the duty of the engineer and fireman, when not otherwise engaged, to keep a lookout ahead for persons and things that may be upon the track or crossing or attempting to cross the same, or dangerously close thereto, and to use all ordinary and reasonable care and diligence to prevent injuring and damaging them, or either of them. In this case, if they negligently failed to do so, and the injury and damage to the mares resulted in consequence of such negligence, then the company would be liable; but if they did this, or were not negligent in failing to do it, then the company would not be liable on that account, although the mares may have been frightened by the train and injured and damaged in consequence thereof."

The ruling relative to such instruction was:

"It has been frequently held by this court that it is erroneous for the judge to charge the jury that certain acts or omissions of the defendant constitute negligence, when such acts or omissions are not negligence per se."

It will be observed that the charge there involved was not merely as to the duty of the servants to "look out" for persons and things at the crossings, but it went beyond and instructed them in effect that certain things which would not amount to negligence per se would show negligence upon the part of the defendant's servants, thereby invading the province of the jury. It is provided in Civil Code, § 2875, that:

"There must be fixed on the line of said roads and at a distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

This statute necessarily implies the duty of the engineer to look out and to have the locomotive under control in approaching the crossing; and the court could properly so instruct the jury without invading their province.

[§] 6. Another ground of the motion for new trial complains of the charge:

"A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The criticisms upon the charge were: (a) That it was inapplicable to the plaintiff's case; (b) that the plaintiff was not entitled to this charge against defendants, or either of them. The action was against the railroad company and its engineer who operated the train that killed the watchman. The homicide occurred on the 24th day of October, 1908, before the adoption of the act of 1909 (Acts 1909, p. 160). The charge relates to the statutory presumption provided in

Civil Code, § 2780. The presumption provided for in that section of the Code does not arise against the engineer. *Louisville & Nashville R. Co. v. Hames*, 135 Ga. 67, 68 S. E. 805. But the engineer is not complaining, and the mere fact that the statute was applied to him would not afford the railroad company any ground for new trial. In suits of the character now under consideration, the statute which the court gave in charge to the jury does not apply. *W. & A. R. Co. v. Jackson*, 113 Ga. 355, 38 S. E. 820. See, also, *Hopkins on Personal Injuries*, § 240 et seq. Under these authorities, in actions against a railroad company for an injury to its employé, the plaintiff could make out a prima facie case by proving the injury and that he was free from fault, or by proving the injury and that the injury was caused by the negligence of the agents and servants of the defendant, as alleged in the petition. By giving in charge the law relative to the statutory presumption, the court relieved the plaintiff of the burden of showing affirmatively either the negligence charged against the defendant, or that the watchman was free from fault. The evidence did not demand a verdict for the plaintiff, and the error in the charge affords ground for a new trial.

Judgment reversed. All the Justices concur.

(16 Ga. App. 616)

LOFTON v. GARRISON. (No. 5909.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ~~637~~—DISMISSAL—BILL OF EXCEPTIONS—FAILURE TO SIGN.

Where a bill of exceptions is presented in the time required by law, the failure of the judge to sign it within the time prescribed, regardless of the reasons which influence him to postpone his signature, is no ground for dismissal of the writ of error, unless it appears that his failure to sign and certify within the prescribed time was caused by some act of the plaintiff in error or his counsel. In the present case it appears that the presiding judge deferred certifying the bill of exceptions until he could conveniently confer with counsel for both parties on a review of the brief of the evidence as set forth in the bill of exceptions. But since it also appears that the bill of exceptions was timely presented by counsel for plaintiff in error, and was not returned to him by the judge for correction, the delay cannot be said to have been caused by the act of the plaintiff in error or his counsel, and the writ of error will not be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2829; Dec. Dig. ~~637~~.]

2. ANIMALS ~~61~~—ESTRAYS—SALE—PURCHASER—RIGHT OF OWNER.

The provisions of section 2002 of the Civil Code are to be strictly construed, and one who buys cattle sold as estrays, when no affidavit has been made in the proceedings that the marks and brands of the estrays are correct, and that such marks have not been altered or disfigured since the cattle were taken up, does not acquire such title as will prevent the orig-

inal owner of the estrays from recovering them in an action in trover. For this reason, the trial judge erred in directing the verdict.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 194-210, 214; Dec. Dig. § 61.]

Error from City Court of Fitzgerald; D. E. Griffin, Judge.

Action between Ollie Lofton and Charlie Garrison. From the judgment, Lofton brings error. Reversed.

McDonald & Grantham and U. J. Bennett, all of Fitzgerald, for plaintiff in error. L. Kennedy, of Fitzgerald, for defendant in error.

RUSSELL, C. J. Judgment reversed.

(16 Ga. App. 593)

BREWER v. BARNETT NAT. BANK.
(No. 5787.)

(Court of Appeals of Georgia. July 29, 1915.)
(*Syllabus by the Court.*)

1. MOTION FOR NEW TRIAL—PRINCIPAL AND AGENT.

The general grounds of the motion for a new trial are without merit. There was evidence from which the jury were authorized to infer that the relation of principal and agent existed between Albertson and his son-in-law, Brewer, and that Brewer, as agent for Albertson and in his behalf, deposited with the plaintiff the 900 shares of stock of the Upchurch Lumber Company indorsed in blank by Albertson as collateral security for the debt of \$54,000 due by Albertson and his associates, and not solely in behalf of Brewer himself for the purpose of securing a note for \$10,000 which he had personally indorsed and which is the note sued upon.

2. TRIAL § 193—INSTRUCTIONS—INTIMATION OF OPINION.

There was no expression or intimation of opinion by the court as to what had been proved in the following excerpt from the charge of the court: "They contend that it was then and there agreed, and it was agreed by Mr. Brewer and these other parties, that certain stock of the Upchurch Lumber Company be put up as additional security for the \$54,000 note." Taken in connection with its immediate context, as well as in connection with the charge as a whole, it is obvious that the court was merely stating a contention of the plaintiff, and the language used is not susceptible of any other rational construction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. § 193.]

3. TRIAL § 233—INSTRUCTIONS—CONTENTIONS OF PARTIES.

While the jury, in the consideration of any case submitted to them, are confined to the issues raised by the pleadings, they may nevertheless look to the contentions of counsel, as well as to instructions from the court, for the elucidation of the issues raised by the pleadings or for the interpretation thereof. Hence there was no error in the following instruction: "These * * * are substantially the contentions of the parties in this case. You will look to the pleadings in the case, and to the statements of counsel for any additional contentions which were made by either party, and which may have been overlooked by me, if any." Under a fair interpretation of this language, the contentions of counsel referred to were only those statements of counsel which related to

substantial contentions in the pleadings which had not been specifically mentioned by the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 527-530; Dec. Dig. § 233.]

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

Viewed in the light of the entire record, there is no substantial merit in any of the remaining grounds of the motion for a new trial, the charge as a whole fairly submitted the questions at issue to the jury, there was ample evidence to sustain the verdict returned, and the trial court did not err in overruling the motion for a new trial.

Error from City Court of Douglas; W. C. Lankford, Judge.

Action between J. C. Brewer and the Barnett National Bank. From the judgment, Brewer brings error. Affirmed.

McDonald & Willingham, of Douglas, and Willingham & Willingham, of Forsyth, for plaintiff in error. Dickerson, Kelley & Roberts, of Douglas, Woodward & Smith, of Valdosta, and W. M. Toomer and Fleming & Fleming, all of Jacksonville, Fla., for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 527)

W. G. BAGGETT & SON v. ATLANTIC COAST LINE R. CO. (No. 6111.)

(Court of Appeals of Georgia. July 30, 1915.)

(*Syllabus by the Court.*)

GENERAL DEMURRER.

The petition, while possibly subject to special demurrer, set forth a cause of action, and the court erred in sustaining the general demurrer and in dismissing the petition.

Error from City Court of Cairo; J. R. Singletary, Judge.

Action by W. G. Baggett & Son against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed.

M. L. Ledford, of Cairo, and Roscoe Luke and C. E. Hay, both of Thomasville, for plaintiffs in error. Pope & Bennet, of Albany, and W. J. Willie, of Cairo, for defendant in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 619)

G. O. LOVING & CO. v. PARKER.
(No. 5994.)

(Court of Appeals of Georgia. July 30, 1915.)

(*Syllabus by the Court.*)

1. INSTRUCTIONS.

There is no substantial merit in any of the exceptions to the charge of the court, when the excerpts complained of are viewed in connection with the entire charge.

2. VERDICT SUSTAINED.

The evidence sufficiently supported the allegations made in the petition, proof of which this court has heretofore held would warrant

a recovery (Parker v. Loving, 13 Ga. App. 284, 79 S. E. 77), and the verdict was authorized.

3. DENIAL OF NEW TRIAL.

The court did not err in overruling the motion for a new trial.

Error from City Court of Americus; Z. A. Littlejohn, Judge.

Action by R. E. Parker, guardian, against G. O. Loving & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Shipp & Sheppard, of Americus, for plaintiffs in error. L. J. Blalock and J. A. Hixon, both of Americus, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 629)

PONDER v. GRANT. (No. 6139.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — REVIEW—FINDINGS OF FACT.

The only issue in this case is one of fact, and, that having been resolved by the jury in favor of the plaintiff, their finding will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 899.]

2. NEW TRIAL — GROUNDS—CUMULATIVE EVIDENCE.

The ground of the motion for a new trial based upon alleged newly discovered evidence is wholly without merit. The documentary evidence in question is merely cumulative in character, its subject-matter was testified to upon the trial, and, in its attempted introduction, the movant failed to meet the requirements of Civ. Code 1910, § 6086.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from City Court of Forsyth; G. O. Persons, Judge.

Action by C. D. Grant against G. D. Ponder. Judgment for plaintiff, and defendant brings error. Affirmed.

A. M. Zellner, of Forsyth, for plaintiff in error. Willingham & Willingham, of Forsyth, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 631)

RIVERDALE PECAN CO. v. CUTTER. (No. 6207.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. PLEADING — FILING ANSWER AFTER APPEARANCE TERM—RIGHT.

Under the provisions of the act creating the municipal court of Macon (Acts 1913, p. 259), the mere omission to make an entry of "default" as to a case called upon the appearance docket (unless it appears that the case was not sounded upon the call of the appearance docket) does not entitle a defendant, as a matter of right, to file an answer at a subsequent

term. See Dodson Printers' Supply Co. v. Harris, 114 Ga. 986, 41 S. E. 54; Thurmond v. Groves & Co., 126 Ga. 779, 55 S. E. 915.

It is an essential prerequisite to the grant of a motion to file a plea after the appearance term that a reasonable excuse be offered for not having filed the plea within the time required by law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.]

2. PLEADING — AMENDED ANSWER — RIGHT TO FILE.

The original answer, being merely a plea of the general issue and presenting no defense, did not furnish subject-matter for amendment, and there was no error in refusing to allow the proposed amendment, which was nothing more than an attempt to file an answer for the first time, after the time allowed by law had expired.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.]

3. PLEADING — FILING OF PLEA—RIGHT—TIME.

In an instance such as that referred to in the preceding paragraphs, it is not an abuse of discretion to refuse to allow the defendant to file a plea offered after the time when a plea could properly be filed has passed, where no excuse of any kind is offered for the failure to file a proper plea at the appearance term.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.]

Error from Municipal Court of Macon; Augustin Daly, Judge.

Action between the Riverdale Pecan Company and H. D. Cutter. From the judgment, the Pecan Company brings error. Affirmed.

Chambers & Deaver, of Macon, for plaintiff in error. Walter De Fore and Chas. H. Garrett, both of Macon, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 630)

EUREKA FIRE HOSE MFG. CO. v. MAYOR AND COUNCIL OF CITY OF EASTMAN. (No. 6156.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — CONTRACTS—POWER OF MAYOR.

Under the charter of the city of Eastman (Acts 1907, p. 569), authority to bind the city by signing any contract entered into or authorized by the city council is vested in the mayor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 654-656; Dec. Dig. § 230.]

2. MUNICIPAL CORPORATIONS — ACTION ON CONTRACT—PLEADING—CHARTER POWERS.

As a general rule of law, when authority is delegated by the Legislature to a municipality to enter into contracts in a specified manner, it becomes the duty of any person dealing with the municipality in a contractual relation to see that there has been a compliance with the mandatory provisions of the law limiting and prescribing its powers. It would follow from this principle that when a suit is instituted by one against a municipality on a contract, it should be clearly shown in the petition, setting forth the cause of action, that the contract was valid under the charter powers con-

ferred upon the city. *Wiley v. City of Columbus*, 109 Ga. 296, 84 S. E. 575.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2203-2205; Dec. Dig. ¶1034.]

3. MUNICIPAL CORPORATIONS ¶1034—ACTION ON CONTRACT—PETITION—DEMURRER.

It being apparent from the petition itself that the contract upon which the plaintiff's action was based was not authorized by proper authority of the municipality, the trial judge did not err in sustaining the general demurrer. A different result might have been reached, had the plaintiff elected to sue upon a quantum meruit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2203-2205; Dec. Dig. ¶1034.]

Error from City Court of Eastman; J. A. Neese, Judge.

Action by the Eureka Fire Hose Manufacturing Company against the Mayor and Council of Eastman. Judgment for defendants, and plaintiff brings error. Affirmed.

Jas. F. Broach, of Eastman, for plaintiff in error. J. H. Milner, of Eastman, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 600)

GALLAGHER v. GUNN. (No. 6132.)

(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ¶330—PLEADING—NEGLIGENCE OF SERVANT—PRESUMPTION—ISSUES AND PROOF.

Where the plaintiff's evidence showed that the defendant was the owner of the automobile that injured him, and that the chauffeur operating the machine at the time of the injury was the defendant's servant, the presumption arose that the servant was engaged in the master's business and within the scope of his employment; and the burden was then upon the defendant to show that the machine was not his, or that the chauffeur was not his servant, or that the servant, at the time of the injury was not engaged in the prosecution of the defendant's business. *Stewart v. Baruch*, 103 N. Y. App. Div. 577, 93 N. Y. Supp. 161; *Long v. Nute*, 123 Mo. App. 204, 209, 210, 100 S. W. 511; *Moon v. Matthews*, 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902; *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1270-1272; Dec. Dig. ¶330.]

2. PLEADING ¶375—FAILURE OF PROOF—IMMATERIAL AVERMENTS—AWARD OF NONSUIT.

While certain immaterial averments of the petition were not proved by the plaintiff's evidence, a prima facie case was made out, and the court erred in awarding a nonsuit.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1224; Dec. Dig. ¶375.]

Error from City Court of Macon; Robert Hodges, Judge.

Action by Thomas Gallagher against Will Gunn. Judgment for defendant, and plaintiff brings error. Reversed.

Robt. L. Berner, of Macon, for plaintiff in error. W. D. McNeil, of Macon, for defendant in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 650)

MANNING v. STATE. (No. 6467.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION ¶110—FOLLOWING LANGUAGE OF STATUTE—DISTURBING PUBLIC ASSEMBLY.

While it is preferable that an accusation charging a violation of section 424 of the Penal Code of 1910, should specifically state how and in what manner the accused interfered with the persons assembled at a school, an indictment which charged that the defendant did "willfully interrupt and disturb an assemblage of Pleasant Hill public school, lawfully and peacefully held for the purpose of literary and social improvement," etc., being practically in the terms of section 424, is sufficient to withstand a demurrer.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. ¶110.]

2. CRIMINAL LAW ¶304—EVIDENCE—JUDICIAL NOTICE.

The Court of Appeals will take judicial cognizance of the fact that a meeting of a public school for the purpose of holding its commencement exercises is a meeting of the school for the purpose of literary and social improvement.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. ¶304.]

3. DISTURBANCE OF PUBLIC ASSEMBLAGE ¶11—SCHOOL—PROOF.

There being no testimony that any person in attendance on the school exercises in question was disturbed by any act or language of the defendant, or that the school as a whole, or any part thereof, was either interrupted or disturbed by any act of the defendant, the verdict of guilty was wholly without evidence to support it, and the court erred in refusing to grant the defendant's motion for a new trial.

[Ed. Note.—For other cases, see *Disturbance of Public Assemblage*, Cent. Dig. § 14; Dec. Dig. ¶11.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Roy Manning was convicted of disturbing an assembly, and brings error. Reversed.

Eubanks & Mebane, of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., of Rome, and W. B. Shaw, of La Fayette, for the State.

RUSSELL, C. J. Judgment reversed.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(16 Ga. App. 595)

WATTERS v. FREEMAN BROS. (No. 5807.)
(Court of Appeals of Georgia. July 29, 1915.)

*(Syllabus by the Court.)*1. PLEADING \S 93 — ANSWERS — CONTRADICTORY ALLEGATIONS.

Two separate pleas were filed by the defendant on the same date. One contained a general denial of indebtedness on the part of the defendant and exacted proof of the corporate existence of the plaintiff. The other admitted the existence of the judgment sued upon, but denied its validity, on the ground that it had been obtained by perjury. "No part of an answer shall be stricken out or rejected on account of being contradictory to another part of the same, but the court shall suffer the whole answer to remain, if the defendant should desire it, and avail himself of any advantage he can or may have under either or the whole of said answer, and proceed to trial accordingly." Civ. Code 1910, \S 5649.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 189, 190; Dec. Dig. \S 93.]

2. JUDGMENT \S 914—PLEADING \S 347, 355 — JUDGMENT ON PLEADINGS — "NUL TIEL RECORD."

"A plea of general denial is equivalent, under the code system of pleading, to a plea of nul tiel record." This plea denies the existence of the record of such a judgment as is declared on, and is fully met by legal proof of such a record." Little Rock Cooperage Co. v. Hodge, 112 Ga. 521, 37 S. E. 745.

(a) The existence of the record sued upon being put in issue by the plea of general denial, the court erred in striking this plea on account of contradictory statements in the other plea, and in thereafter rendering judgment without the intervention of a jury.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1744-1746; Dec. Dig. \S 914; Pleading, Cent. Dig. \S 1052, 1102-1110; Dec. Dig. \S 347, 355.

For other definitions, see Words and Phrases, First and Second Series, Nul Tiel Record.]

Error from City Court of Floyd; J. H. Reece, Judge.

Action by Freeman Bros. against A. W. Watters. Judgment for plaintiff, and defendant brings error. Reversed.

Hutchens & Hutchens, of Rome, for plaintiff in error. Lipscomb & Willingham and Nathan Harris, all of Rome, for defendant in error.

WADE, J. Judgment reversed.

(16 Ga. App. 639)

GREEN v. BRINSON RY. CO. (No. 5974.)
(Court of Appeals of Georgia. July 31, 1915.)

*(Syllabus by the Court.)*MASTER AND SERVANT \S 286, 289—INJURY TO SERVANT—PLEADING—DEMURRER.

It being alleged in the petition that the plaintiff did not know of the defective condition of the locomotive operated by him as engineer of the defendant company, to which his injuries were directly attributed, and that his means of knowledge were not equal to those of the master, and it further appearing, from the allegations of the petition, that in order to make the necessary repairs on the locomotive it was necessary for

him to go under the engine, the movement of which caused the injuries complained of, and this movement, as alleged, being traceable to the negligence of the fireman, in disobedience of the engineer's orders and in disregard of his duty, and questions of negligence and diligence being peculiarly for solution by the jury, a cause of action was set forth, and the trial judge erred in sustaining a general demurrer and in dismissing the action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1048-1050, 1089, 1090, 1092-1132; Dec. Dig. \S 286, 289.]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by J. E. Green against the Brinson Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Brinson & Hatcher, of Waynesboro, W. D. Tutt, of Elberton, and Isaac S. Peebles, Jr., of Augusta, for plaintiff in error. H. J. Fullbright, of Waynesboro, and Hitch & Denmark, of Savannah, for defendant in error.

RUSSELL, C. J. Judgment reversed.

(16 Ga. App. 653)

HILLIS v. E. T. COMER & CO.
(No. 6177.)

(Court of Appeals of Georgia. July 31, 1915.)

*(Syllabus by the Court.)*1. APPEAL AND ERROR \S 440—EFFECT OF APPEAL—AMENDMENT PENDING APPEAL.

Upon its former appearance before this court (Hillis v. Comer & Co., 14 Ga. App. 30, 79 S. E. 930), the judgment of the court below in this case was reversed upon two grounds: (1) That, the copy of the mortgage attached to the affidavit of foreclosure not being sufficiently verified to meet the requirements of the statute, the court erred in overruling the affidavit of illegality; and (2) because there was no evidence then in the case which showed that the guano sold by the plaintiff to the defendant was used in the cultivation of the cotton levied upon, and therefore that the direction of a verdict in favor of the plaintiff was error. Before the remittitur of this court was made the judgment of the court below, the plaintiff, by leave of the court and over the objection of the defendant's counsel, amended the foreclosure proceedings by introducing the original mortgage, and upon motion the case was placed on the docket for retrial. *Held*, a proper amendment to a petition can be made at any stage of the case, and a case brought to this court is still pending until the remittitur from this court is entered upon the minutes of the trial court. See C. & W. C. Ry. v. Miller, 115 Ga. 92 (1), 41 S. E. 252; Thurmond v. Clark, 47 Ga. 501; Augusta Ry. Co. v. Andrews, 92 Ga. 706, 19 S. E. 713; Savannah Ry. Co. v. Chaney, 102 Ga. 814, 30 S. E. 437; Seaboard Air Line Ry. v. Randolph, 126 Ga. 240, 55 S. E. 47. The court did not, therefore, err in allowing plaintiff's amendment, or in ordering the cause to be retried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2198-2201; Dec. Dig. \S 440.]

2. EVIDENCE \S 210—PLEADING—ADMISSIBILITY.

Paragraph 6 of the defendant's counter-affidavit was properly admitted in evidence, as

this paragraph contained an implied admission by the defendant that he had used the fertilizers upon his cotton lands.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 729-737; Dec. Dig. ¶210.]

8. TRIAL ¶141—DIRECTION OF VERDICT—EVIDENCE.

The plaintiff having introduced evidence which showed that the guano sold by it to the defendant was used in the cultivation of the cotton levied upon, and the defendant having offered no evidence whatever, the court did not err in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. ¶141.]

Russell, C. J., dissenting in part.

Error from City Court of Waynesboro; W. H. Davis, Judge.

Action by E. T. Comer & Co. against R. J. Hillis. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Boykin, of Sylvania, and H. J. Fullbright, of Waynesboro, for plaintiff in error. Brinson & Hatcher, of Waynesboro, for defendant in error.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J. (dissenting). I agree to the rulings in the first two headnotes; but, in my opinion, the fact that the defendant introduced no evidence is of no consequence in determining whether a verdict should be directed, and that the court erred in directing a verdict, because, before it could be said that a verdict for the plaintiff was demanded, the burden was upon the plaintiff, not merely to show that the defendant probably used the guano purchased from the plaintiff under this cotton, but that the testimony adduced could not have suggested or authorized any other inference on the part of a jury than that the particular guano was used under the identical cotton embraced in the mortgage. *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209.

(16 Ga. App. 635)

SOUTHERN RY. CO. v. SPEERING. (No. 6231.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶1001—REVIEW—SUFFICIENCY OF EVIDENCE.

This suit was against a common carrier, for the value of a printing press alleged to have been totally destroyed in transit, and there was evidence from which the jury could draw the inference that the press was a total loss when it arrived at destination; and since it is the exclusive right of the jury to determine every issue of fact, if there is any evidence to support the verdict (and slight evidence is sufficient), this court cannot set the verdict aside under an assignment that it is contrary to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ¶1001.]

2. APPEAL AND ERROR ¶1151—COSTS ¶234—MODIFICATION OF JUDGMENT.

The verdict returned was not so excessive as to create a suspicion of bias and prejudice, but it appears that the jury omitted to deduct all the demurrage chargeable against certain unbroken packages which were included in the same shipment, and we therefore direct that the verdict and judgment be reduced from \$177.70 principal to \$169 principal, and that the defendant in error pay the costs of this writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. ¶1151; Costs, Cent. Dig. §§ 892-899; Dec. Dig. ¶234.]

Error from City Court of Richmond County; Wm. F. Eve, Judge.

Action by Fred Speering against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

Cumming & Hull, of Augusta, for plaintiff in error. C. A. Picquet, of Augusta, for defendant in error.

WADE, J. Judgment affirmed, with direction.

(16 Ga. App. 635)

SAVANNAH ELECTRIC CO. v. GROOVER. (No. 5781.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

1. INSTRUCTIONS.

The charge of the court is not subject to the criticism that the court's instructions authorized the plaintiff to recover upon every allegation of negligence contained in the petition.

2. DAMAGES ¶91—INJURY TO PROPERTY—PUNITIVE DAMAGES.

There was evidence authorizing the inference that the injury to the plaintiff's property was inflicted under circumstances evidencing an utter reckless disregard for the rights of others, and consequently the finding for exemplary or punitive damages was authorized. In view of this evidence, the instructions of the court upon the subject of punitive damages were appropriate.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. ¶91.]

3. DAMAGES ¶94—INJURIES TO PROPERTY—EXCESSIVE DAMAGES.

In view of the testimony indicative of a reckless disregard of the rights of others on the part of the defendant's servants, which at least authorized the jury to find punitive damages in order to prevent a repetition of a similar casualty, and in view of the fact that the evidence fully authorized a recovery in behalf of the plaintiff for the amount claimed as actual damages, the verdict as returned by the jury (and which included exemplary damages) cannot be said to be excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 216, 218, 219, 221; Dec. Dig. ¶94.]

4. TRIAL ¶296—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

The instruction of the court upon the measure of damages, to the effect that the plaintiff was entitled to recover the market value of the articles damaged, was so fully qualified by the repeated instruction that damages recovered by the plaintiff should be compensatory ("what

will pay the plaintiff for the damage done to his property") as to afford the defendant no cause for complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ☞ 296.]

5. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in overruling the motion for a new trial.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by J. U. Groover against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error. Anderson, Cann & Cann and Thos. F. Walsh, Jr., all of Savannah, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 619)

ADAMS v. PARRISH. (No. 5983.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence as a whole sufficiently supported the verdict. There is no substantial merit in the various assignments of error, and the court did not err in overruling the motion for a new trial.

Error from City Court of Nashville; C. A. Christian, Judge.

Action between I. W. Adams, as administrator, and W. J. Parrish. Judgment for Parrish, and Adams brings error. Affirmed.

J. J. Murray, of Hahira, for plaintiff in error. W. D. Bule and D. M. Bule, both of Nashville, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 619)

BARTON v. GEORGIA FRUIT PACKAGE MFG. CO. (No. 5979.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ☞1001—FINDINGS OF FACT—EVIDENCE.

The legal questions involved were fairly submitted by the charge of the court, and the finding of the jury upon the issues of fact is conclusive, since there was evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ☞1001.]

2. TRIAL ☞256—INSTRUCTIONS—REQUEST.

If any fuller charge had been desired as to any feature of the defense interposed, a timely request therefor should have been submitted in writing.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. ☞256.]

3. DENIAL OF NEW TRIAL APPROVED.

The court did not err in overruling the motion for a new trial.

Error from City Court of Macon: Robert Hodges, Judge.

Action between Wm. Barton and the Georgia Fruit Package Manufacturing Company. From the judgment, Barton brings error. Affirmed.

L. D. Moore, of Macon, for plaintiff in error. Miller & Jones, of Macon, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 617)

SOUTHERN RY. CO. v. MORGAN.

(No. 5942.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. CARRIERS ☞99, 102—DELAY IN DELIVERING SHIPMENT—CONVERSION—RIGHT OF ACTION—DAMAGES.

Under the ruling of this court in Georgia, Florida & Alabama R. Co. v. Elliott, 3 Ga. App. 773 (2), 60 S. E. 363, the consignee is not required to tender the amount due the carrier for freight charges in advance of a demand that a "solid" car be so placed as to make its unloading practicable; and under the ruling in Southern Express Company v. Briggs, 1 Ga. App. 294 (4), 57 S. E. 1066, a failure to deliver a shipment promptly and when the shipment is needed, or the postponement of delivery of such shipment until the necessity for its use has passed, will support an action for the conversion of the property, and a recovery of the value of the property thus held by the carrier as damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 338-355, 434; Dec. Dig. ☞99, 102.]

2. INSTRUCTIONS—NEW TRIAL.

The errors in the charge, and in the refusal of the instructions requested, in the light of the whole record, were not of sufficient materiality to have required the grant of a new trial.

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by J. A. Morgan against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John L. Tison and Bunn & Trawick, all of Cedartown, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. I. F. Mundy, of Rockmart, and W. W. Mundy, of Cedartown, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 599)

RIVERSIDE MILLS v. WYOFSKI.

(No. 6103.)

(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ☞637—BILL OF EXCEPTIONS—SUFFICIENCY.

The bill of exceptions contained the following assignment of error: "At the conclusion of the introduction of the aforesaid testimony by the plaintiff, defendant moved the court to grant a nonsuit, which the court refused. After said refusal of the court to order a nonsuit, the trial proceeded with introduction of evi-

dence by defendant and by plaintiff in rebuttal. A verdict and judgment were rendered in favor of the plaintiff. To the action of the court, after its refusal to order a nonsuit, in permitting the trial to proceed, and in allowing said verdict and judgment to be rendered, the defendant excepted, now excepts, and assigns the same as error, upon the ground that, the refusal to order a nonsuit being erroneous and necessarily controlling in effect, all subsequent proceedings in the case were vitiated and rendered illegal thereby, and were contrary to law." Section 6183 of the Civil Code of 1910 provides that "it shall be unlawful for the Supreme Court of Georgia to dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to that court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein." While the bill of exceptions does not specifically assign error on the refusal to grant a nonsuit, it is apparent from the bill of exceptions itself that this ruling is the real question which the plaintiff in error desires this court to pass upon. Accordingly the bill of exceptions will not be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2829; Dec. Dig. ☞ 637.]

2. TRIAL ☞139—NONSUIT—EVIDENCE.

The plaintiff's evidence submitted before the motion for a nonsuit was made substantially proved the case as laid in the petition, and the court did not err in overruling the motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ☞ 139.]

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Mrs. John Wyofski against the Riverside Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Barrett, of Augusta, for plaintiff in error. Isaac S. Peebles, Jr., H. A. Woodward, and C. H. & R. S. Cohen, all of Augusta, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 599)

CONSTITUTION PUB. CO. v. CHAS. M. MAY & CO. (No. 5962.)

(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

EVIDENCE ☞5—JUDICIAL NOTICE.

There was no proof that the article published in the newspaper known as the Atlanta Constitution was published by the Constitution Publishing Company. Even if the news item which was published in the Atlanta Constitution, and which appears in the agreed statement of facts, were sufficient to have conveyed notice or knowledge to the publisher of that paper of the adjudication of the defendants as bankrupts (although the plaintiff was not listed as one of the creditors), still the courts do not judicially know that the Atlanta Constitution is published by the Constitution Publishing Company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. ☞5.]

Error from Municipal Court of Atlanta.

Action by the Constitution Publishing Company against Chas. M. May & Co. Judgment for defendant, and plaintiff brings error. Reversed.

Dorsey, Brewster, Howell & Heyman, John K. MacDonald, Jr., and Stephen Tighe, all of Atlanta, for plaintiff in error. John S. McClelland, of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment reversed.

WADE, J., disqualified.

(16 Ga. App. 608)

CALDWELL et al. v. DUPLEX PRINTING PRESS CO. (No. 6200.)

(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

1. TRIAL ☞141—DIRECTION OF VERDICT—EVIDENCE.

The suit was upon a promissory note, and the only defense was failure of consideration. There being no evidence in support of this plea, no finding other than one in favor of the plaintiff was legally proper; and the directing of the verdict was harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. ☞141.]

2. BILLS AND NOTES ☞518—CONSIDERATION—EVIDENCE.

In an action upon a promissory note for the purchase price of machinery which the purchasers declined to take, a plea of total failure of consideration is unsupported when the uncontradicted evidence shows that the only reason why the makers of the note declined to take the machinery was that they had no need for it. In this case the note in question was executed contemporaneously with and as a part of a contract for the purchase of machinery, which contained stipulations as to delivery, payment of freight, terms of payment, rate of interest, and other matters which must ordinarily be assumed to be of value to a purchaser, and these promises on the part of the vendor of themselves supplied some consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816-1820; Dec. Dig. ☞ 518.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Duplex Printing Company against A. B. Caldwell and others. Judgment for plaintiff, and defendants bring error. Affirmed.

A. E. Ramsaur and A. E. Wilson, both of Atlanta, for plaintiffs in error. Wm. F. Buchanan and C. A. Stokes, both of Atlanta, for defendant in error.

RUSSELL, C. J. [1] The plaintiffs in error, having been sued upon a promissory note, filed a plea of failure of consideration. They had the right to do this regardless of whether the note was under seal or not (Sims v. Scheussler, 5 Ga. App. 850, 64 S. E. 99), and the court would have erred in directing a verdict if there had been any testimony tending to show a failure of consideration. "A verdict should not be directed unless there is no issue of fact, or unless the proved facts viewed from every possible legal point of

view, can sustain no other finding than that directed." *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209. But a judge may direct a verdict when there is no issue of fact; and we think that in the present case the judge correctly held that there was no issue as to the only plea filed by the defendants.

[2] The sum and substance of the testimony in behalf of the defendants (who admitted the execution of the note) is that they received no benefit from the execution of the note. The fact that the consideration they received was of no benefit to the defendants because, on account of a change in their plans or an alteration of conditions in Atlanta, they no longer desired the printing press which they had purchased, and therefore their contract of purchase was of no value to them, did not establish the fact that the contract they secured was totally worthless to others at the time they procured this contract. The testimony in their behalf did not establish their contention that the notes were without consideration; for there was no testimony that the press which the defendants contracted to buy was worth less than the contract price, or was for any reason defective, or that there was any unwillingness on the part of the vendor to ship the press, or that shipment was delayed for an unreasonable time. No other conclusion can be drawn from the testimony of the defendants than that, after purchasing the printing press (a part of the purchase price of which is represented by the note here sued on), they changed their minds and decided to make an effort to be released from the contract. The fact that something was said by one of the representatives of the plaintiff about claiming damages is wholly immaterial, because by bringing the present action the plaintiff elected to stand upon the contract.

There was some evidence that one of the representatives of the plaintiff stated that the press had been sold to a party in Pennsylvania. However, there is no evidence in the record to show that the person making this statement was such an agent of the plaintiff as that his statement could be treated as an admission of the fact of a sale on the part of the plaintiff. Agency cannot be proved by the mere declarations of one who claims to be an agent. But even if the admission as to the sale of the press be treated as authoritative, this alone would not release the defendants from the payment of the note; for, according to the terms of the contract, they were required to pay the note before ordering the press to be shipped, and it is perfectly plain, from their evidence, that they had fully and finally determined never to order the press to be shipped. Even if the press had been sold, proof of this fact would not support a plea of failure of consideration. In *Juchter v. Boehm-Bendheim & Co.*, 63 Ga. 72, it was held that the fact that the notes declared upon were given for

the purchase of goods, and that the plaintiff, in violation of his agreement, foreclosed a mortgage to secure the same debt and caused the goods to be seized and sold, so that they were wholly lost, was not matter for a plea of total failure of consideration. To the same effect, see *Dickon v. Tunstall*, 3 C. P. Rep. (Pa.) 128, in which it was held, that where a note is given to one person for the purchase of bank stock which a third person is bound to deliver, failure of delivery of the stock is no defense to the note.

Judgment affirmed.

(16 Ga. App. 636)

CLEMENTS et al. v. CITIZENS' BANKING CO. OF EASTMAN. (No. 5802.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

TRIAL \S 248, 256—INSTRUCTIONS—REQUESTS.

The suit was upon two notes, one for \$1,000 and the other for \$270. There being no evidence charging the holder of the \$1,000 note with notice as to any defense to it, the verdict in favor of the plaintiff as to this note was demanded. The verdict in favor of the plaintiff as to the \$270 note was supported by the evidence. There was no material error in the instructions given, and the requests for instructions, so far as they were pertinent, were sufficiently covered in the charge as delivered. If fuller instructions had been desired as to certain other portions of the charge to which exceptions are taken, an appropriate and timely request therefor should have been submitted. The charge as a whole clearly and fairly submitted the issues, and is especially to be commended, in that the instructions were concretely applied to the testimony as it had been delivered to the jury, and in that it did not consist of abstract statements of the law without specific application. The court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 582, 583, 628-641; *Dec. Dig.* \S 248, 256.]

Broyles, J., dissenting.

Error from City Court of Eastman; J. A. Neese, Judge.

Action by the Citizens' Banking Company of Eastman, Ga., against W. H. Clements and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Chas. W. Griffin and W. A. Wooten, both of Eastman, for plaintiffs in error. Roberts & Smith, of Eastman, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., dissents.

(16 Ga. App. 634)

PEARSON v. ABELL. (No. 6215.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT \S 296—POSSESSORY WARRANT—DISMISSAL.

While the general relation between the parties may have been that of landlord and cropper (although this does not clearly appear in

the record), so far as the particular property which was the subject-matter of this action was concerned, no such relationship existed between them, but they were in fact partners.

(a) This being true, and the undisputed evidence showing that the tenant acquired possession of the property in dispute without fraud, and by virtue of a contract with the landlord, the possessory warrant taken out by the landlord should, on motion, have been dismissed. *Owens v. Outlaw*, 105 Ga. 477, 30 S. E. 427.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1272-1275, 1283; Dec. Dig. ¶296.]

2. LANDLORD AND TENANT ¶316 — POSSESSORY WARRANT—EVIDENCE.

It being shown by the evidence that the tenant was clearly entitled to the possession of the property, the awarding of the property to the landlord was contrary to law and the evidence, and the judge of the superior court should have sanctioned the certiorari.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1336-1343; Dec. Dig. ¶316.]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between A. C. Pearson and E. B. Abell. From a refusal to sanction certiorari, Pearson brings error. Reversed.

Lewis A. Mills, Jr., and Hendricks & Hendricks, all of Nashville, for plaintiff in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 649)

ADAMS v. GREESON. (No. 6155.)
(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

1. TRIAL ¶250—INSTRUCTIONS—CONFORMITY TO PLEADINGS AND EVIDENCE.

There being neither evidence nor pleading to justify an instruction to the jury upon the subject of privileged communications, predicated upon the fact that the plaintiff and the defendant belonged to the same lodge of Odd Fellows, the instruction of the court upon this subject was erroneous and prejudicial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 584-586; Dec. Dig. ¶250.]

2. INSTRUCTIONS ON PRIVILEGED COMMUNICATIONS.

The evidence relative to statements alleged to have been made by the defendant as to the plaintiff was insufficient to establish that such statements were made either bona fide in the performance of a public duty, or in the performance of a private duty, either legal or moral, or with a bona fide intent to protect the interest of the defendant in a matter where his interest was concerned, and the instructions of the trial judge upon the subject of privileged communications, as embodied in the fifth, seventh, and eighth grounds of the motion for a new trial, were erroneous.

3. LIBEL AND SLANDER ¶7, 101—SLANDEROUS WORDS — INSTRUCTION — BURDEN OF PROOF.

The words alleged to have been used by the defendant of the plaintiff, imputing to him the crime of larceny, were slanderous per se, and it was therefore error for the court to instruct the jury that if the defendant "used the verbal charges against the plaintiff in an endeavor to find his property, or to locate the party who had it, with a view of suing for the same, civilly or criminally," the law would presume

that he acted in good faith. Where a verbal statement is slanderous per se, there is no presumption that the person making the statement acted in good faith; on the contrary, upon proof of the slanderous words, it devolves upon him either to justify by proving the truth of his accusation or to establish the fact that for some reason the communication was privileged.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 17-78, 150, 273, 275-280; Dec. Dig. ¶7, 101.]

4. EVIDENCE ¶182—BEST AND SECONDARY.

Parol evidence is not admissible to prove the substance of charges preferred by a secret order against one of its members, unless there first be evidence that the charges were not in writing.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 601-604; Dec. Dig. ¶182.]

5. ASSIGNMENTS OF ERROR.

Except as above indicated, the trial was free from error.

Error from City Court of Monroe; A. C. Stone, Judge.

Action between J. W. Adams and J. L. Greeson. From the judgment, Adams brings error. Reversed.

Walker & Roberts, of Monroe, for plaintiff in error. J. H. Felker, of Monroe, for defendant in error.

WADE, J. Judgment reversed.

(16 Ga. App. 601)

POLHILL v. POSTAL-TELEGRAPH-
CABLE CO. et al. (No. 6153.)
(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES ¶66, 73—NONDELIVERY OF TELEGRAM—ACTION FOR DAMAGES—BURDEN OF PROOF—NONSUIT.

In a suit against a telegraph company for damages on account of nondelivery of a telegram, where the plaintiff introduced the telegram in evidence, and upon the back of it was printed a stipulation that "the company shall not be liable for damages, or statutory penalties, in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission," it was incumbent upon the plaintiff, in order to make out his case, to show that this stipulation had been complied with, or that the company had waived it.

(a) The plaintiff's evidence failing to show that the above-mentioned stipulation had been complied with, or that it had been waived by the company, the grant of a nonsuit was not error.

(b) This is true in an action sounding in tort (as well as in one sounding upon contract) when the plaintiff's right to sue rests upon his contract with the telegraph company, contained in the telegraph blank. See *Hill v. W. U. Telegraph Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *Western Union Telegraph Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Stamey v. W. U. Telegraph Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *Western Union Telegraph Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; *Postal Telegraph Co. v. Moss*, 5 Ga. App. 503, 63 S. E. 590; *Williams v. Central R. Co.*, 117 Ga. 830, 43 S. E. 980; *Albers v. Western Union Telegraph Co.*, 98 Iowa, 51, 66 N. W. 1040; *Hart v. Western Union Telegraph Co.*, 66 Cal. 579, 6 Pac. 631,

56 Am. Rep. 119; Western Union Telegraph Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 718, 719.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63, 76; Dec. Dig. ¶¶ 66, 73.]

2. HARMLESS ERROR.

The exclusion of the letter, as complained of by the plaintiff, if error, was harmless.

3. APPEAL AND ERROR ¶970 — TRIAL ¶69—DISCRETIONARY RULING—REOPENING OF CASE.

Where a plaintiff has rested his case and a motion for a nonsuit has been made, and he then moves the court to be allowed to introduce other evidence, the reopening of the case for this purpose is within the sound discretion of the court, and such discretion will not be controlled unless it has been manifestly abused. In the present case this court cannot say that the trial judge abused his discretion. See *Penn v. Georgia R. Co.*, 129 Ga. 856, 60 S. E. 172, and cases there cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. ¶¶ 970; Trial, Cent. Dig. §§ 164, 165; Dec. Dig. ¶¶ 69.]

Russell, C. J., dissenting.

Error from Municipal Court of Atlanta.

Action by T. E. Polhill against the Postal-Telegraph-Cable Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hines & Jordan, of Atlanta, for plaintiff in error. R. W. Crenshaw, Jno. K. MacDonald, Jr., and Dorsey, Brewster, Howell & Heyman, all of Atlanta, for defendants in error.

BROYLES, J. [1] The first headnote alone needs elaboration. It is contended by the learned counsel for the plaintiff that as there was no allegation in the plaintiff's petition that written notice of the claim was given within 60 days, and that as neither of the defendant companies pleaded failure to give such notice within the required time, the question whether the plaintiff gave such notice to the defendants within 60 days is not in issue in this case; and the said counsel further declare that:

"In all cases where a nonsuit has been granted in this state, on the ground of failure to give notice (e. g., *Hill*, 85 Ga. 425 [11 S. E. 874, 21 Am. St. Rep. 166], and *James*, 90 Ga. 254 [16 S. E. 83]), it affirmatively appeared (doubtless on proper pleadings) that such notice had not been given; which clearly distinguishes this line of cases from the case at bar, where there was no evidence of failure to give such notice."

The same counsel admit further that:

"If the plaintiff had put this question in issue by alleging the giving of notice, or if defendant had put it in issue by specially pleading it, then a nonsuit would have been proper, had the plaintiff failed to sustain this issue."

From an examination of the original record in the *Hill* Case, supra, we find that the plaintiff's petition (just as in the case at bar) contained no allegation that the notice of the plaintiff's claim was given within 60 days, and that the defendant telegraph company did not plead as a defense that such

notice was not given within the required time; and yet in that case, in the trial court, counsel for the defendant company, after the plaintiff had introduced his evidence, moved for a nonsuit, "on the ground that, as appears from the evidence, no demand or claim for damages had been given in writing to said company or its agents, within 60 days, as required by the rules and regulations of the company printed on the blank on which the message was sent," and the court sustained the motion and granted the nonsuit on that ground. The Supreme Court sustained this ruling, so far as it related to the failure of the plaintiff to make a written demand upon the company within the time specified, though the judgment granting a nonsuit was reversed; the reversal being solely upon the ground that the evidence submitted showed that the company, by the action of its agent, had waived the written demand or notice. As neither the letter admitted in evidence in the case at bar nor the one which was excluded by the court, nor both together, showed any waiver on this point by the defendant company, in our judgment the nonsuit was properly awarded. Judgment affirmed.

RUSSELL, C. J. (dissenting). I think the court erred in awarding a nonsuit. The plaintiff is always entitled to recover when he proves his case as laid. *Kelly v. Strouse*, 116 Ga. 872, 881, 43 S. E. 280; *Moore v. Central of Georgia Ry. Co.*, 1 Ga. App. 514, 58 S. E. 63; *Pendleton Bros. v. Atlantic Lumber Co.*, 3 Ga. App. 714, 60 S. E. 377. In the performance of its public duties as a public service corporation, a telegraph company is liable for at least nominal damages upon proof of any failure to discharge such duties. *Glenn v. Western Union Telegraph Co.*, 1 Ga. App. 821, 58 S. E. 83. The petition contained no allegation with reference to the written notice of claim for damages, which the contract required to be presented in writing within sixty days. There was no demurrer to the petition. There was no plea setting up, in defeasance of the plaintiff's right of action, the contention that no written claim for damages had been presented within the time stipulated. In the absence of demurrer and plea, the parties went to trial, waiving in open court, as I see it, any contention whatsoever in regard to the 60 days' notice of the claim for damages. A waiver can as well be implied from failure to demur and plead as from the circumstances referred to in the numerous cases decided by the Supreme Court and this court. The plaintiff proved his case as laid; and for that reason the award of the nonsuit was erroneous. Furthermore, in view of the defendant's failure to demur or plead, as to the failure of the plaintiff to give written notice, it was, in my opinion, an abuse of discretion on the part

of the trial judge to refuse to open the case and permit the plaintiff to prove that he had in fact given notice as required by the terms of the contract.

(16 Ga. App. 643)

GREAT EASTERN CASUALTY CO. v. HAYNIE et al. (No. 6017.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

1. INSURANCE — 618, 626—ACTION AGAINST INSURER—VENUE—PROCESS—SERVICE.

Prior to the amending act of 1902 (Acts 1902, p. 53), the Code provided that a suit could be instituted against any insurance company having agencies, or more than one place of doing business, in the county where the principal office of the company was located, or in any county where the insurance company had an agency or place of doing business, or in any county where such agency or place of doing business was located at the time the cause of action accrued or the contract was made out of which the said cause of action arose. Civil Code 1895, § 2145. The word "agency" was changed to "agent" by the act of 1902 (Civil Code 1910, § 2563); and since the passage of that act the venue of a suit against an insurance company is determined by the fact of the company having an "agent" or place of doing business in the county, and service is perfected upon the company by leaving a copy of the petition or writ with the agent. Civil Code 1910, § 2564.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1536-1539, 1572; Dec. Dig. 618, 626.]

2. INSURANCE — 626—ACTION AGAINST INSURER—PROCESS—SERVICE ON AGENT.

An authorized agent of an insurance company, who at the time the suit against the company was instituted, and at the time the cause of action accrued, and at the time of the making of the contract out of which the cause of action arose, was acting, under a state license from the insurance commissioner, as a state agent for the company, and had his headquarters and place of business as such agent in the county in which the suit was instituted, was such an agent of the insurance company that service upon him in that county was binding upon the defendant. Civ. Code 1910, §§ 2563, 2564; U. S. Casualty Co. v. Newman, 137 Ga. 447, 73 S. E. 667; Jefferson Fire Ins. Co. v. Brackin, 140 Ga. 637, 79 S. E. 467; Aetna Ins. Co. v. Brigham, 120 Ga. 926, 48 S. E. 348; Equity Life Ass'n v. Gammon, 119 Ga. 271, 275, 46 S. E. 100; Reeves v. Sou. Ry. Co., 121 Ga. 561, 565, 49 S. E. 674, 70 L. R. A. 513, 2 Ann. Cas. 207.

(a) This is true, although his contract with the defendant company did not include the county in which the suit was brought, if, nevertheless, he then had in that county with the knowledge of the company, his headquarters and his place of business for the transaction of the company's business, and solicited and wrote insurance in that county for the company, with its knowledge and permission, under a contract with other agents of the company, who had a contract to write insurance for the company in that county (such other agents dividing their premiums with him upon the policies which he wrote in that company and on renewals thereof), and the company ratified his acts by accepting the premiums and issuing policies therefor.

(b) It is immaterial that the agent served had in another county his legal residence for

voting, etc., as indicated by the domicile of his family.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1572; Dec. Dig. 626.]

3. INSURANCE — 626—ACTION AGAINST INSURER—PROCESS—SERVICE ON AGENT.

As section 2564 of the Civil Code of 1910 provides a plain method of procuring service upon an insurance company in the county where the suit was brought, under the facts in this case, there was no necessity or authority for the issuance of a second original for service upon a person resident in another county, who had been designated by the defendant company as its agent and attorney upon whom service could be made. See U. S. Casualty Co. v. Newman, supra.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1572; Dec. Dig. 626.]

4. APPEAL AND ERROR — 877—SCOPE OF REVIEW—NONPREJUDICIAL ERROR.

The only errors in the charge of the court were prejudicial to the defendant in error alone, and of those, of course, the plaintiff in error cannot complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. 877.]

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and there was no error requiring the grant of a new trial.

Russell, C. J., dissenting.

Error from City Court of Miller County; Thos. H. Hill, Judge.

Action by M. T. Haynie and others against the Great Eastern Casualty Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Callaway, Howard & West, of Augusta, for plaintiff in error. Wm. H. Fleming, of Augusta, for defendants in error.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J., dissents.

(16 Ga. App. 594)

CENTRAL OF GEORGIA RY. CO. v.

O'KELLEY. (No. 5800.)

(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 528—RECORD—AFFIDAVITS ON MOTION FOR NEW TRIAL.

The motion to dismiss on the ground that this court "is without jurisdiction, because none of the evidence before the court below is in the record now before the court," is overruled. Certain affidavits relating to a ground of the extraordinary motion for a new trial are specifically referred to therein as being attached to the motion as exhibits, and are actually so attached, and were filed with the motion as a part thereof, and are therefore a part of the record in this case, and, being transmitted under the certificate of the clerk of the court below, can be considered by this court, in the determination thereof.

(a) Other affidavits relating to a ground of the extraordinary motion for a new trial, which are not set forth in the bill of exceptions nor attached thereto as exhibits, but are merely specified therein as material to a clear understanding of the errors complained of, and which

are not referred to in the motion or attached to it, as exhibits, or filed with it as a part thereof, but are separately filed, cannot be considered by this court as a part of the record, even though used at the hearing of the motion and notwithstanding each affidavit was actually filed in office. *Glover v. State*, 128 Ga. 1, 57 S. E. 101.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. § 528.]

2. APPEAL AND ERROR § 1202—COURTS § 217—CERTIFYING CASE—EXTRAORDINARY MOTION FOR NEW TRIAL.

A motion for a new trial was regularly made and was overruled, and the judgment of the lower court was by this court affirmed. *Central Ry. Co. v. O'Kelley*, 14 Ga. App. 273, 80 S. E. 688. Thereafter an extraordinary motion for a new trial, based on alleged newly discovered evidence, was presented to the trial judge. *Held*, that the trial court had jurisdiction to entertain the extraordinary motion under these circumstances.

(a) This court must decline to certify to the Supreme Court for review the cases of *Patterson v. Collier*, 77 Ga. 295, 3 S. E. 119, *Hays v. Westbrook*, 96 Ga. 219, 22 S. E. 893, *Norman v. Goode*, 121 Ga. 449, 49 S. E. 268, and *Mallary v. Moon*, 125 Ga. 428, 53 S. E. 960, in each of which the Supreme Court entertained jurisdiction of a second motion for a new trial, in view of the fact that there appears to be no conflict raised by any of the decisions of the Supreme Court on this question, and section 6092 of the Civil Code 1910, authorizes this proceeding. For the same reasons, this court declines to review and set aside the ruling in the case of *Seaboard Air-Line Railway v. Reid*, 6 Ga. App. 18, 63 S. E. 1130.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4669; Dec. Dig. § 1202; Courts, Cent. Dig. §§ 536-538; Dec. Dig. § 217.]

3. APPEAL AND ERROR § 1178—DECISION—REMAND—FAILURE TO EXERCISE DISCRETION.

It appears, from the express recitals in the order of the trial judge overruling the motion for a new trial, that he did not exercise his discretion in passing upon the motion; and for this reason the judgment is reversed, and the case is sent back, with direction that the trial judge do pass upon the motion in the exercise of the discretion with which he is charged by law. *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 606; *M. D. & S. R. Co. v. Anchors*, 140 Ga. 531-535, 79 S. E. 153; *Savannah Electric Co. v. Lackens*, 12 Ga. App. 765-767, 79 S. E. 53, and cases there cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.]

Error from City Court of Sandersville; *El. W. Jordan*, Judge.

Action between the Central of Georgia Railway Company and T. M. O'Kelley. From the judgment, the railway company brings error. Reversed, with directions.

See, also, 14 Ga. App. 273, 80 S. E. 688.

Saffold & Jordan, of Swainsboro, and W. M. Goodwin, of Sandersville, for plaintiff in error. O. A. Nix, of Lawrenceville, Jos. H. Hall, of Macon, and Hardwick & Wright, of Sandersville, for defendant in error.

WADE, J. Judgment reversed, with direction.

(16 Ga. App. 617)

CHARLES v. PITTS. (No. 5968.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE § 60, 86—JURISDICTION—ATTACHMENT—OBJECTION BY CLAIMANT—JUDGMENT.

An attachment returnable to a justice's court of Worth county, Georgia, was issued by a justice of the peace of that county against Horton, and was levied by a deputy sheriff of Worth county upon certain lumber described as the property of the defendant. A claim to the property so levied upon was interposed by Charles, and the attachment, levy, and claim were all returned to the said justice's court for trial. On the trial day the plaintiff and defendant were both present, and the claimant absent. After proper amendment of the affidavit upon which the judgment issued, the court proceeded to try the issue raised by the claim, and also to hear testimony as to the indebtedness of the defendant to the plaintiff, and rendered a judgment finding the property subject to the attachment, and directed that the attachment proceed specially against the property under levy, and generally against the defendant, and also adjudged that the judgment rendered "operated as a special judgment against the property seized and as a general judgment in terms of the law for the full amount of principal, \$93, lawful interest thereon, and for all costs incurred in this proceeding." It appears, from the evidence of the defendant, that he lived in the county of Tift at the time the attachment was levied on the car load of lumber, and had been living there for some time; but the defendant stated in open court that he would "waive jurisdiction in this case both as to my person and the property or subject-matter in this case." *Held*:

(a) Jurisdiction being waived as to person and the subject-matter, as between the plaintiff and the defendant, a valid judgment was rendered. Thereafter the defendant himself could make no objection for lack of jurisdiction, and the claimant could not make an attack on the judgment, except upon some ground which could at that time be urged by the defendant. "A defendant who has had his day in court cannot go behind the judgment for the purpose of showing that it ought never to have been rendered, nor will a claimant be allowed any such right." *Ansley Co. v. O'Byrne*, 120 Ga. 618, 620, 48 S. E. 228. Had the claimant been present at the trial and urged objection to the rendition of a judgment binding his rights, which depended upon a waiver of jurisdiction by the defendant, his objection would have been good; but the judgment against the defendant is not void as to the claimant, since no objection was urged by him at the time to such rendition. The case of *Suydam v. Palmer*, 63 Ga. 547, 548, does not apply.

(b) Since the court's lack of jurisdiction was waived by the defendant, the court had the right to proceed, regardless of the absence of the claimant, unexplained. The court, therefore, having jurisdiction, the question arises whether the judgment rendered, which includes both a finding on the attachment and a judgment adverse to the claimant, is for that reason defective. Under proper practice, the magistrate should have rendered separate judgments: First, a judgment against the defendant in attachment, with a special lien on the property levied upon; and, secondly, the claim might properly have been dismissed, or the magistrate might have proceeded, as he did, to hear evidence which authorized a judgment upon the issue raised by the claim. In a justice's court, where niceties of pleading are not required, the in-

clusion of the entire subject-matter of the suit in a single judgment did not render it fatally defective.

[Ed. Note.—For other cases, see *Justices of the Peace, Cent. Dig. §§ 217-221, 280-294; Dec. Dig. ☞ 60, 86.*]

2. ASSIGNMENTS OF ERROR—CERTIORARI.

The assignments of error not dealt with above are without substantial merit, when viewed in connection with the entire record, and the judge of the superior court did not, therefore, err in overruling the certiorari.

Error from Superior Court, Worth County; E. E. Cox, Judge.

Claim case by J. H. Pitts against J. B. Charles. Judgment for plaintiff, certiorari overruled, and defendant brings error. Affirmed.

Claude Payton, of Sylvester, for plaintiff in error. J. H. Tipton, of Sylvester, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 596)

JONES v. GARAGE EQUIPMENT CO. (No. 5951.)

(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

JUDGMENT ☞ 298, 341, 381 — CONTROL BY COURT—MODIFICATION—RIGHT TO VACATE.

A court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them, for cause appearing, or may, to promote justice, revise, supersede, revoke, or vacate them, as may in its discretion seem necessary; and where, "for good cause shown," a judgment is considered to have been improvidently entered, the court may, at the same term, ex mero motu, and without notice to either party, vacate or set aside the judgment.

[Ed. Note.—For other cases, see *Judgment, Cent. Dig. §§ 582, 667, 725; Dec. Dig. ☞ 298, 341, 381.*]

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by the Garage Equipment Company against R. M. Jones. Judgment for plaintiff, and defendant brings error. Affirmed.

J. S. Adams, of Dublin, for plaintiff in error.

RUSSELL, C. J. The Garage Equipment Company filed an action of trover and an affidavit for bail, to recover possession of an automobile described by number and also as the "Dr. Chappell car." In the petition the value of the car is alleged to be \$250, and the value of the hire was fixed at \$30.10. The original petition was filed June 10, 1911, and the defendant filed a plea August 26, 1911. In the defendant's answer it appeared that he had surrendered possession of the automobile to the officer who seized it, but it does not appear from the record that the plaintiff, desiring possession of the automobile, gave bond as required by law. At the June term,

1914, the trial judge dismissed the suit for want of prosecution; the case (as appears from the judge's order) "being called in open court, and the plaintiff not being present to prosecute the same." The judge at the same term entered a judgment in favor of the defendant, as follows:

"The property in the above-stated cause, to wit, one Maxwell two-cylinder automobile, known as the Dr. Chappell car, engine No. —, car No. 12445, Model N. V., having been seized by the sheriff under bail trover process in the above-stated case, and turned over and delivered by said sheriff to the plaintiff, the defendant failing and refusing to give bond, and the said cause having been called in its order for trial in the city court of Dublin at the regular June quarterly term of said court, to wit, on the 8th day of June, 1914, the plaintiff not appearing, the court sounding said cause for trial, the said cause was dismissed for want of prosecution, and it appearing that the value of the property described in the plaintiff's petition is \$350, according to the sworn affidavit of the plaintiff and according to the declaration in the petition, it is therefore by the court, on motion of the defendant, ordered, considered, and adjudged (there being no demand entered in said case for a jury) that the defendant R. M. Jones recover of and from the plaintiff, Garage Equipment Company, a corporation described in the declaration, the said principal sum of \$350, and interest hereafter on said principal sum at the rate of 7 per cent. per annum, the defendant having elected to take a money verdict. Done in open court this June 9, 1914."

Thereafter, during the same term of the court, the judge entered another judgment setting aside both his order dismissing the suit for want of prosecution and the judgment of restitution, entered June 9th, which is quoted above. Exception is taken to the judgment last mentioned, it being insisted that the court was without authority to set aside the two original judgments referred to, "without written motion, pleadings, or petition of any kind," and "without notice either written or verbal of any kind to the plaintiff in error." It is further insisted that in granting the final order which reinstated the case the trial judge abused his discretion.

1. We are of the opinion that the trial judge is empowered, prior to the adjournment of the term at which judgment was rendered, to mold, amend, withdraw, revoke, or otherwise nullify any judgment rendered at that particular term of the court, when the judgment does not involve the consideration of, and is not based upon, evidence necessary to support it. Until the adjournment of the term, all judgments rest in the breast of the court, and are subject to alteration by the judge, to meet the ends of justice. Where a judgment is founded upon a verdict of a jury, or a finding of a judge sitting as a jury, it may be proper that notice be given to the opposite party and that a hearing be had, and a written petition may be necessary as a basis of the order (though it is not necessary that this point be ruled upon at this time); but where a motion to dismiss for want of

prosecution is made, and the matter thus is peculiarly in the knowledge of the judge, he may thereafter, for any good cause shown to him (even though informally), set aside the judgment as improvidently entered. It appears, from the order setting aside the judgment in this case and reinstating the case, that it was done "for sufficient cause shown," and this, to our minds, is sufficient to show that the judgment as entered was improvidently or inadvertently entered. In the Encyclopedia of Law & Procedure, vol. 23, p. 948, the rule is laid down that:

"During the term at which a judgment was rendered, the court has power of its own motion to vacate the same for irregularity or because it was improvidently or inadvertently entered," etc.

As was said by this court in *Strachan v. Wolfe*, 2 Ga. App. 254, 58 S. E. 492:

"While the truth of a motion to reinstate a case, or similar motion, should be made to appear, yet, where the presiding judge entertains the motion, this fact, on exceptions to the judgment, affords a sufficient implicit verification."

So that, it being certified by the trial judge, this court will assume it to be true that the judgment attacked was set aside "for sufficient cause shown."

"The authorities all hold that a court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them, for cause appearing, or may, to promote justice, revise, supersede, revoke, or vacate them, as may in its discretion seem necessary." 1 Black, Judg. § 153.

The trial judge is allowed a wider control as to modification or annulment of those judgments which, outside the merits of the controversy, pertain to the rules of practice and are rendered upon formal matters of procedure, than as to judgments upon substantial matters affecting the merits of any portion of the case. *East Tenn., etc., Ry. Co. v. Greene*, 95 Ga. 37, 22 S. E. 36.

"The exercise of discretion by the trial judge in reinstating a case dismissed for want of prosecution will not, unless flagrantly abused, be disturbed. *Davis v. Alexander*, 27 Ga. 479; *Wallace v. Cason*, 42 Ga. 435." *Strachan v. Wolfe*, supra.

In the present case, it is not made to appear that there was any abuse of this discretion.

Judgment affirmed.

(16 Ga. App. 651)

YOUNG v. DUBLIN FERTILIZER WORKS.
(No. 6163.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

SUNDAY — 13, 15 — NOTES — VALIDITY — DELIVERY — RATIFICATION.

The plea that the note sued on was void, because executed on Sunday, was not sustained

by the evidence. From the agreed statement of facts it appears that, although the note was signed by the principal maker on Sunday, it was not signed by the surety or delivered to the payee, or to any one for the payee, until afterward, on a week day; and it appears that it was not for a debt contracted on Sunday, but was in renewal of a note for fertilizer sold on a week day. Delivery is essential to the validity of a promissory note, and a note signed on Sunday, but not delivered on that day, is not a contract made on Sunday. See *Reese v. Fidelity Mutual Life Association*, 111 Ga. 482 (2), 485, 486, 36 S. E. 637; 37 Cyc. 562. Even if the note be treated as a Sunday contract, the subsequent acts of the principal maker in procuring the signature of the surety and in delivering the note on a week day amounted to a ratification. See *McAuliffe v. Vaughan*, 185 Ga. 852, 70 S. E. 322, 33 L. R. A. (N. S.) 255, Ann. Cas. 1912A, 290; *Jones v. Belle Isle*, 13 Ga. App. 438 (2), 79 S. E. 357. The trial judge, who by consent tried the case without a jury, did not err in rendering judgment for the plaintiff.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. §§ 36-44, 46; Dec. Dig. — 13, 15.]

Error from City Court of Dublin; Jas. B. Hicks, Judge.

Action by the Dublin Fertilizer Works against E. Young. Judgment for plaintiff, and defendant brings error. Affirmed.

The agreed statement of facts was as follows:

"That the plaintiffs, in 1911, sold to E. Young fertilizer on a week day, Young giving his note for the same; that when the note became due in 1911, Young being unable to pay, the plaintiffs agreed to an extension if Young would give a new note with Graham as security; the agreement to extend payment was made on a week day, and, upon Young's agreement to have Graham sign the note, plaintiffs sent the old note to M. C. Carter, of Scott, Ga., who was the agent and representative of the plaintiffs; that Carter prepared said note sued upon on Friday, at the request of E. Young, the principal, who was to call for the same for the purpose of having it signed and returned to Carter, the agent of the Dublin Fertilizer Works; that E. Young called for the note on Sunday, and signed the same on that day, and took the note for the purpose of having Graham sign; that Graham signed the note on a week day, and some time during the week the note was returned to Carter, agent of the plaintiffs; that plaintiffs had no notice that the note was signed by either of the defendants on Sunday until some time after the note was returned to plaintiffs by their agent, M. C. Carter, and that Graham was security on the note. Counsel in the above-stated case agree on the above evidence, withdraw the case from the jury, and agree that the judge shall try the same upon the above-stated evidence without the intervention of a jury. The consideration was fertilizers, and Young was a farmer engaged in farming and purchasing guano to be used on his farm, and the note sued upon was a renewal of a guano note given for fertilizers."

J. S. Adams, of Dublin, for plaintiff in error. Davis & Sturgis, of Dublin, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 639)

JAMES v. JOHN FLANNERY CO.
(No. 5950.)

(Court of Appeals of Georgia. July 31, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §1097—LAW OF THE CASE—DECISION ON FORMER APPEAL.**

The controlling questions of law involved in this case are settled by the ruling of this court when the case was previously here (John Flannery Co. v. James, 13 Ga. App. 425, 79 S. E. 912), and, as said by this court in Washington County v. Holliman, 10 Ga. App. 322, 73 S. E. 351, "even if it were likely that this court would change its views so soon on the questions presented alike by the former and the present records, it has not the right or legal power to do so, so far as affects this case."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. §1097.]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and there were no errors of law which require a new trial.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action between D. W. James and the John Flannery Company. From the judgment, James brings error. Affirmed.

Pope & Bennet and Pottle & Hofmayer, all of Albany, for plaintiff in error. O'Byrne, Hartridge & Wright, of Savannah, and Walter G. Park, of Blakely, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 646)

SEABOARD AIR LINE RY. v. HAMILTON
(two cases). (Nos. 6151, 6152.)

(Court of Appeals of Georgia. July 31, 1915.)

*(Syllabus by the Court.)***ACTION §53—SPLITTING CAUSES OF ACTION—CONTRACTS.**

If breaches occur at successive periods in an entire contract, an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein, and the plaintiff cannot arbitrarily divide such breaches, and bring one suit for some of them, and file another suit on the same date for the others.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 551, 553-623; Dec. Dig. §53.]

Error from Municipal Court of Atlanta.

Actions by J. S. Hamilton against the Seaboard Air Line Railway. Judgments for plaintiff, and defendant brings error. Reversed.

W. G. Loving, of Atlanta, for plaintiff in error. Felder & Coburn and C. V. Hohenstein, all of Atlanta, for defendant in error.

WADE, J. J. S. Hamilton filed two separate suits against the Seaboard Air Line Railway on September 8, 1914. In one of the suits the cause of action was stated as follows:

"Suit on account for salary under contract of employment for one year, from December 31, 1914, at \$2,000 per annum, the following months being due and unpaid: March 15, 1914, to June 1, 1914, at \$166.66% per month, \$417."

In the other suit the cause of action was stated as follows:

"Suit on account for salary under contract of employment for one year from December 31, 1913, to December 31, 1914, \$2,000 per annum, the following months being due and unpaid: June 1, 1914, to September 1, 1914, \$166.66% per month, \$500."

The defendant filed a plea to the jurisdiction in each case, alleging that both suits were based upon the same contract, and the amounts claimed in each were due, if due at all, on September 8, 1914, when the separate suits were instituted, and that the plaintiff had split his demand against the defendant into two parts, and had instituted on the same day two separate suits therefor in order to give jurisdiction to the municipal court of Atlanta, the jurisdiction of which court does not extend beyond \$500.

Section 4389 of the Civil Code reads as follows:

"Suits for breach of contracts. If a contract be entire, but one suit can be maintained for a breach thereof; but if it be severable, or if the breaches occur at successive periods in an entire contract (as where money is to be paid by installments), an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein."

The two suits instituted by Hamilton were each suits for several successive breaches by the defendant of an alleged contract binding it to pay to the plaintiff a salary amounting to \$2,000 per annum, and even if it be assumed that under the contract one-twelfth of the total yearly salary of \$2,000, or the sum of \$166.66%, was payable monthly to the plaintiff, or the total salary was payable in 12 monthly payments of \$166.66%, it appears clear, under the provisions of section 4389, recited above, since the plaintiff permitted several breaches to occur before commencing his action therefor (conceding that the breaches occurred at successive periods in an entire contract), that at the time of commencing his action he must have included therein all breaches that had occurred up to that date, and that he could not arbitrarily divide or split his cause of action, and bring an action for several breaches of the contract in one suit, and a separate action for several other of such breaches, in order to give jurisdiction to the court in which his suits were filed. Had the plaintiff desired, if in fact his salary was payable monthly in certain agreed installments, he might have instituted an action at the expiration of each month for the installment then due; but, where he waits until several installments are past due, he must, under the plain provisions of the statute, include all installments past due at the time he brings his suit in the action filed.

It was held by this court in *Willingham v. Buckeye Cotton Oil Co.*, 13 Ga. App. 233-254(3), 79 S. E. 496:

"Where the contract is entire, but one suit can be maintained for a breach thereof, and all the breaches occurring up to the commencement of the action must be included therein"—citing *Johnson v. Klassett*, 9 Ga. App. 733, 72 S. E. 174; *Puffer Manufacturing Co. v. Rivers*, 10 Ga. App. 154, 73 S. E. 20; *Thompson v. McDonald*, 84 Ga. 5, 10 S. E. 448; Civil Code, § 4389."

In *Johnson v. Klassett*, supra, the question is discussed at considerable length, and the various rulings of the Supreme Court are reviewed, and Hill, C. J., speaking for this court, said:

"All of these cases are based upon the principle that both law and equity abhor a multiplicity of suits."

In that case, it is true, the suit was upon an account; but certainly the rule which would prevent the bringing of several different actions upon an account by splitting the same into different demands would apply equally to suits based upon successive breaches of a contract.

The case of *Parris v. Hightower*, 76 Ga. 631, relied upon by the defendant in error in the case we are now considering, may be easily distinguished. In that case the suit was upon an account; it was agreed between the parties thereto, at the time the debt was incurred, that the account should be divided into four distinct parts, due on different days, and after all of the four parts were past due, under the terms of the agreement, the plaintiff instituted an action on one part separately, and on the three remaining parts together; and the Supreme Court held that the plaintiff was not compelled to unite them all in one suit, "so as to prevent the jurisdiction of a justice's court," where the division of the account into such distinct parts, due on separate days, was by agreement between the parties.

In the case under consideration, it is not alleged that there was any agreement between the plaintiff and the Seaboard Air Line Railway that the amount claimed by him when his two separate actions were filed on September 8th should be divided into two separate and distinct demands, and it is obvious that the ruling in the *Parris* Case does not cover the facts in this case. If it were permissible, after several successive breaches in an entire contract had occurred, for the plaintiff arbitrarily to apportion or divide these breaches, and institute at the same time two separate suits therefor, it would be equally allowable for the plaintiff to wait until all possible breaches under the contract had occurred, and then bring a separate and distinct suit for each breach, and thereby wholly nullify Code, § 4389, supra, the purpose and intention of which is to prevent a needless multiplicity of suits.

The appellate division of the municipal court of Atlanta, therefore, erred in over-

ruling the plea to the jurisdiction, in each of the above-stated cases.

Judgment reversed.

(16 Ga. App. 636)

MILL WOOD & COAL CO. et al. v. FLINT RIVER CYPRESS CO.

FLINT RIVER CYPRESS CO. v. MILL WOOD & COAL CO. et al.

(Nos. 5932, 5933.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

1. CONTRACTS \Leftrightarrow 147—CONSTRUCTION — ENFORCEMENT.

"The cardinal rule of construction [of contracts] is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction." Civ. Code 1910, § 4266. In this case the contract itself, the conduct of the parties after the contract was first executed, and all the attendant circumstances (as shown in the petition and amendments thereto) leave little room for doubt that the intention of the parties was that both should be bound in the manner contended for by the plaintiff in the court below; and that intention contravening no rule of law, and sufficient words having been used to express the intention, substantial justice requires that the contract be enforced.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. \Leftrightarrow 147.]

2. CONTRACTS \Leftrightarrow 153—CONSTRUCTION—MUTUALITY.

The construction which will uphold the contract in whole and in every part is to be preferred, and the whole contract should be looked at in arriving at the construction of any part. Civ. Code 1910, § 4268, subd. 3. "Courts should guard with jealous care the rights of private contracts, and give to them full effect when possible so to do." *Mutual Life Insurance Co. v. Durden*, 9 Ga. App. 797 (3), 72 S. E. 295. If the contract in the instant case was not binding on the seller, it was not binding on the purchaser either; it was void. In this case it is "possible" to construe the contract as binding on both parties; consequently it is not unilateral. See *Palmer Brick Co. v. Woodward*, 138 Ga. 289 (1), 75 S. E. 480; 2 *Snyder on Mines*, § 1284.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. \Leftrightarrow 153.]

3. SALES \Leftrightarrow 377 — BREACH OF CONTRACT — AMENDMENTS TO PETITION—DEMURRE.

Where a suit is brought for the breach of a written contract, and under the contract the owner of a mill agrees to sell to the buyer "all of its refuse wood, known as stovewood, which the party of the first part manufactures at its sawmill just north of the corporate limits of Albany, on the Leesburg road, from this date, for and during the period of five years, [and] the party of the second part hereby purchases said wood on terms and conditions as hereinafter stated," and where the "party of the first part reserves the right to use for its own purposes and needs such amount of stovewood as it may require in the operation of its business and for its own use only, agreeing not to sell the wood to other parties during the life of this contract," and where the defendant demurs to the petition as setting forth no cause of action, because it is based on a contract that is unilateral and incapable of enforcement so far as regards any future acts to be performed thereunder, and where

an amendment to the petition is made, alleging the surrounding circumstances, such as that the mill was already manufacturing stovewood at the average rate of $7\frac{1}{2}$ cords per day when the contract was made, that the mill needed only a certain definite amount of wood, to wit, an average of $1\frac{1}{4}$ cords a day, to be used for its own purposes and needs, that this amount continued practically the same, and that it was in the contemplation of the parties that the mill would continue to manufacture stovewood throughout the life of the contract just as it was manufacturing it when the contract was made, and that it was known by the parties at the time of making the contract that the needs of the mill required a definite and certain amount of stovewood for its own use, an average of $1\frac{1}{4}$ cords a day, and that it would continue to require the same amount while the contract lasted, and that this also was in the contemplation of the parties at the time the contract was made, and that, since the defendant's breach of the contract the plaintiff has continued to operate said mill and to manufacture stovewood to the amount of $7\frac{1}{2}$ cords a day. *Held*, that such allegations in the amendment were material and relevant, and were not subject to demurrer. See *Palmer Brick Co. v. Woodward*, *supra*; *McCaw Manufacturing Co. v. Felder*, 115 Ga. 408, 41 S. E. 664; *Albany Power Co. v. City of Albany*, 133 Ga. 376, 381, 382, 65 S. E. 886; *Cohn v. Brown*, 7 Ga. App. 395, 66 S. E. 1038; *Oak City Coöperage Co. v. Kennedy*, 4 Ga. App. 344, 61 S. E. 499; *National Furnace Co. v. Manufacturing Co.*, 110 Ill. 427; *Hadden v. Dimick*, 31 How. Prac. (N. Y.) 196; *Farmers Union Warehouse Co. v. Hollis*, 8 Ga. App. 339, 69 S. E. 33; *Carey Emerson v. Pacific Coast Co.*, 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 113 Am. St. Rep. 603, 6 Ann. Cas. 973. [Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1092; Dec. Dig. ¶ 377.]

4. SALES ¶384 — BREACH OF CONTRACT — MEASURE OF DAMAGES.

Where a fairly definite part of the output of a mill is sold for a period of five years under a written contract, and the purchaser, after accepting the goods for several months, notifies the seller that he (the purchaser) will not carry out the contract any further, and thereupon the seller notifies the purchaser that he will advertise and resell the remaining goods contracted for, acting therein as agent of the buyer, and where he afterwards does advertise and resell the said goods to the best advantage possible, and at the then market price, but at a price less than the original purchaser agreed to pay, the measure of damages is the difference between the price which the original purchaser contracted to pay and the price at which the goods were re-

sold. *Civ. Code* 1910, § 4181; *Southern Flour & Grain Co. v. St. Louis Grain Co.*, 11 Ga. App. 401, 75 S. E. 439; *American Manufacturing Co. v. Champion Manufacturing Co.*, 13 Ga. App. 551, 554, 79 S. E. 485; *Acme Brewing Co. v. Rahr Sons Co.*, 10 Ga. App. 564, 73 S. E. 955; *Sims-McKenzie Grain Co. v. Patterson*, 10 Ga. App. 742, 73 S. E. 1080; *Bridges Grocery Co. v. Dan Joseph Co.*, 9 Ga. App. 189, 70 S. E. 964; *Mendel v. Miller*, 126 Ga. 834 (1), 56 S. E. 88, 7 L. R. A. (N. S.) 1184.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1098-1107; Dec. Dig. ¶ 384.]

5. PLEADING ¶248—BREACH OF CONTRACT—AMENDED PETITION—NEW CAUSE OF ACTION.

The amendment did not set forth a new cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. ¶ 248.]

6. ACTION ¶45—JOINDER—CONTRACTS.

In this case there was no joinder of causes of action *ex contractu* and *ex delicto*. It was a suit on account for wood already furnished, and for damages for breach of the contract, due to a refusal to accept wood to be furnished in future, and as to each of these matters was a suit *ex contractu*.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 378-383, 385-448; Dec. Dig. ¶ 45.]

7. PETITION—DEMURRERS.

The petition as finally amended set forth a cause of action, and was not subject to any of the demurrers, either general or special. The court erred in sustaining the special demurrer as to paragraphs 9 to 13, inclusive, of the original petition, and to paragraphs 14 to 16, inclusive, of the amendment to the petition, and in striking those paragraphs.

Error from City Court of Albany; Clayton Jones, Judge.

Action between the Mill Wood & Coal Company and others and the Flint River Cypress Company. From the judgment, both parties bring error. Affirmed on main bill of exceptions, and reversed on cross-bill.

Peacock & Gardner, R. J. Bacon, and R. H. Ferrell, all of Albany, for plaintiffs in error. Pope & Bennet, of Albany, for defendant in error.

BROYLES, J. Judgment on main bill of exceptions affirmed; on cross-bill, reversed.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(148 Ga. 776)

CENTRAL GEORGIA POWER CO. v.
NOLEN. (No. 451.)(Supreme Court of Georgia. July 14, 1915.
Rehearing Denied Aug. 14, 1915.)*(Syllabus by the Court.)*1. NUISANCE \S 50—WATERS AND WATER
COURSES \S 53—INJURY TO HEALTH—RE-
COVERY OF DAMAGES—RIGHT—CONSTRU-
TION AND MAINTENANCE OF DAM.There was no error in overruling the de-
murrer to the petition.[Ed. Note.—For other cases, see Nuisance,
Cent. Dig. \S 118-127; Dec. Dig. \S 50; Wa-
ters and Water Courses, Cent. Dig. \S 45; Dec.
Dig. \S 53.]2. JURY \S 90—DISQUALIFICATION—RELA-
TIVES OF PLAINTIFFS IN OTHER CASES.

Where suit was brought against an elec-
tric light and power company to recover dam-
ages to the health of the plaintiff, alleged to
have been caused by a nuisance created by the
dam and reservoir of the defendant, and where
it appeared that a number of suits had been
brought by other plaintiffs against the same
defendant, some of them in the county where
the first-mentioned suit was brought, and some
of them in other counties, seeking to recover
from the defendant on account of damages
alleged to have been caused by the dam and
reservoir of the defendants. This did not dis-
qualify all of the relatives of the plaintiffs in
such other cases, within the fourth (or other)
degree, from sitting as jurors in the first-men-
tioned case.

[Ed. Note.—For other cases, see Jury, Cent.
Dig. \S 413-418, 422; Dec. Dig. \S 90.]3. CORPORATIONS \S 432—ACTION AGAINST—
SERVICE OF PROCESS—AGENT—SUFFICIENCY
OF EVIDENCE.

The evidence was sufficient to authorize
the jury to find that the person on whom the
service of the petition and process was perfect-
ed was an agent of the defendant company,
within the meaning of Civ. Code 1910, \S
2258, rather than a mere servant.

[Ed. Note.—For other cases, see Corporations,
Cent. Dig. \S 1717, 1718, 1724, 1726-1735,
1737, 1743, 1762; Dec. Dig. \S 432.]4. INSTRUCTIONS, VERDICT, AND DENIAL OF
NEW TRIAL APPROVED.

While the charge may not have been be-
yond the range of criticism in some respects,
yet when considered as a whole, especially in
the absence of any written request, none of the
parts of it complained of constituted reversible
error for the reasons assigned. The evidence
was sufficient to support the verdict, and there
was no error in overruling the motion for a
new trial.

Error from Superior Court, Butts County;
Robt. T. Daniel, Judge.Action by Allie Nolen against the Central
Georgia Power Company. Judgment for
plaintiff, and defendant brings error. Af-
firmed.Hatcher & Smith, of Macon, W. E. Wat-
kins, of Jackson, and Greene F. Johnson, of
Monticello, for plaintiff in error. C. L. Red-
man, of Jackson, for defendant in error.LUMPKIN, J. [1] 1. The act of 1897 (Civ-
il Code of 1910, \S 5240) declares that corpora-

tions or individuals owning or controlling
any water power in this state, and operat-
ing or constructing, or preparing to con-
struct, thereon a plant or works for generat-
ing electricity by water, to be used for the
purpose of lighting towns or cities, or sup-
plying motive power to railroads or street
car lines, or supplying light, heat, or power
to the public, shall have the right to pur-
chase, lease or condemn rights of way or
other easements upon the lands of others, in
order to run lines of wires, maintain dams,
"flowback water," or for other uses neces-
sary to such purposes, upon first paying just
compensation to the owners of the land to
be affected. By the act of 1908 (Civil Code
of 1910, \S 3634) it is declared:

"It shall be lawful for all corporations and
individuals owning or controlling lands upon
opposite sides of any stream in this state,
which is not a navigable stream as defined by
section 3631, to construct and maintain a dam
or dams across such stream for the develop-
ment of water power and other purposes, to-
gether with canals and appurtenances there-
of: Provided, that this section shall not be con-
strued to release individuals or corporations
constructing such dam or dams and appurte-
nant works from liability to private property
for damages resulting from the construction
and operation thereof, either by overflow or
otherwise."

It will be noted that the latter section
deals generally with the right of an owner
of land on both sides of a nonnavigable
stream to construct and maintain a dam or
dams across such stream "for the develop-
ment of water power and other purposes."
It is not confined to companies or persons
furnishing heat, light, or power to the pub-
lic. We need not discuss how far this al-
tered the rights of riparian owners as they
already existed; but it may be said that
it was hardly intended to declare broadly
that any owner of land might build a dam
and be free from all damages resulting
therefrom, if it created a nuisance injurious
to health. It has been held that, where pub-
lic or quasi public corporations exercise le-
gitimately and in a proper manner the pow-
ers expressly or by necessary implication
conferred on them by law, such exercise can-
not be held to be a nuisance per se, but by
the negligent or improper exercise of such
powers the company might create a nuisance,
and furnish a cause of action. We deem it
unnecessary to consider our constitutional
provision to the effect that private property
shall not be taken or damaged for public
purposes without just and adequate com-
pensation being first paid. Civil Code 1910,
 \S 6388. The injury here complained of is to
health, not property. It will not be presu-
med that the Legislature intended to author-
ize a corporation or an individual negligently
to create a nuisance tending to destroy the
lives or injure the health of others without
remedy for damages resulting therefrom,
unless it should clearly so appear. The right

of a company to build a dam does not include a right to build or maintain it in such negligent or improper manner as to cause a nuisance injurious to the health of the adjacent community. For damages arising from such things an action will lie. In determining whether the authority has been properly exercised, the location and surroundings may be considered. In this state damages recoverable on account of a nuisance are not limited to injury to realty, but injury to health may furnish a basis for such recovery. The remark made in *Central Georgia Power Co. v. Ham*, 139 Ga. 569, 573, 77 S. E. 396, that it would seem that this proviso (referring to that in the Civil Code of 1910, § 3634) is exclusive in confining the liability for the construction of dams to damages to private property and in limiting the remedy to actions for the recovery of such damages, was an obiter dictum. The point there was whether the dam of the public service corporation could be summarily abated as a nuisance by application to the ordinary. The case of *Austin v. Augusta Terminal Railway Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, involved different facts from those now before us; and it may be mentioned that two justices there dissented. When the decision in *Georgia Railroad & Banking Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315, is carefully read in connection with the facts there involved, it does not conflict with what is here said. See, in this connection, *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172, 80 S. E. 636, *Central Georgia Power Co. v. Pope*, 141 Ga. 186, 80 S. E. 642, and *Central Georgia Power Co. v. Fincher*, 141 Ga. 191, 80 S. E. 645, in some of which cases the right to recover physician's bills was tacitly recognized, rather than ruled. *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844. There was no error in overruling the demurrer to the petition.

[2] 2. A motion was made to test the competency of jurors. It was alleged that a number of suits had been brought by different plaintiffs, other than the plaintiff in the present case, against the same defendant, in Butts and other counties, to recover damages alleged to have been caused in certain years by the creation of a nuisance by the defendant by means of its dam and reservoir, and that this was one of the earliest cases brought. It was contended that the relatives of such plaintiffs within the fourth degree were disqualified from acting as jurors in the present case. (Why the fourth degree was selected is not stated.) The court held that a person who had a pending suit against the company, based upon the same cause of action, would be disqualified, but that the facts stated did not disqualify relatives of plaintiffs in the other suits. In this latter ruling he decided correctly. Relatives of parties to a case within the prohibited degree are disqualified to sit as jurors

therein. But the mere fact that the principles decided in one case may, in some collateral way, be beneficial to a party in another case, or that evidence similar to that in the first case might be introduced in the later case (each being based on the creation or maintenance of a nuisance), does not disqualify the kindred of the plaintiff in the later case from sitting as jurors in the first case.

[3] 3. A traverse to the return of service was made, and the issue was submitted at the same time with the main case. The contention was that the person served was not an agent of the company, but a mere subordinate employé or servant. A written contract between the company and such person was introduced, in which there seems to have been a careful effort to call him an "employé." But he was to operate the power plant under the immediate control of the chief engineer, with whom he was to communicate by telephone as to all matters of discretion involving the operation of the plant. He was to forward to the engineer daily log sheets or "trouble reports," and perform other services, which need not be set out. He was to receive from the company \$100 per month. There was also evidence as to the services performed by this person. Under the evidence, the jury were authorized to find that the person in question was an agent within the meaning of Civil Code 1910, § 2258, rather than a mere servant. The calling him by the name "employé" in the contract did not preclude the jury from finding that in fact he was an agent. On this point the case falls within the decision in *Southern Bell, etc., Co. v. Parker*, 119 Ga. 721, 47 S. E. 194, rather than within that in *Smith v. Southern Ry. Co.*, 132 Ga. 57, 63 S. E. 801. In the latter case the person in question was a clerk in the office of the station agent of the company.

[4] 4. Some of the grounds of alleged error were expressly abandoned by counsel for the plaintiff in error in their brief, and need not be discussed. The charge was not beyond the range of criticism in some respects. But when considered as a whole, especially in the absence of any written request, none of the parts of it complained of constitute reversible error for the reasons assigned. The evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur.

(18 Ga. App. 630)

KAPLAN et al. v. COLLIER. (No. 6002.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

SALES §472—CONDITIONAL SALE CONTRACT—FAILURE TO RECORD—GIFT.

Where personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in the vendor until the purchase price shall have been paid,

and the reservation of title is evidenced by a sufficient written contract, which the vendor fails to record within 30 days after the date thereof, the vendor may nevertheless recover the property from one who acquired it from the vendee by gift and for no valuable consideration, even where the person who thus obtained the property by gift had no actual knowledge, at the time the gift was made, that title was in the original vendor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. ¶472.]

Error from Municipal Court of Macon; Augustin Daly, Judge.

Action by H. D. Kaplan and others against E. B. Collier. Judgment for defendant, and plaintiffs bring error. Reversed.

Harris & Harris and M. J. Witman, all of Macon, for plaintiffs in error. W. E. Martin, Jr., of Macon, for defendant in error.

WADE, J. Where personal property is sold with the condition that the title thereto shall remain in the vendor until the purchase price has been paid, the reservation of title must be evidenced in writing in order to be valid as against "third parties" (Civil Code, § 3318), and—

"conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages." Civil Code, § 3319.

Mortgages, "as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record in the clerk's office." Civil Code, § 3320.

It will be seen that section 3318, supra, provides that bills of sale shall be governed by the laws relating to the registration of mortgages.

In *Harvey v. Sanders*, 107 Ga. 740, 33 S. E. 713, the Supreme Court said:

"The registry act of 1889 [which includes section 3320 of the Code of 1910] was intended not only for the protection of innocent creditors who might acquire liens or transfers of property of a defendant in *fi. fa.* to secure their debts, but also for the protection of bona fide purchasers for value who obtain title to such property by absolute deed."

And in *Toole v. Toole*, 107 Ga. 472, 477, 33 S. E. 686, 687, the Supreme Court said that the holder of a voluntary deed "does not occupy the position of a bona fide purchaser," and the court quoted with approval from *Webb on Record of Title*, § 204, as follows:

"The purchaser protected under the recording acts must be one who acquired his right for a valuable consideration. If he be a mere volunteer whose title has been derived by gift, inheritance, devise, or some kindred mode, he does not come within the term 'purchaser' as used in these statutes."

Again, in *Finch v. Woods*, 113 Ga. 996, 39 S. E. 418, the Supreme Court said that:

"The registry laws were not intended for the protection of those who claim under voluntary conveyances."

See, also, *Martin v. White*, 115 Ga. 866, 42 S. E. 279. This court held in *Tremere v. Barfield*, 12 Ga. App. 774, 78 S. E. 729, that:

"Where personal property is sold, with the condition affixed to the sale that title is to remain in the vendor until the purchase money is paid, the reservation of title must be in writing and recorded within 30 days from the date of its execution, in order to be valid against a third person who, without actual notice of the reservation of title, parts with money or other thing of value upon the faith of the vendee's apparent unconditional ownership of the property, and in consideration therefor receives from the vendee a bill of sale to the property to secure the debt, and records it in the manner prescribed by law." One who, in consideration of the execution of such a bill of sale, surrenders to the vendee a valid mortgage on other property, and cancels the debt evidenced thereby, is a third person, within the meaning of section 3318 of the Civil Code."

And in the same case the court said:

"Section 3319 provides: 'Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages.' Hence a seller of personal property, who reserves title in writing until the purchase money has been paid, but who fails to properly record the reservation of title, loses his right to enforce his reservation of title against third persons who in good faith part with money or other thing of value upon the faith of the apparent unconditional ownership of the property by the vendee, and without actual or constructive notice of the vendor's reservation of title. As to all such persons, the vendee is to be treated as having the absolute unconditional title to the property; but as between the parties themselves and persons who have notice the reservation of title is good whether recorded or not. *Hill v. Ludden*, 113 Ga. 320, 38 S. E. 752. In order, however, for third persons to acquire priority over a vendor who has failed to record his reservation of title, it must appear that such person has parted with something of value on the faith of the vendee's apparent ownership of the property."

See, also, *Reisman v. Wester*, 10 Ga. App. 96, 72 S. E. 942, where a vendor who failed to record his reservation of title suffered because credit had been extended to a donee of the vendee on the faith of his apparent ownership of the property sold to her husband. Again, this court held in *Phillips & Crew Co. v. Drake*, 13 Ga. App. 764, 79 S. E. 952, that where one sold property under a contract of conditional sale and delivered it over into possession of the vendee without recording the contract, he took the risk of the acquisition of a judgment lien against the property by other creditors of the defendant. The court said:

"The owner of personal property sold on conditional sale cannot withhold the contract from record, and then enforce the reservation of title against one who subsequently obtains a lien at a time when the defendant is apparently clothed with the absolute title to the property."

Construing these several decisions together, and many others of like import, it may be concluded that, where the owner of personal property sells it on conditional sale, and withholds the contract from record, he would be unable, as against one who ob-

tains a lien or a transfer for value at a time when the vendee is apparently clothed with the absolute title to the property, to enforce any rights under his retention of title contract; but where the person in possession of the property, the title to which is reserved by the vendor, acquires the property merely by gift or for no valuable consideration, the vendor may still assert his rights as against the holder, notwithstanding his failure to comply with the registration laws. In other words, the "third parties" protected by the proper execution and registration of a retention of title contract are not those whose title has been acquired by gift, and who have parted with no valuable consideration therefor.

The facts disclosed by the record in this case were as follows: The plaintiffs (who are the plaintiffs in error here) sold to Charles Collier, the husband of the defendant, two diamond earrings on September 20, 1912, for \$265, for which Collier gave them on that date, when the earrings were delivered to him, a note due after date, reserving title in the vendor, which was filed for record in the clerk's office of Bibb superior court on October 14, 1912, and recorded on the following day. On October 9, 1912, the plaintiffs, H. D. Kaplan and Henry Kaplan, having heard nothing from Charles Collier, and having received no payment from him, went to his house and found him sitting on the porch with his wife, the defendant, Mrs. Ella Butts Collier. H. D. Kaplan testified that he went on the porch with the note in his hand, and said to Charles Collier:

"Well, what are you going to do about the earrings?" And that Collier "turned to his wife and asked her what he should do about it—whether he should keep them or not. His wife said, 'Well, suit yourself; keep them if you want to.' He stated for me to call around the next day, and he would make a payment. The defendant in this case [the wife of Collier] was sitting next to Charles Collier, within four or five feet from me. We left, and on the next day he made a payment of \$25. He made regular payments on the earrings up to August 25, 1913, which is the date of his last payment to me."

This witness further testified that in May, 1914, he went to see Mrs. Collier and inquired what she intended to do about the earrings, informing her that Charles Collier had failed to make the payments, and—

"that she also was not making regular payments. She had made two or three payments since Collier made his last payment on August 25, 1913."

The defendant replied that her husband had left her without any money, and she was unable to make any payments just then, that she knew that there was a balance due on the earrings, and she would pay something every month. The witness told the defendant to see his attorneys and make some arrangement with them, but this she failed to do. Henry Kaplan identified the earrings obtained by the sheriff from the defendant as the earrings delivered to Charles Collier

on September 20, 1912, and described in the retention of title note, signed by Collier on that date, which was introduced in evidence. His testimony was in accord with that of H. D. Kaplan as to the conversation between H. D. Kaplan and Charles Collier and the defendant on October 9, 1912, and he added that in the early part of 1914 the defendant herself came to his store and stated to him that her husband was in trouble, and he then warned her not to sell the diamond earrings belonging to himself and H. D. Kaplan, since the full purchase price had not been paid, and she admitted that she knew the earrings had not been paid for, and indicated her intention not to sell them. Another witness testified that he had made three collections for the plaintiffs from the defendant on the diamond earrings in controversy (on December 6, 1913, \$5; December 15, 1913, \$6, February 5, 1914, \$2), and that these amounts were paid to him for the plaintiffs by the defendant in person. It was admitted that the earrings sued for were in the possession of the defendant at the time suit was instituted, and it was further admitted that before suit a demand was made by the plaintiffs on the defendant for the return of the earrings, and that she refused to return them. The defendant herself testified that in the early part of September, 1912, her husband, Charles Collier, gave the rings to her as a present, and that she knew nothing of any claim in favor of the plaintiffs for the purchase money of the earrings until H. D. Kaplan spoke to her about them in May, 1914. She further testified that the only conversation which occurred between H. D. Kaplan, her husband, and herself, on the porch at her home, that she recalled, was that H. D. Kaplan asked Charles Collier to make him a payment on the earrings, and that Collier told Kaplan to come to his place of business on the following day, and he would do so. She denied that she had ever told Henry Kaplan in his store that she knew the diamond earrings had not been paid for, and that she would not sell them, and said that she made only one payment on them; that this payment was made some time in February, 1914; that Charles Collier left the money with her for this payment, but she did not know what the payment was for. She further testified that she and Charles Collier were not then living together, having separated in April, 1914. This was the entire evidence, and, on motion of the defendant's counsel, the court directed a verdict in her favor, whereupon the plaintiffs brought the case to this court for review.

The court erred in directing a verdict in favor of the defendant. On the evidence submitted a verdict might, without error, have been directed in behalf of the plaintiffs. Collier could not convey by gift any better title than he himself possessed, and, under the provisions of the note introduced in evidence, he had no title to the earrings at the time he

delivered them to his wife as a gift. The fact that the vendors failed to record their retention of title contract would, of course, have destroyed their rights under the contract so far as recovery of the property described therein might be concerned if Charles Collier had hypothecated the earrings to some third person for a loan, or had mortgaged them, or had effected a sale or transfer of the property to some third person, without knowledge of the fact that the title to the property was not in him. As indicated by numerous rulings of the Supreme Court and of this court, the purpose of the Registration Act, including the provision requiring the record of a conditional bill of sale, is to protect those who acquire liens on the property or a transfer of the title thereto for a valuable consideration; and certainly, where one acquires possession of personal property by gift only, the donee, having parted with nothing of value in order to acquire the property, cannot rely upon the registration laws in order to defeat the title of the vendor. Mrs. Collier did not contend that she was a purchaser for value or had parted with anything of value to acquire the property sued for, the identity of the property was clearly established, and the fact that the property had been purchased from the plaintiffs by her husband under a retention of title contract, and that a balance yet remained unpaid of the purchase money. Under these facts, since Mrs. Collier was not one of the "third parties" protected by the Registration Act, what claim of title could she in equity and good conscience maintain against the plaintiffs, who made the conditional sale to her husband and who were yet unpaid? Failure to record a conditional bill of sale results in the loss of the vendor's rights in the property only where, because of his negligence in this respect, some innocent person, or a person without either actual or constructive legal notice, in good faith obtains for a valuable consideration a transfer or lien on the same property; and this loss falls on the vendor by way of a penalty for his negligence, and as a matter of wise public policy, in conformity with the practical and equitable rule that where one of two innocent persons must suffer, the loss should fall upon that one whose negligence made such a loss possible. Civil Code, § 4537. Mrs. Collier was not an innocent purchaser, and did not acquire for a valuable consideration a transfer or lien binding the property sold by the plaintiffs to her husband.

It is unnecessary to discuss the legal effect of a sale from husband to wife, since nothing of that sort appears in this case. As between the parties to the contract, the reservation of title would be good, though unrecorded, and no reason exists why one obtaining the property from the vendee by gift

should not occupy precisely the same position that the vendee himself would occupy.

Judgment reversed.

RUSSELL, C. J. (concurring specially). I agree that the judgment of the lower court in directing a verdict should be reversed, but I do not concur in all that is said in the opinion of the majority of the court. It appears to me that the bona fides of the gift from Collier to his wife is unquestioned. It is likewise undisputed that the unconditional bill of sale was not recorded within the 30 days provided by law. The case in my opinion is not altogether dissimilar to that of *Reisman v. Wester*, 10 Ga. App. 96, 72 S. E. 942, in which this court held that a piano which had been sold upon the installment plan, and the title to which had been reserved by Wester, was subject to the lien of a judgment obtained against Mrs. Taylor, whose only title had been acquired by gift from her husband, the purchaser under an unrecorded reservation of title. It is true that the decision in that case is based partly upon the fact that Wester, by failing to record his reservation of title, placed it in the power of Mrs. Taylor to obtain credit from Reisman, but the principle that a wife may, by gift, acquire title from her husband, and that the original vendor may part with his title (making the sale in effect merely a sale upon account) by failing to record his reservation of title within time, was clearly recognized. As said by the Supreme Court in the case of *Southern Iron, etc., Co. v. Voyles*, 138 Ga. 262, 75 S. E. 248, 41 L. R. A. (N. S.) 375, Ann. Cas. 1913D, 369:

"When one undertakes to circumvent the rights of others by the assertion of a superior right, accruing solely from compliance with a statute conferring superiority, he must show full and complete compliance with the statute."

The vendor in the present case was apprised, by the nature of the articles purchased, that they were probably intended for a gift, and this affords an additional reason why the vendors should have been prompt in having the contract of conditional sale put to record if they intended to reserve title. One who sells diamond earrings to a man who is not engaged in the sale of jewelry must naturally infer that they are purchased with the idea of giving them to some one. That this fact is judicially of some significance is recognized in *Re Priege Paint Co.* (D. C.) 175 Fed. 586, 587, and in *Re Garcewich*, 115 Fed. 87-89, 53 C. C. A. 510. In my opinion the plaintiffs in the lower court were charged with notice that the diamond earrings were purchased by Collier to be by him given to his wife or some other woman; and this was wholly inconsistent with their reservation of title, unless they promptly complied with the strict letter of the law with reference to the recording of the reservation of title.

(16 Ga. App. 632)

SEABOARD AIR LINE RY. v. PARISH.
(No. 6209.)

(Court of Appeals of Georgia. July 30, 1915.)

*(Syllabus by the Court.)***1. RAILROADS** \S 446—**KILLING OF ANIMALS**
—**PRESUMPTION OF NEGLIGENCE—REBUTTAL**
—**QUESTION FOR JURY.**

In a suit against a railroad company for killing stock by the running of its locomotive and cars, where there was evidence that the animal had for some time been feeding near the track, that the track at this point was straight and the country flat, without any bushes or deep ravines, that when the animal started to cross the track the train did not slacken its speed, and that no whistle was blown or bell rung, it was a question for the jury to determine whether the railroad had successfully rebutted the presumption of negligence which arose after the animal had been killed by one of its trains. *Darien & Western R. Co. v. Thomas*, 125 Ga. 801, 54 S. E. 692; *Western & Atlantic R. Co. v. Smith*, 15 Ga. App. 289, 82 S. E. 906; *Atlantic Coast Line R. Co. v. Chastain*, 15 Ga. App. 707, 84 S. E. 167.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. \S 446.]

2. RAILROADS \S 446—**KILLING ANIMALS**
—**NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.**

It was also for the jury to determine whether, under the facts of this case, the railroad company was negligent in having an unprotected and dangerous well, and whether such negligence was the proximate cause of the killing of the plaintiff's pig.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. \S 446.]

Wade, J., dissenting.

Error from Superior Court, Bryan County; W. W. Shepard, Judge.

Action by H. A. Parish against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Cann & Cann, of Savannah, for plaintiff in error. J. P. Dukes, of Pembroke, for defendant in error.

BROYLES, J. Judgment affirmed.

WADE, J., dissents.

(16 Ga. App. 606)

REYNOLDS v. STARKS (two cases).
(Nos. 6166, 6167.)

(Court of Appeals of Georgia. July 29, 1915.)

*(Syllabus by the Court.)***1. HUSBAND AND WIFE** \S 87 — **DEBT OF WIFE—SURETY FOR HUSBAND.**

While a wife cannot legally become surety for her husband's debt, yet where she and he jointly sign a promissory note for clothing, hats, etc., for herself and their children, he and she become joint debtors. There is no element of suretyship on the part of one for the other. The wife, in such a case, does not undertake to pay the debt of her husband; her undertaking is to pay her own debt, one which she

has made her own by sharing in the consideration and by uniting in the joint contract to pay the whole sum. *Schofield v. Jones*, 85 Ga. 816, 824, 11 S. E. 1032; *Waldrop v. Veal*, 89 Ga. 306 (1), 15 S. E. 310. See, also, *Connerat v. Goldsmith*, 6 Ga. 14.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 346-353, 798; Dec. Dig. \S 87.]

2. APPEAL AND ERROR \S 1002—**FINDING OF FACT—EVIDENCE.**

Where the parol evidence introduced is conflicting as to whether the debt was the husband's or the wife's, the determination of that question by the jury will not be interfered with.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. \S 1002.]

3. PETITION FOR CERTIORARI.

The judge of the superior court did not err in dismissing the petition for certiorari.

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Actions between Mrs. M. F. Reynolds and Mrs. M. E. Starks. From the judgments, Mrs. Reynolds brings error. Affirmed.

C. D. Rivers, of Summerville, for plaintiff in error. J. M. Bellah, of Summerville, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 606)

SMITH v. J. F. BROWN & CO. (No. 6198.)
(Court of Appeals of Georgia. July 29, 1915.)*(Syllabus by the Court.)***1. HUSBAND AND WIFE** \S 86—**MARRIED WOMAN—LIABILITY ON CONTRACT.**

There was sufficient evidence to authorize the jury's finding that credit for the goods included in the account sued on was extended by the plaintiff to the defendant (a married woman) in her individual capacity, and that she was liable for the same. See *Connerat v. Goldsmith*, 6 Ga. 14; *Mitchell v. Treanor*, 11 Ga. 324 (3, 4), 56 Am. Dec. 421; *Schofield v. Jones*, 85 Ga. 816, 824, 11 S. E. 1032; *Goodson v. Powell*, 9 Ga. App. 497, 71 S. E. 705; *Reynolds v. Starks*, supra, this day decided.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 342-345; Dec. Dig. \S 86.]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict. There was no material error of law, and the judgment of the appellate division of the municipal court, refusing a new trial, is affirmed.

Russell, C. J., dissenting.

Error from Municipal Court of Atlanta.

Action by J. F. Brown & Co. against Mrs. J. H. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

John F. Methvin, of Atlanta, for plaintiff in error. Dillon, Burress & Kobak, of Atlanta, for defendant in error.

BROYLES, J. Affirmed.

RUSSELL, C. J., dissents.

(16 Ga. App. 603)

BROWN v. STATE. (No. 6160.)

(Court of Appeals of Georgia. July 29, 1915.)

*(Syllabus by the Court.)***BIGAMY §11—MARRIAGE—PRESUMPTION—EVIDENCE.**

The charge of the court was not for any reason assigned erroneous, the evidence authorized the conviction of the accused, and the trial judge did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 50-53; Dec. Dig. §11.]

Error from Superior Court, Turner County; E. E. Cox, Judge.

Joe Brown was convicted of bigamy, and brings error. Affirmed.

R. L. Tipton and J. A. Comer, both of Ashburn, for plaintiff in error. R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper, of Atlanta, for the State.

RUSSELL, C. J. The defendant was indicted for the offense of bigamy; the charge being that, while he was lawfully married to one Ruth Sanders, he unlawfully married one Willola Bland, knowing that his lawful wife, Ruth, was living. The defendant placed his defense upon the contention that he could not be convicted of the charge in the indictment, but that, if he was guilty of bigamy, the crime consisted in marrying Willola Bland while a previous wife, Oka Berry Pearce, was still living. In other words, the defense seems to consist of a set-off of one bigamy against another; for, although the defendant attempted to excuse his marriage to Willola Bland on the ground of fear, no facts are stated which tend to show that the marriage with her was induced by duress. The record does not disclose that the defendant was as ardent an imitator of Solomon as was Norman in Norman v. Goode, 113 Ga. 121, 38 S. E. 317, and it may be that this results merely from the fact that the evidence does not extend over so long a period of time as in Norman's Case, for in the rapidity of the defendant's matrimonial adventures his speed far exceeded that of Norman. From 1865 to 1898, and ranging impartially through the states of Florida, Georgia, and Kentucky, Norman took six women for better or for worse. It appears from the record now before us that the defendant was contented to restrict his efforts to the territorial limits of a single state, and that within a few days more than three years (according to his statement) he entered into three separate matrimonial contracts; the last two ceremonies being performed within four days of each other. The jury, however, evidently discredited his statement as to the alleged first marriage, as they had the right to do; and the question therefore arises as to whether there was sufficient testimony to authorize a finding in the first place that he was married to one Oka Berry Pearce before his marriage to

Ruth Sanders, and in the second place that Oka Berry Pearce was alive at the time of the latter marriage.

The state having charged that Ruth Sanders was the lawful wife of the accused at the time that he was married to Willola Bland, the prosecution would have failed, had it been shown that Ruth Sanders was in fact not the lawful wife of the accused, for the reason that the marriage to her was void, in that the accused already had a lawful wife at the time of the marriage to Ruth Sanders. See Norman v. Goode, supra. The defendant introduced a certificate from the court of ordinary of Stewart county, showing that a marriage license issued and that a marriage was solemnized between one J. L. Brown and Oka Berry Pearce on December 23, 1910. However, outside of the defendant's statement, there is nothing to show that the defendant was ever in Stewart county, or that he was the person who married Oka Berry Pearce; nor is there any testimony to show that the person whom he carried to the homes of his brother-in-law and his sister, and who was held out as his wife, was named Oka Berry Pearce, or had borne that name. The testimony of the defendant's brother-in-law and of his sister goes no further than that the defendant brought a woman with him to their respective homes, who he said was his wife and who admitted that she was his wife; and even if it were to be presumed, from the circumstances of cohabitation and repute testified to by Mitchell, the brother-in-law, and by Mrs. Barrett, the sister, of the accused, that a marriage had taken place between Brown and his companion, still "the presumption of law, founded on cohabitation and repute, that a marriage had taken place, will not prevail over proof of a subsequent marriage in fact by one of the parties with a third person." Norman v. Goode, 113 Ga. 121 (2), 38 S. E. 317.

Under this rule the presumption that the woman accompanying Brown was his wife, in the absence of any proof identifying her as Oka Berry Pearce, was compelled to yield to the positive proof of the marriage with Ruth Sanders. Furthermore, the witness Mitchell testified that the defendant stated, at a period prior to the marriage with Ruth Sanders, that the wife who visited his house was dead. According to this witness, who was the defendant's brother-in-law, the statement of the accused that his wife was dead was made the May previous to the January in which the two marriages of the defendant referred to in the indictment were entered into. It is true that the defendant's sister testified that she did not know whether the wife he brought to her house was alive or dead, and the defendant stated that he got a letter from her in October, 1913, in which this wife said "she was figuring on joining an opera troupe." But it was the

right of the jury to accord the preference in credibility to the defendant's admission to his brother-in-law that his wife was dead in May, 1913. As we view it, therefore, the defendant not only failed to prove the identity of himself and his putative wife with the J. L. Brown and Oka Berry Pearce who were married in Stewart county in December, 1910, but even if it had been conceded that the woman whom he held out as his wife was Oka Berry Pearce, the marriage to Ruth Sanders was still lawful, because, according to his own admission, Oka Berry Pearce was dead at the time of the second marriage. It is evident the jury did not believe the defendant's statement. They were not required to do so, and, omitting the statement, the evidence is sufficient to authorize the conviction of the accused.

The various exceptions to the charge of the court embraced in seven grounds of the amended motion for a new trial really present but two points: (1) That the form of some of the court's instructions were expressive of an opinion that certain essential facts had been proved by the state, and in this connection emphasized certain contentions of the state; and (2) that the court erred in charging the jury that proof of a marriage between the defendant and the person referred to in the indictment as his lawful wife would raise the presumption that the marriage contract was lawful. A careful consideration of the exceptions serially, as well as a review of the charge as a whole, thoroughly convinces us that there is no merit in either exception. The jury were fully instructed upon the theory presented by the defendant's statement, and the charge as a whole is a full and fair exposition of the law as adjusted to the evidence in the case, without the slightest intimation or expression of opinion on the part of the trial judge as to what had or had not been proved.

Judgment affirmed.

(16 Ga. App. 592)

SOUTH GEORGIA MERCANTILE CO. v. LANCE.

LANCE v. SOUTH GEORGIA MERCANTILE CO.

(Nos. 5578, 5579.)

(Court of Appeals of Georgia. July 29, 1915.)

(Syllabus by the Court.)

1. INTEREST — 29 — RATE — VALIDITY OF STATUTE.

Under the ruling of the Supreme Court on the questions certified to that court by the Court of Appeals (143 Ga. 530, 85 S. E. 749), the trial judge did not err in overruling the third and fourth grounds of the defendant's demurrer, which complained that the act of the General Assembly approved August 16, 1912 (Acts 1912, pp. 144, 145), is unconstitutional.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 60; Dec. Dig. — 29.]

2. INTEREST — 37 — RIGHT TO RECOVER — ACTION FOR LOAN — PARTIAL PAYMENTS.

The court did not err in sustaining the first, second, fifth, and sixth grounds of the demurrer, in so far as they raised the point that the plaintiff could not sue for the principal and interest set forth in the first paragraph of the plaintiff's petition, in which it is alleged that the defendant is indebted to the plaintiff in the sum of \$1,028.35, together with interest thereon at the rate of 12 per cent. per annum from the date of the filing of the petition.

(a) What the plaintiff "could sue for was the amount of the loan, to wit, \$1,000, with the legal interest thereon from the date of the loan, crediting the payment made as a partial payment as of the date when it was made." 143 Ga. 530, 85 S. E. 749, supra.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. — 37.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action between the South Georgia Mercantile Company and J. B. Lance. From the judgment, both parties bring error. Affirmed on both bills of exceptions.

John G. Kennedy, of Savannah, for plaintiff in error. Hitch & Denmark, of Savannah, for defendant in error.

WADE, J. Judgment affirmed on both bills of exceptions.

BROYLES, J., not presiding.

(16 Ga. App. 672)

McJENKINS v. CULPEPPER. (No. 6206.)

(Court of Appeals of Georgia. Aug. 4, 1915.)

(Syllabus by the Court.)

ARBITRATION AND AWARD — 85 — ACTION ON AWARD — EVIDENCE — VERDICT.

Where a suit is based upon an arbitrator's award, and the evidence shows there was in fact no arbitration, and hence no valid award, a verdict for the plaintiff is not authorized by the evidence.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 484-495, 497-503; Dec. Dig. — 85.]

Error from Municipal Court of Atlanta.

Action between J. E. McJenkins and E. F. Culpepper. From the judgment, McJenkins brings error. Reversed.

R. W. Crenshaw, of Atlanta, for plaintiff in error. Frank Carter, of Atlanta, for defendant in error.

BROYLES, J. Even though pleadings in the municipal court of Atlanta be not held to the strict nicety of superior court procedure, the plaintiff in that court must set forth with some degree of certainty his cause of action, and, having done so, must recover, if at all, upon the cause as laid, and cannot recover upon a different and distinct ground of liability. Civ. Code 1910, § 4715. Powell v. Alford, 113 Ga. 979, 39 S. E. 449. The instant suit was brought by a contractor

for extra material and labor supplied to the owner of a house under a contract, which was attached to and made a part of the declaration. One of the stipulations of the contract was that:

"If any question or difference should arise between the owner and the contractor, it will be left to the architect, and his decision will be final and binding on both parties."

The plaintiff specifically alleged in his petition (paragraph 7) that:

"Said architect has decided that plaintiff is entitled to compensation for extra work and material furnished at the prices shown by itemized statement attached to this petition and made a part hereof, and marked 'Exhibit B.'"

Plaintiff's action was therefore based upon an arbitrator's award. Upon the trial the architect, testifying for the plaintiff, swore that on or before September 8, 1914, Mr. Culpepper, the plaintiff, gave him the itemized statement of the claim for extras, and that he inspected the work and O. K'd the items checked on the list; that previously, in the latter part of August, he had inspected the work with the defendant; that he O. K'd the items checked on the list introduced in evidence, but that he did not undertake to pass on any dispute between the plaintiff and the defendant; that he meant by his O. K. merely that the items checked had been done by the plaintiff, and that the amount charged was, in his opinion, reasonable. He further testified that defendant was not present when the plaintiff handed him the itemized statement of the claim for extras, and that the defendant had not been notified to be present.

From the above evidence it is plainly apparent that there was no arbitration as to the differences between the parties, and consequently no valid award, and that the appellate division of the municipal court of Atlanta erred in refusing to grant a new trial.

Judgment reversed.

(16 Ga. App. 645)

GATLIN v. ED MATTHEWS & CO.
(No. 6117.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES — 47 — REPLEVIN — 59 — SALES — 461 — DETINUE — DESCRIPTION OF PROPERTY — BAIL TROVER.

"In providing that a mortgage or a conditional bill of sale shall specify the property on which it is to take effect, the law does not require such a description as will serve to identify the property without the aid of parol evidence." *Thomas Furniture Co. v. T. & C. Co.*, 120 Ga. 879, 48 S. E. 333. Measured by this rule, the description of the property sued for was sufficient, inasmuch as the purpose of an action of trover is not so much to recover the specific chattels as to recover damages as for a conversion, and the same particularity of description is not essential to the maintenance of that action as is requisite in

detinue. If the action for the possession of personal property be designed rather to recover the specific chattels than damages for a conversion, and this design of the pleader be evidenced by supplementing his action with a bail proceeding, the goods should be described with such particularity as would enable the court to seize the chattels for which the suit is brought and hold them for restitution in the event of final recovery by the plaintiff. *McElhannon v. Farmers' Alliance Co.*, 95 Ga. 670, 22 S. E. 686; *Leitner v. Strickland*, 89 Ga. 363, 15 S. E. 469; *Beaty v. Sears*, 132 Ga. 516, 64 S. E. 321; *Reeves v. Allgood*, 133 Ga. 835 (3), 67 S. E. 82; *Pepper v. James*, 7 Ga. App. 518-519, 67 S. E. 218.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 87, 88; Dec. Dig. — 47; *Replevin*, Cent. Dig. §§ 215-218; Dec. Dig. — 59; *Sales*, Cent. Dig. § 1349; Dec. Dig. — 461.]

2. PLEADING — 406 — REPLEVIN — 59, 97 — TROVER — VALUE OF PROPERTY.

Where various articles of different kinds are sued for in trover, the value of each should be alleged, or at least the aggregate value of all, in order not only to show jurisdiction in the court, where the jurisdictional amount is limited, but also to inform the defendant if it be necessary to present evidence to fix the proper amount of a recovery in case the plaintiff should elect to take a money verdict for the highest proved value of the property. *Terrell v. McKinny*, 26 Ga. 447; *Macon & Western Railroad Co. v. Meador*, 67 Ga. 672-674. In the absence however, of a special demurrer, the court did not err in refusing to dismiss a petition in trover which failed to allege any value whatsoever. The failure to allege the value of articles to be recovered by trover would preclude the plaintiff from the exercise of his option to elect an alternative verdict in damages.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. — 406; *Replevin*, Cent. Dig. §§ 215-218, 386, 387; Dec. Dig. — 59, 97.]

3. REPLEVIN — 69 — TROVER — JUDGMENT — EVIDENCE.

No single witness testified that the identical property sued for was ever actually in the possession of the defendant prior to the institution of the action in trover, nor were there any circumstances in proof sufficient to establish such possession by him, or from which his possession at any time could be legally inferred. The judgment in favor of the plaintiff was therefore not supported by evidence, and the appellate division of the municipal court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 257-279; Dec. Dig. — 69.]

4. ASSIGNMENTS OF ERROR.

There is no substantial merit in the remaining assignments of error.

Error from Municipal Court of Atlanta.

Action by Ed Matthews & Co. against W. T. Gatlin. Judgment for plaintiffs, and defendant brings error. Reversed.

C. V. Hohenstein and Felder & Coburn, all of Atlanta, for plaintiff in error. D. K. Johnston and M. Herzberg, both of Atlanta, for defendants in error.

WADE, J. Judgment reversed.

(16 Ga. App. 642)

MIZE v. CLOUD. (No. 6014.)

(Court of Appeals of Georgia. July 31, 1915.)

*(Syllabus by the Court.)***1. MASTER AND SERVANT — NEGLIGENCE OF CHILD—LIABILITY OF PARENT.**

Fairly construed, the plaintiff's petition makes the negligence of the minor son of the defendant the direct and proximate cause of the injury to the plaintiff, and sufficiently alleges that the tort was committed by the defendant's command or in the prosecution and within the scope of his business. Civ. Code 1910, § 4413. And it does not clearly appear from the allegations of the petition that the plaintiff, by the use of ordinary care, could have avoided the consequences to herself caused by the said negligence. *Ball v. Walsh*, 137 Ga. 350 (1b), 73 S. E. 585. The general demurrer was properly overruled.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.]

2. SPECIAL GROUNDS OF DEMURRER.

The special grounds of demurrer, in view of the amendments made to the plaintiff's petition, were without substantial merit, and the court did not err in overruling them.

3. TRIAL — CONDUCT OF COURT—EXAMINATION OF WITNESSES.

The fourth, fifth, sixth, and seventh grounds of the motion for a new trial, complaining that the court intimated an opinion and stressed unduly the contentions of the plaintiff by addressing certain questions to a witness for the defendant, are likewise without substantial merit, when all the questions so propounded and the answers thereto are considered together and in connection with the entire evidence, though the practice on the part of trial judges of indulging in extensive examinations of witnesses is rather to be reprehended than approved, because of the probability that the jury may be impressed thereby that the court entertains one opinion of the evidence or of the case on trial rather than another. See *Sharpton v. State*, 1 Ga. App. 542, 57 S. E. 929.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.]

4. INSTRUCTIONS.

There was no substantial merit in any of the exceptions taken to the charge of the court, when they are considered in connection with the charge as a whole, but the charge appears to have been fair and impartial and sufficiently full.

5. INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

There was no error on the part of the court in recalling the jury and charging the Code provision as to contributory negligence; nor did the charge as given, when taken in connection with the charge as a whole, exclude from the consideration of the jury the questions of proximate cause or lack of ordinary care on the part of the plaintiff.

6. TRIAL — REFUSAL OF INSTRUCTIONS COVERED.

The court did not err in refusing to give in charge the requested instructions covering the law of unavoidable accident, since the point involved was in substance and sufficiently covered by the instructions given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.]

7. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to authorize the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by Ada Cloud against J. K. Mize. Judgment for plaintiff, and defendant brings error. Affirmed.

R. G. Hartsfield, of Bainbridge, for plaintiff in error. M. E. O'Neal and Harrell & Wilson, all of Bainbridge, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 690)

AMERICAN NAT. INS. CO. v. DANIELS. (No. 6232.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

*(Syllabus by the Court.)***VERDICT AND DENIAL OF NEW TRIAL APPROVED.**

The verdict is authorized by the evidence; there was no material error of law, and the judgment of the court overruling the motion for a new trial is affirmed.

Error from Municipal Court of Macon; Augustin Daly, Judge.

Action between the American National Insurance Company and Bessie Daniels. From the judgment, the Insurance Company brings error. Affirmed.

Chas. H. Hall and R. K. Hines, both of Macon, and Willis M. Everett, of Atlanta, for plaintiff in error. E. C. Powers, Chas. H. Garrett, and Will Gunn, all of Macon, for defendant in error.

BROYLES, J. Affirmed.

(16 Ga. App. 683)

CENTRAL OF GEORGIA RY. CO. v. SISTRUNK et al. (No. 6118.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

*(Syllabus by the Court.)***1. PLEADING — DEMURRER AFTER DEFAULT—STRIKING.**

At any time within 30 days after the entry of "default," the defendant, upon payment of all costs which have accrued, shall be allowed to open the default and file his defense by demurrer, plea, or answer. Civ. Code 1910, § 5654. The defendant in this case after the default was entered, having complied with the requirements of this code section, the court erred in striking its demurrer at the trial term, for the alleged reason that it was filed too late.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 464-469; Dec. Dig. § 199.]

2. DAMAGES — MEASURE—INJURY TO CAR.

Where a petition alleges that a car was damaged \$500 by fire, caused by the negligence of the defendant, and the proof shows that after the fire, the defendant repaired the car, the evidence should also show the difference, if any, in the value of the car before the fire and its value after it was repaired; such difference being the true measure of damages for which the defendant would be liable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 90, 91, 279, 280; Dec. Dig. § 113.]

8. APPEAL AND ERROR \S 1201—DAMAGES \S 157—TRIAL \S 252 — VARIANCE — AMENDMENT.

Where a petition alleges that a train of the defendant company struck the plaintiff's private car "with such force that a lighted lamp, fastened to the wall of the [private] car, was thrown from its place and set fire to the car, badly damaging same, burning the floor," etc., and the undisputed testimony showed that the lamp was not lighted when thrown from the wall, but that it fell into a sulphur fire, which was burning in a pan upon the floor of the car, for the purpose of disinfecting the car, and the lamp, breaking when it fell, set fire to the car, there was a fatal variance between the allegata and the probata; and it was error for the trial judge, in his charge to the jury, to state the above contention of the plaintiff as set forth in the petition, as there was no evidence, to support it. Of course the plaintiff has the right to amend his petition so as to make its allegations in this respect conform to the proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673, 4677-4683; Dec. Dig. \S 1201; Damages, Cent. Dig. §§ 429-438, 440, 447, 449-453; Dec. Dig. \S 157; Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. \S 252.]

4. DENIAL OF NEW TRIAL.

The court erred in refusing to grant a new trial.

Error from City Court of Sylvania; H. A. Boykin, Judge.

Action by N. E. W. Sistrunk and others against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Saffold & Jordan, of Swainsboro, and White & Lovett, of Sylvania, for plaintiff in error. E. K. Overstreet, of Sylvania, for defendants in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 612)

DABBS v. ROME RY. & LIGHT CO.
(No. 5903.)

(Court of Appeals of Georgia. July 30, 1915.)

(Syllabus by the Court.)

CARRIERS \S 314—INJURIES TO STREET CAR PASSENGER—PETITION—DEMURRER.

Construing the plaintiff's petition in accordance with the rule which requires the court, on demurrer, to adopt inferences adverse to the pleader, rather than to create assumptions in his favor, the petition does not state any reason which would have authorized the plaintiff to alight from the car at the time or place of the injury. Nor does it appear that the conductor had better means than the plaintiff had of knowing that the car had not stopped; and therefore it does not appear why the failure of the conductor to warn him not to alight was negligence imputable to the defendant. So far as appears from the allegations of the petition, the car had not reached the plaintiff's intended destination, there was no emergency requiring him to leave the car, and he voluntarily assumed the risk of alighting from the car while it was in motion. Consequently the court did not err in sustaining the general demurrer and dismissing the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. \S 314.]

Error from City Court of Floyd; J. H. Reece, Judge.

Action by W. M. Dabbs against the Rome Railway & Light Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error. Dean & Dean and L. H. Covington, all of Rome, for defendant in error.

RUSSELL, C. J. The third and fourth paragraphs of the petition set forth the circumstances of the injury and the alleged negligence on the part of the defendant, and are as follows:

"(3) That defendant is engaged in the business of running cars propelled by electricity for the purpose of hauling passengers for hire. Its system of tracks is located partly in the city of Rome and partly beyond the city limits. On November 5, 1913, after sunset, petitioner boarded one of the defendant's cars at the corner of Avenue C and West Eleventh street, and paid his car fare to the conductor, stating that he wanted to go to South Rome. The conductor on the Fourth ward car received the fare from petitioner and gave him a transfer good for transportation on the car going to South Rome. Petitioner boarded the South Rome car at the transfer station on Broad street in said city, and went to the conductor on said South Rome car while the same was crossing the bridge over the Etowah river, and handed him the transfer that he had received from the conductor on the initial car, and stated to the conductor that he wanted to get off the car at Robert's stable, in South Rome, or Fifth ward; that the conductor replied that the first stop beyond the bridge was where petitioner wanted to get off the car, and accordingly gave the proper signal (two bells) to the motorman to stop the car at the next regular stop for the cars, which was almost in front of Robert's stables, where petitioner wished to alight. The motorman failed and refused to obey the signal of the conductor, and failed and refused to slacken the car that petitioner might alight. Whereupon the conductor gave the motorman another signal by pulling the bell cord, which rang the bell on the front end of the car, where the motorman stands. Petitioner in the meantime, thinking that the motorman would obey the signal of the conductor, had stepped on the steps of the car that are attached to the rear platform. The motorman proceeded to obey, to a limited extent, the second signal he had received from the conductor, and shut off current and was bringing said car to a stop. It was dark, and petitioner could not see. The street is paved where the car was being stopped, and the rails are heavy, which makes the cars of defendant run easily and smoothly. Petitioner having notified the conductor that he wished to alight at this particular place, and the conductor having given the signal for the second time to the motorman to bring the car to a stop, and the motorman proceeding then to obey the conductor, this petitioner thought that said car had stopped, and alighted from said car.

"(4) It was dark when petitioner alighted from said car, and he was not aware that the car had not been brought to a standstill. The conductor of the car is in charge of same, and gives the signal to the motorman when to stop and when to propel forward his car. The motorman is required to obey the signals of the conductor. The failure and refusal of the motorman to obey the signal of the conductor was negligence

upon the part of the defendant, and was the direct cause of the injuries suffered by petitioner, which will hereinafter be shown. Petitioner was not aware that said car had not been brought to a stop, and he would not have alighted from said car had he known the same was in motion. The motorman had ample opportunity to stop said car from the time the conductor signaled for the stop until petitioner alighted from same, and it was a breach of duty the defendant owed to petitioner as a passenger for a failure upon the part of the motorman to stop said car when signaled so to do. Petitioner had a right to expect and rely upon the motorman obeying the signal of the conductor to stop said car, and he did rely and expect him to stop same, and, as previously stated, he thought same had been brought to a stop when he alighted from same. On account of the darkness and the smooth running of the car petitioner was unaware that same was yet in motion. The conductor saw petitioner when he started to alight, and did not warn him that the car was yet in motion. Such failure on the part of the conductor was a breach of duty defendant owed to petitioner, and was negligence that accentuated the cause that brought about petitioner's injury."

Construed with that strictness which is always adverse to the pleader, the petition in effect alleges that on the date named, after sunset, the petitioner boarded one of the defendant's cars and paid his fare, stating to the conductor that he wanted to go to South Rome. He was given a transfer, and at the transfer station boarded a South Rome car. While the car was crossing the bridge over the Etowah river he handed the conductor his transfer and stated that he wanted to get off at Robert's stables, in South Rome. The conductor replied that the first stop beyond the bridge was where the petitioner wanted to get off the car, and gave the motorman the signal to stop the car at this place, which was almost in front of Robert's stables. The motorman, it is alleged, failed and refused to obey this signal of the conductor, and failed and refused to slacken the speed of the car so that the petitioner might alight. The conductor gave the motorman another signal, by pulling the cord, which rang the bell on the front end of the car where the motorman stood, and while the motorman was seeking to obey this second signal and was bringing the car to a stop, the petitioner, who had stepped on the steps of the car, alighted from the moving car and was injured. It is true that it is also alleged that it was dark, and that the petitioner could not see, and that the rails used by the defendant were so heavy and made the cars run so easily and smoothly that the petitioner thought the car had stopped, and also that it was the duty of the conductor to warn the petitioner, when the conductor saw him starting to alight, that the car was yet in motion; and it is alleged that this failure to notify him was negligence on the part of the defendant; but it is not shown that the conductor had any better means than the passenger himself had of knowing that the car had not stopped, nor is it stated that the first signal of two bells given by the conductor to

the motorman was a signal to stop the car, rather than a means employed to warn or notify the motorman that the car was intended to stop when the next regular stop was actually reached. It plainly appears from the petition that the first signal was given while the car was still on the bridge, and certainly the plaintiff could not have understood that this point, midstream the Etowah river, was Robert's stable, a point on the opposite side of the river and his point of destination. It is therefore apparent that the plaintiff was not misled by the first signal given by the conductor. It is equally plain, from further allegations, that the conductor, on seeing the plaintiff arising from his seat, gave the proper signal for the car to stop, and that the plaintiff alighted from the car, not only before it had stopped, but before it reached Robert's stables, the place of his destination, for it must be assumed that if the car had reached or had passed its regular stopping place, which the plaintiff intended and was told was the proper place for him to alight, that fact would have been stated.

We do not lose sight of the well-settled and salutary principle that questions of negligence and diligence are for determination exclusively by a jury, nor would we restrict in the slightest degree the rule frequently announced (see *Evans v. Southern Railway Company*, 12 Ga. App. 319, 77 S. E. 197) that it is a question of fact for the jury whether, under the particular circumstances of a given case, it is negligence for a passenger to alight from a moving train. However, under the petition in the instant case, which falls to allege any fact showing negligence on the part of the defendant, and which shows that the injuries received by the plaintiff were the result of his own acts, the only question presented is one of law. There was no necessity for the plaintiff to leave the car while it was still in motion, and—

"a railroad company is not liable in damages to one who jumps from its train when there is no necessity for doing so." *Whelan v. Georgia, M. & G. R. Co.*, 84 Ga. 506, 10 S. E. 1091.

According to his own petition, he could have avoided the injury by remaining on the car until the motorman had succeeded in bringing the car to a stop. On the facts stated he could not legally recover, even though the defendant were negligent. As was said in *Simmons v. Seaboard Air Line Railway*, 120 Ga. 225, 47 S. E. 570, 1 Ann. Cas. 777:

"If with a clear chance to avoid the consequences of defendant's negligence or breach of duty the plaintiff voluntarily assumes the risk occasioned thereby, such conduct on his part is not merely contributory negligence, lessening the amount of damages, but a failure to avoid danger, defeating the right to recover."

It is perfectly clear to us that the court did not err in sustaining the general demurrer and dismissing the petition.

Judgment affirmed.

(101 S. C. 404)

STATE v. BROWN. (No. 9148.)

(Supreme Court of South Carolina. July 28, 1915.)

1. CRIMINAL LAW \S 1153—RELEVANCY OF EVIDENCE—DISCRETION OF COURT—REVIEW.

Rulings on the admission or exclusion of evidence on the ground of relevancy will be reviewed only when the discretion of the court is unreasonably abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. \S 1153.]

2. CRIMINAL LAW \S 338—EVIDENCE—RELEVANCY—ABUSE OF DISCRETION.

In a prosecution for assault with intent to kill, the court excluded a question to the prosecutor as to what a third person did when he was charged with a crime. Questions propounded to the father of the prosecutor as to whether he had not heard that another was first accused of the crime were also excluded. *Held*, that the exclusion did not show an abuse of the trial court's discretion in rejecting relevant testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. \S 338.]

3. CRIMINAL LAW \S 338—EVIDENCE—RELEVANCY.

For the court to receive in a prosecution for assault with intent to kill, evidence that several days after the assault shells were found in the public place near where the assault was committed was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. \S 338.]

4. CRIMINAL LAW \S 741 — EVIDENCE — WEIGHT.

The weight of testimony is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1133, 1221, 1705, 1718, 1716, 1717, 1727, 1728; Dec. Dig. \S 741.]

Appeal from General Sessions Circuit Court of Kershaw County; C. J. Ramage, Special Judge.

Henry Brown was convicted of assault and battery of a high and aggravated nature, and he appeals. Affirmed.

W. B. De Loach, of Camden, for appellant. Solicitor W. Hampton Cobb, of Columbia, for the State.

FRASER, J. This case is an indictment for assault and battery with intent to kill. The appellant was convicted of assault and battery of a high and aggravated nature, and sentenced to serve 20 months on the chain gang.

The exceptions will be considered as made:

[1] I. Exception 1:

"Because his honor committed error, it is respectfully submitted, in sustaining the objections of the solicitor to the question put on cross-examination to the prosecutor herein as follows: 'When you accused Owens of doing it [the shooting], what did he do? Whereas the said objection should have been overruled, and the witness required to answer the said question, the same being on cross-examination of the said prosecutor, and, as such, a test for the reasons why he did not prosecute the man who he first accused of committing the crime charged; the said testimony being relevant and competent to the issues in the case.'"

In Crawford v. Baltimore Co., 98 S. C. 123, 82 S. E. 273, this court says:

"In all cases the admission or exclusion of testimony on the ground of relevancy or irrelevancy must necessarily be left to the sound discretion and judgment of the trial judge, which is subject to review only when it is unreasonably exercised or abused."

It does not appear that the trial judge unreasonably exercised or abused his discretion. This exception is overruled.

[2] II. Exception 2:

"Because his honor committed error, it is respectfully submitted, in allowing the state to introduce in evidence, over the objection of the defendant, shells found, as alleged by the prosecutor, several days after the alleged assault in the public place near where the assault is alleged to have been committed, said evidence being irrelevant and the finding of the said shells several days after commission of the crime charged and in a public place, and thus it being impossible to connect said shells with the crime, and the mere declaration of the prosecutor that he so found the said shells being merely a self-serving declaration upon the part of the prosecutor."

This exception is overruled for the reason above stated.

[3] III. Exception 3:

"Because his honor committed error, it is respectfully submitted, in sustaining the objection of the solicitor to the question addressed to W. F. Truesdell, father of the prosecutor, on cross-examination, as follows: 'Q. He [Owens] was the first accused of doing the shooting? A. I did not accuse any one. Q. But he was accused; you heard of his being accused? Solicitor Cobb: I object; would be hearsay. The Court: I don't think it competent.' Whereas the said question was addressed to the said witness on cross-examination, and was for the purpose of getting before the court and the jury the fact that the witness knew that the said Owens was accused of committing the said offense, and having that knowledge his reasons for not following up the same with the prosecution of the said Owens for the said crime."

For the same reason this exception is overruled.

[4] IV. Exception 4:

"Because there was no evidence to sustain the verdict."

There was evidence to sustain the verdict. Its weight was for the jury.

Judgment affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(101 S. C. 415)

McDANIEL v. CHARLESTON & W. C. RY. (No. 9151.)

(Supreme Court of South Carolina. July 29, 1915.)

RAILROADS \S 443—INJURY TO ANIMALS—EVIDENCE.

In an action against a railroad company for negligent killing of a dog, evidence held insufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. \S 443.]

Appeal from Common Pleas Circuit Court of Edgefield County; R. W. Memminger, Judge.

Action by G. C. McDaniel against the Charleston & Western Carolina Railway. From a judgment for plaintiff, defendant appeals. Reversed.

Brooks Mayson and S. M. Smith, both of Edgefield, for appellant. John C. Sheppard, of Edgefield, and F. B. Grier, of Greenwood, for respondent.

FRASER, J. This is an action for the negligent killing of a dog. There are six exceptions, but if the first exception is sustained, the others need not be considered.

The first exception complains of error in the circuit judge in refusing a motion for a nonsuit on the ground that there was no evidence of negligence on the part of the defendant. This exception must be sustained.

The only witness relied upon to prove negligence was Charley Bussey. He testified as follows:

"Charley Bussey sworn. Direct examination by Mr. Mayson: Q. Where do you live? A. At Modoc. Q. How old are you? A. Fourteen. Q. How long have you known the railroad track that passes through Modoc? A. Ever since I have been born. Q. Where were you the evening that the dog was killed? A. I was coming home around a curve, and the train was coming down the road and the dog was up the road there and the train was not quite in sight, and they could have seen around the curve if they been on this side; when I got middle ways of the curve the dog was not far from the train; I got off the railroad and let the train pass by me, but the view of the dog was cut off; the train passed me, and I went on up the road and found the dog dead. Q. You saw the dog coming down the railroad? A. Yes, sir. Q. What condition was that dog in? A. He looked like he was tired, and had his head and tail down like he was worried. Q. Did the train blow? A. I did not hear it. Q. If it had blown you could have heard it? A. Yes, sir. Q. Did the bell ring? A. No, sir; I do not think it did. Q. This dog was killed on a straight line track? How far was that straight line on which he was killed from the little curve? A. I guess it is a quarter of a mile. Q. The dog was below the curve? A. It was right straight up the railroad. Q. I understand you to say the dog was killed on a straight line of railroad? A. Yes, sir. Q. If the engineer had been looking he could have seen him? A. Yes, sir.

"Cross-examination by Mr. Sheppard: Q. How long after you saw the dog on the track before the train came along? A. Ten or 15 or 20 minutes. Q. And he got some distance from the train in that time, or some distance down the track in that time? A. Yes, sir. Q. You did not see the train hit him? A. No, sir. Q. You could not see whether the dog ran across the track or not? A. No, sir. Q. You do not know exactly where he was when the train hit him? A. No, sir. Q. There is a curve there, and you were on the side of the curve, and the train was coming on the other side of the curve up the railroad? A. Yes, sir. Q. And you do not know how far the train was from the curve when you last saw the dog? A. No, sir. Q. This is your signature to that statement [presenting same]? A. Yes, sir. Q. It gives me pleasure to say that you can write your name better than I can mine."

This case is determined by *Fowles v. Railway*, 73 S. C. page 308, 53 S. E. page 535:

"The dog's intelligence, the rapidity and agility with which he moves, warrant those in charge of a train in acting upon the supposition that he will observe its approach and get out of its way. In this respect it is reasonable to place him on somewhat the same footing as a human being when in the possession of all his faculties and capable of seeing the danger and escaping from it. If the dog had been observed by the engineman to be on the track in a condition of helplessness, or even impaired capacity to take care of itself, it would have been the duty of the engineman to take some precaution for its safety; but there is no proof that the dog was not in possession of his faculties, or that the engineman had any opportunity to see him on the track before he was killed."

The witness had not seen the dog on the track within from 10 to 20 minutes before the train passed. He said the dog looked tired and worried, but did not intimate that the condition of the dog was one of helplessness or an incapacity to take care of himself.

There is no showing that the train could have stopped even if the dog remained on the track. He said, "When I got middle ways of the curve, the dog was not far from the train." When asked, "Did the bell ring?" said, "I do not think it did."

The record does not show any negligence for which the defendant is responsible, under the law of this state, and the nonsuit should have been granted.

The judgment is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(101 S. C. 293)

STATE v. SMITH. (No. 9105.)

(Supreme Court of South Carolina. May 14, 1915.)

1. MARRIAGE \Leftrightarrow 54—CONSANGUINITY—CONSTRUCTION OF STATUTE—"VOID MARRIAGE"—"VOIDABLE MARRIAGE."

Civ. Code 1912, § 3743, declares that no man shall marry his sister's daughter, and that no woman shall marry her mother's brother. Section 3752 provides that either party to a marriage, the validity of which is doubted, may institute a suit to determine the validity. Section 3753 provides that the court of common pleas may determine any issue affecting the validity of contracts of marriage. Defendant in 1882 married the daughter of his half-sister. Held, that the statute included relatives of the half blood; that the marriage was not void, but voidable, the distinction being that a "void marriage" is one not good for any legal purpose, the invalidity of which may be maintained in any proceeding between any parties, while a "voidable marriage" is one where there is an imperfection which can be inquired into only during the lives of both of the parties in a proceeding to obtain a sentence declaring it void, so that until set aside it is practically valid, and when set aside is rendered void from the beginning.

[Ed. Note.—For other cases, see *Marriage*. Cent. Dig. §§ 93-103, 105, 106, 109; Dec. Dig. \Leftrightarrow 54.]

2. BIGAMY \Leftrightarrow 1—OFFENSE—FORMER VOIDABLE MARRIAGE.

Where defendant's marriage to the daughter of his half-sister was not void, but voidable, and no proceeding to have it declared invalid was ever commenced, his marriage to another

woman after separation from his first wife was bigamous.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 1-15; Dec. Dig. ¶1.]

3. INCEST ¶2—OFFENSE — EX POST FACTO LAW.

Where defendant in 1882 married the daughter of his half-sister when incest was not a crime, and such marriage was not void, but voidable, his cohabitation with her after act Dec. 24, 1884 (18 Stat. 857), Criminal Code, § 383, making incest a crime, could not be punished as incest, for as to him the statute would be *ex post facto*.

[Ed. Note.—For other cases, see Incest, Dec. Dig. ¶2.]

Appeal from General Sessions Circuit Court, of Cherokee County; Thos. S. Sease, Judge.

H. L. Smith was convicted of bigamy and he appeals. Affirmed.

J. B. Bell and Butler & Hall, all of Gaffney, for appellant. A. E. HHL, of Spartanburg, for the State.

HYDRICK, J. Defendant appeals from sentence on conviction of bigamy. In 1882, he married Leonora Harris the daughter of his half-sister. They cohabited as man and wife for 30 years or more, and raised a family of seven children. Some 3 or 4 years ago, they separated. In 1913, after the separation defendant married another woman, M. E. B. Harris, and cohabited with her as his wife up to the time of the trial, at which time both women were alive. The sole defense is that the first marriage, being within the degrees prohibited by statute, was incestuous and void, and therefore the second was not bigamous.

Questions affecting marriage and its consequences are of grave importance to the citizens and the state, and they deserve the most careful consideration.

In *State v. Barefoot*, 2 Rich. 209, decided in 1845, it was held that a nephew might lawfully marry his aunt; and having married again while she was alive, he was guilty of bigamy. In that case, the court pointed out the difference between executory and executed contracts of marriage, and, also, the difference between marriages which are void and those which are only voidable—differences of the utmost importance in the determination of the status and rights of the immediate parties thereto, and the consequences, as they affect the innocent offspring of such unions, and society, or the state. It was there shown that at common law the marriage in question was not void, but merely voidable, and until avoided by decrees of a court of competent jurisdiction, it was valid and binding, and the subsequent marriage was bigamous. It was also held, upon clear and cogent reasoning, that, although the immediate parties to such an incestuous union may deserve punishment, their offspring have rights that should not be ignored.

In *Bowers v. Bowers*, 10 Rich. Eq. 551, 73

Am. Dec. 99, decided in 1858, it was held that a marriage between uncle and niece was so far valid as to protect the claim of the wife, after the death of her husband, to her distributive share in his estate. The avowed object of that appeal was to obtain the review and reversal of the decision in *Barefoot's Case*. But it was reaffirmed, and the court again pointed out the difference between void and voidable marriages, and showed that the latter must be avoided, if at all, during the life of the parties. The decision in those cases is fully sustained by the authorities therein cited, and is in accord with the great text-writers and the consensus of judicial opinion in England and in this country.

[1-3] But it is contended that, at the date of those decisions, there was no statute in this state prohibiting such marriages, and no court with power to annul them—a fact which was adverted to in the opinions of the Court—and that, since that time, the Legislature has, by statute, not only prohibited such marriages, but has made the parties thereto guilty of the crime of incest, which was not a crime at common law. The question must therefore be considered as it may be affected by subsequent legislation. The first legislation on the subject appears in the Revised Statutes of 1873, and this has been brought forward in subsequent revisions, and appears in section 3743 of the Civil Code of 1912, which, so far as pertinent, reads:

"All persons, except idiots and lunatics, not prohibited by this section, may lawfully contract matrimony. No man shall marry his * * * sister's daughter. * * * No woman shall marry her * * * mother's brother."

In passing, it may be remarked that the fact that the relationship in this case is only of the half blood, and therefore not strictly within the prohibition of the statute is of no consequence; for upon reason and authority, the words used in the statute must be taken in their ordinary meaning, and therefore include relations of the half blood, and also illegitimates who are within the prohibited degrees. 16 A. & E. Enc. L. (2d Ed.) 137, and cases cited in notes; 19 A. & E. Enc. L. 1175; 1 Bish. Mar. & Div. §§ 745, 748.

By section 1 of "An act to regulate the granting of divorces," passed in 1872 (15 Stat. p. 30), either party to a marriage the validity of which was doubted or denied was authorized to institute a suit to determine the validity thereof; and, while that act was repealed in 1878 (16 Stat. p. 719), the provision above referred to has been brought forward in subsequent revisions, and now appears as section 3752, Civ. Code 1912. In 1882 (17 Stat. 681), an act was passed, which is now section 3753, Civ. Code 1912, and reads:

"The court of common pleas shall have authority to hear and determine any issue affecting the validity of contracts of marriage, and to declare said contracts void for want of consent of either of the contracting parties, or for

any other cause going to show that, at the time the said supposed contract was made, it was not a contract: Provided, that such contract has not been consummated by the cohabitation of the parties thereto."

In 1884 (18 Stat. 857) incest was made a crime, and carnal intercourse between persons within the degrees of relationship within which marriage was prohibited by section 3743, supra, was made incest. Crim. Code, § 368. It appears, therefore, that at the time of the marriage between defendant and Leonora Harris, in 1882, incest was not a crime. It follows that, if that marriage was only voidable, and not absolutely void, his cohabitation with her after the passage of the act of 1884, making it a crime, cannot be punished as incest; for, as to the parties to that marriage, the statute would be ex post facto.

The question then is whether the prohibition of the statute renders the marriage void ab initio, for we have seen that, but for that prohibition, it would be only voidable, and the subsequent marriage bigamous. In determining this question, it is important to keep in mind the difference, already adverted to, between executory and executed contracts of marriage, and, also, the difference between void and voidable, as applied to such contracts. No doubt the Legislature had in mind these differences when it added the proviso to section 3753, supra, which limits the court in declaring marriages void, when they have been consummated by cohabitation of the parties.

In 1 Bish. Mar. & Div. § 253 et seq., the difference between void and voidable is pointed out, as applied by text-writers and judges to marriage contracts, and it is there shown that there is a peculiar sort of voidable with reference to marriage contracts which does not pertain to others. In sections 258 and 259, the author thus defines void and voidable marriages (pages 958, 959):

"A marriage is termed void when it is good for no legal purpose, and its invalidity may be maintained in any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally.

"A marriage is voidable when in its constitution there is an imperfection which can be inquired into only during the lives of both of the parties, in a proceeding to obtain a sen-

tence declaring it null. Until set aside, it is practically valid; when set aside, it is rendered void from the beginning."

In discussing the effect of statutes prohibiting certain marriages, the same author (section 289) says:

"If it does not appear in the affirmative words of a statute whether the marriage it forbids is void or voidable, we seek the legislative intent in the prior law. And we follow the rule that all laws, written and unwritten, at whatever dates established, are to be interpreted into one harmonious system of jurisprudence. The written law of void or voidable within the prohibited degrees is, in our states generally, what the English unwritten law, modified by the written, was before the enactment of St. 5 & 6 Will. 4 C. 64. And we have seen that through the workings of a statute of Henry VIII the marriage became voidable. Therefore, as every enactment is to be interpreted in harmony with the written law, and as superseding it only to the extent required by its express terms or necessary operation, it results that, unless the one defining the forbidden degrees declares the marriage it prohibits void, it is but voidable."

In 26 Cyc. 846, it is said:

"At common law the canonical impediments of consanguinity and affinity rendered a marriage voidable merely, and the same is true where such marriages subject to such impediments are merely prohibited by the statute; and in some jurisdictions statutes declaring such marriages void have been construed as meaning voidable only."

Sedgwick, at page 89 of his work on Statutory and Constitutional Law, says:

"It does not, however, follow that, when an act is forbidden by statute, everything done in contravention of the act is to be considered void. This would lead to results of too serious a character. So, in regard to marriage, where a statute imposes a penalty on an officer for solemnizing the union, but does not in words declare the marriage void, * * * the marriage is valid, and the penalty only attaches to the officer who performs the act expressly prohibited."

These authorities show that, notwithstanding the prohibition of section 3743, which does not, in express terms, declare marriages therein prohibited to be void, the marriage of the defendant to Leonora Harris in 1882 was not void, but only voidable. It follows that his marriage in 1913 was bigamous.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 418)

HENDRICKS et al. v. TEMPLE et al.
(No. 9152.)

(Supreme Court of South Carolina. July 31, 1915.)

WILLS \S 614—**CONSTRUCTION—INTEREST—DEVISE.**

A testator left his wife real property, declaring that she should have and hold it during her natural life or widowhood, but that on her remarriage, or at her death, the property should be sold, and the proceeds of the sale divided between two named persons and the wife, or her heirs. *Held*, that the wife took an estate for life in the whole of the lands, and that in event of her remarriage she should be entitled immediately to one-third of the proceeds of the sale of the land, or if she died without remarriage, such proceeds should go to her heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 1393-1416; Dec. Dig. \S 614.]

Appeal from Common Pleas Circuit Court of Abbeville County; Ernest Moore, Judge.

Action by J. F. Hendricks and others against P. C. Temple and others. From a judgment for plaintiffs, the named defendant appeals. Affirmed.

Wm. N. Graydon, of Abbeville, for appellant. Bonham, Watkins & Allen, of Anderson, for respondents.

WATTS, J. This was an action commenced for the purpose of having the land described in the complaint sold and proceeds distributed among the parties entitled thereto, as claimed in the complaint, the case was referred to the master to take testimony and report to the court. The case was heard by his honor, Judge Moore, at the March term of the court, 1915, who filed a decree, finding in favor of the plaintiffs. From this decree P. C. Temple appeals. All questions raised by the appeal relate to the proper construction of the will of Basil Callaham, or rather in regard to the provision that he made in reference to his wife, Eliza A. Callaham, which is as follows:

"I give and bequeath unto my beloved wife, Eliza A. Callaham, my home tract of land containing one hundred and eighty six acres, also a tract of land adjoining the home tract, known as the Burton tract, containing about thirty acres, to have and to hold to use and possess during her natural life or widowhood, but in the event she should marry, or if she lives single until she dies, in either case, it is my will that the above-named land be sold by my executors hereinafter to be appointed, if either of them be living, and if neither of them be living thereby other proper authorities in law, and proceeds of the sale of land, be divided in the following manner—one-third to her or her heirs, one-third to the children of my son, John William Callaham, now dead, one-third to my daughter, Mary Jane Robinson, now the wife of Hugh Robinson, or if she be dead to her children that may be living, all to share and share alike."

Mrs. Callaham never married again, and died in the year 1913, leaving of force a will in which she devised to P. C. Temple one-third interest in the tract of land devised to her under her husband's will. In November, 1914, this action was commenced, the plain-

tiffs claiming that under the will of Basil Callaham the wife, Eliza A. Callaham, had nothing in the land but a life estate, and that she had no right to will the same to P. C. Temple. We see no error on the part of his honor in making the decree that he did. A proper construction of the will of Basil Callaham shows that he devised: (1) The whole of the 216 acres to his wife, Eliza A. Callaham, for her natural life. (2) If his wife, Eliza A. Callaham, should marry again the 216 acres of land to be sold, and one-third of the proceeds to go to the wife. (3) If wife, Eliza A. Callaham, should die without marrying again, the 216 acres to be sold and one-third of the proceeds thereof to go to her (the wife's) heirs.

All exceptions are overruled. Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(101 S. C. 407)

BARKSDALE v. GIBERT. (No. 9149.)

(Supreme Court of South Carolina. July 29, 1915.)

LIMITATION OF ACTIONS \S 197—**ACTION ON ACCOUNT—APPLICATION OF PAYMENTS—EVIDENCE.**

In an action on an account wherein defendant pleaded the statute of limitations as to all items appearing on the account prior to a date six years before commencement of the action, evidence that the account ran from year to year, and that yearly statements were furnished defendant, each of which showed a balance from the preceding year, the new purchases, and the cash paid by defendant, did not require a finding that plaintiff applied the payments before trial and at the time they were received to new purchases for the current years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 722-726; Dec. Dig. \S 197.]

Appeal from Common Pleas Circuit Court of Abbeville County; Thomas S. Sease, Judge.

Action by W. D. Barksdale against James S. Gibert. From judgment for plaintiff, defendant appeals. Affirmed.

Wm. N. Graydon, of Abbeville, for appellant. Wm. P. Greene, of Abbeville, for respondent.

FRASER, J. "This action was commenced on the 27th day of May, 1914, and alleged that between January 1, 1907, and January 1, 1913, the defendant became indebted to the plaintiff on account of goods sold him in the sum of \$1,027.29. It alleged sundry payments had been made on account up to \$424.67, leaving a balance due of said account of \$602.62. The defendant demanded that the plaintiff serve him with an itemized statement of said account, whereupon plaintiff furnished the defendant with an account the first statement on which was dated Janu-

ary 1, 1907, and read: 'Account rendered \$28.93.' The defendant pleaded the statute of limitations as to all items of said account appearing on said account prior to 27th day of May, 1908, which was six years prior to the commencement of this action."

The judgment was for the plaintiff, and the defendant appealed upon the following exceptions:

"I. Because, the itemized statement of account furnished by the plaintiff to defendant showing on its face the application that the plaintiff had voluntarily made of said payments, it was error in his honor to rule that the plaintiff could make a different application of the payments at the trial, and erred in charging the jury that the plaintiff had a right to apply the said payments to the part of account that was not barred by the statute of limitations.

"II. Because the presiding judge erred in overruling the motion for a new trial, based upon the grounds that the plaintiff, having elected to apply the payments made him by the defendant to the account for the years in which they were paid, had no right to change the application at the trial and apply them in a different manner.

"III. Because the plaintiff, having elected to apply the payments made him, as shown by the accounts offered in evidence to the different years in which the accounts were made, and having rendered statements to the defendant showing the application of said payments, would have had no right at the trial of the case to change the application of said payments, and his honor erred in charging the jury that he would have such a right, and erred in refusing the motion for a new trial based upon the grounds that the plaintiff would have no such right."

These exceptions need not be considered separately, because they are all based upon one error of fact, to wit, that the record shows that the plaintiff had applied the payments before the trial and, at the time they were received to new purchases for the current years.

There is evidence, and there is none to the contrary, that the defendant did not direct the application of his payments. It seems that the account ran on from year to year, and yearly statements of account were furnished defendant. Each of these accounts contained a statement of the balance from the preceding year, the new purchases, and the cash paid by the defendant. To illustrate: The account of 1907 has a balance for 1906, new sales and cash payments. There is nothing to show whether the application was to the balance from 1906 or to new purchases for 1907, and so on for each year. The cash paid in 1907 was properly on the account for 1907, but its appearance on the account for 1907 did not fix its application to recent purchases.

There is little law in this case. The only question is one of fact, and that has been settled by the verdict of the jury.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(101 S. C. 336)

DUNLAP v. GREENVILLE, S. & A. RY. CO.
(No. 9146.)

(Supreme Court of South Carolina. July 28, 1915.)

1. RAILROADS — §348—ACTION FOR INJURIES — WILLFUL NEGLIGENCE—EVIDENCE.

In an action for injuries caused by the recklessness and willful conduct of defendant's motorman, evidence that plaintiff, while crossing defendant's road, was struck by a car coming around an obstruction to the view at a high speed without signals, and that the motorman did not see plaintiff or know that he was struck until after the car arrived at destination, was sufficient to sustain a judgment that defendant was guilty of recklessness and willfulness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.]

2. NEGLIGENCE — §135—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for injuries, contributory negligence is an affirmative defense, and must be established by defendant by a preponderance of the evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 274-276; Dec. Dig. § 135.]

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Action by Joseph Dunlap against the Greenville, Spartanburg & Anderson Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Haynsworth & Haynsworth, of Greenville, for appellant. McCullough, Martin & Blythe, of Greenville, for respondent.

FRASER, J. This is an action for personal injury. There are three exceptions, but they require the decision of only one question. The complaint alleged that the injury was caused by the negligence, recklessness, and willfulness of the defendant. The defendant pleaded, among other things, contributory negligence.

[1] It is manifest that, if there was evidence from which the jury might have inferred recklessness and willfulness, the question of contributory negligence need not be considered.

There was evidence that tended to show that the plaintiff, with another man, was walking along a public highway that crossed the line of defendant's road, and that while crossing the defendant's road he was struck by the forward end of defendant's car; that there was an engine on the Southern Railway that was near the crossing and above the defendant's road; that there was an abutment on the line of the Southern Railway that obstructed the view of the approach of defendant's car from travelers on the public highway until they were within 45 feet of defendant's track; that defendant's car was run across the public highway at high speed; that no signals of its approach were given; that the motorman did not see the plaintiff or his companion, and did not know that he had struck the plaintiff until after the car

arrived at its destination, and then was informed by telephone. There was conflicting testimony, but there was testimony to support a finding that there was recklessness and willfulness.

[2] It may be said that the jury found only actual damages, and therefore the finding negatived recklessness and willfulness. The testimony was conflicting, and, while the jury might not have found that there was a preponderance of the testimony in favor of the plaintiff on this issue, contributory negligence is an affirmative defense, and on that issue the defendant must make out its defense by the preponderance of the testimony and show that its defense was available.

Carter v. Railway, 93 S. C. 341, 75 S. E. 952:

"It may be said that wantonness and willfulness had been eliminated from the case. As a foundation for punitive damages, they were eliminated from the case, but the defendant was still required to make out its affirmative defense of contributory negligence, and, if the facts subsequently proven showed willfulness, the plea could not prevail."

The judgment appealed from is affirmed.

GARY, C. J., and HYDRIOK, WATTS, and GAGE, JJ., concur.

(101 S. C. 391)

CITY OF COLUMBIA v. PHILLIPS.
(No. 9145.)

(Supreme Court of South Carolina. July 28, 1915.)

1. MUNICIPAL CORPORATIONS — 639—ORDINANCES—VIOLATIONS—INFORMATION.

An allegation in an information charging a violation of a city ordinance is an allegation of the commission of an offense within the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-283, 1406-1409; Dec. Dig. —639.]

2. MUNICIPAL CORPORATIONS — 639—ORDINANCES — VIOLATIONS — INFORMATION — SURPLUSAGE.

Where accused was charged with loaning money at usurious interest, in violation of ordinances enacted in 1912, 1913, 1914, and the evidence showed that in February, 1913, accused made a usurious loan, the allegation in the information of a violation of the ordinance of 1912 was surplusage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-283, 1406-1409; Dec. Dig. —639.]

3. MUNICIPAL CORPORATIONS — 116—ORDINANCES—REPEAL.

An ordinance, not specifically repealing a prior ordinance, repeals only inconsistent provisions in the prior ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 268-271; Dec. Dig. —116.]

4. MUNICIPAL CORPORATIONS — 631—VIOLATION OF ORDINANCES—LICENSES—OCCUPATIONS—PRIVATE MONEY LENDERS.

Where ordinances subjecting annual licensed private money lenders to fine or imprisonment for charging usurious interest, and providing for the report of convictions to the

city council, who shall revoke the license of the offender, are deemed annual license ordinances, one cannot be convicted in 1914, for carrying on business in 1914, under an ordinance enacted in 1913; but one may be convicted during 1914, for an offense committed in 1913, under the ordinance adopted in 1913, or a transaction may commence in one year and continue into the succeeding year, and thereby constitute a violation of both ordinances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1386-1388; Dec. Dig. —631.]

5. MUNICIPAL CORPORATIONS — 626—EQUAL PROTECTION OF LAWS — MUNICIPAL ORDINANCES.

An ordinance, punishing private money lenders charging usurious interest, and providing for the report of convictions to the city council, who shall revoke the license of offenders convicted, is not discriminatory, in the absence of anything to show that there are money lenders not within the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1380; Dec. Dig. —626.]

6. MUNICIPAL CORPORATIONS — 592—STATUTORY REGULATION—ORDINANCES—VALIDITY.

A city ordinance, subjecting any private money lender charging usurious interest to a fine not exceeding \$40 or imprisonment in the jail for 30 days, and providing for the report of convictions to the city council, who shall revoke the license of persons convicted, is not forbidden by the state usury statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. —592.]

Appeal from General Sessions Circuit Court of Richland County; C. J. Ramage, Special Judge.

E. E. Phillips was convicted of violating an ordinance of the City of Columbia, and he appeals. Affirmed.

Cooper & Cooper, of Columbia, for appellant. W. H. Cobb, Sol., and D. W. Robinson, both of Columbia, for respondent.

FRASER, J. In the year 1913 the city of Columbia passed this ordinance:

"Any money lender (private) who shall charge, accept or receive interest, charges or compensation for the lending or use of money, directly or indirectly, by whatever name, means or device, in excess of the legal rate of eight per cent. per annum, he, or they, shall be subject to a fine not exceeding forty (\$40.00) dollars, or imprisonment in the city jail for a time not to exceed thirty days for each offense; and the record of his, her or their conviction shall be reported to the next meeting of the city council, whereupon the license of such party or parties so convicted shall be revoked."

It seems that the same ordinance was passed in the years 1912, 1913, and 1914. The necessity or propriety of the annual adoption of this ordinance does not appear in the record.

The appellant was tried before the recorder for a violation of two of these ordinances. The first warrant was based upon a charge of a violation of the three ordinances, but did not state that the offense was committed within the city of Columbia.

On the day set for trial, and before the jury was sworn, the information was amended by striking out the year 1912 and inserting an allegation that the offense was committed within the city. The appellant moved to quash the warrant, on the ground, so far as it affects this appeal, that the warrant could not be amended at all, that the former ordinances had been repealed by the adoption of the later ordinances, and that the ordinance is discriminatory. The motion was overruled, and the appellant was convicted.

The testimony tended to show that in February, 1913, the prosecuting witness applied to appellant for a loan of \$80, and received \$72, and for four months paid back \$80 in installments of \$20, and after that time, on demand of appellant, paid \$10, \$12, and \$16 per month for a while. The appellant offered no evidence. From the judgment of the recorder, the defendant appealed to the court of general sessions. That court affirmed the judgment of the recorder, and the appeal in this court raises four questions:

[1-4] I. Was it error in the recorder to allow the amendment and to fail to quash the indictment?

It was not. The allegation of the violation of the ordinance of the city of Columbia was an allegation of an offense within the city. The allegation of a violation of the ordinance of 1912 was, under the evidence, mere surplusage. The general rule is that a new enactment, unless a repeal is specifically provided for, repeals only inconsistent provisions. If, however, the ordinance was the annual license ordinance, then, while one cannot be convicted in 1914 for carrying on business in 1914 under the 1913 ordinance, yet there is no reason why one cannot be convicted in 1914 for an offense committed in 1913 under the 1913 ordinance. The 1913 ordinance applies to 1913, and the 1914 ordinance applies to 1914. The ordinances cover different periods, and are not in any sense in conflict. A transaction may commence in 1913 and continue in 1914, and be in violation of both ordinances.

[5] II. Was the ordinance discriminatory?

It does not appear to be from the record. The record does not show that there are any money lenders not included in the class.

[6] III. Does the state usury statute forbid this ordinance?

A full answer is found in *Greenville v. Kemmis*, 58 S. C. 433, 36 S. E. 729, 50 L. R. A. 725:

"Granting, for the sake of argument only, that the Legislature has not seen fit to make it a criminal offense for a person to permit his room, in a building formerly used as a hotel, which he rents and occupies, to be used as a place for gaming with cards, we see no reason whatever why that should operate as a prohibition to the city council from passing such an ordinance as that here in question. Common experience shows that city corporations find it necessary for the peace and good order of

the city to forbid the doing of many acts, under penalty, as to which the Legislature have not found it necessary to legislate. The ordinance is certainly not in conflict with any act of the Legislature."

IV. Was it error to admit parol evidence of written instruments?

Neither witness attempted to say what was in the written contracts. It does not appear that either knew, or thought he knew. The city was attempting to prove two facts of its charge: (1) That the defendant was carrying on the business of a money lender; and (2) that he accepted and received a greater rate of interest than the ordinance allowed. The exception that raises this question cannot be sustained.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(101 S. C. 409)

LORENZO v. ATLANTIC COAST LINE R. CO. et al. (No. 9150.)

(Supreme Court of South Carolina. July 29, 1915.)

1. RAILROADS \Leftrightarrow 347—CROSSING ACCIDENT—PERSON PASSING BENEATH TRAIN—EVIDENCE—PLEADING.

Where the complaint, in an action for injuries due to the sudden moving of a car blocking a street and beneath which plaintiff attempted to pass, alleged a willful violation of duty by defendant, evidence that the street had been frequently blocked for an unreasonable time on other occasions was properly admitted.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1124-1137; Dec. Dig. \Leftrightarrow 347.]

2. RAILROADS \Leftrightarrow 350—CROSSING ACCIDENT—PERSON PASSING BENEATH CARS—EVIDENCE—NEGLIGENCE.

Where, in an action for injuries due to the sudden moving of a car blocking the street and beneath which plaintiff attempted to pass there was evidence that the street was blocked for 25 minutes; that the engine was not in sight; that the car was moved without warning; that there was nothing to warn passengers that it might be moved; and that the street was a main thoroughfare which defendant was in the habit of blocking for an unreasonable and unlawful length of time—the court properly refused to grant a nonsuit or direct a verdict for defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. \Leftrightarrow 350.]

3. RAILROADS \Leftrightarrow 350—CROSSING ACCIDENT—PERSON PASSING BENEATH CARS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for injuries due to the sudden moving of a car blocking a street and beneath which plaintiff attempted to pass, there was evidence that plaintiff was a stranger in the city; that he and his companions waited for 25 minutes and could see no motive power attached to the cars; that they went up and down the track for some distance and could see no opening or end of the train; that they considered the matter and concluded that the train was "dead," and would probably remain there for the night, and then went under the car, and it did not appear that it would have been perfectly safe to have gone around the train—

whether plaintiff was guilty of contributory negligence was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. ¶350.]

4. RAILROADS ¶351—CROSSING ACCIDENT—PERSON PASSING BENEATH CAR—INSTRUCTION—EMERGENCY—OBVIOUS RISK.

Where there was evidence from which the jury could have inferred that the risk was not obvious, the court properly refused to instruct that only an emergency could have justified plaintiff in going under the standing car.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. ¶351.]

5. RAILROADS ¶350—CROSSING ACCIDENT—PERSON PASSING BENEATH CAR—EMERGENCY—QUESTION FOR JURY.

Where in such case it appeared that plaintiff was a sailor returning to his ship after a trip to the business portion of the city, the court properly refused to instruct that there was no emergency calling him to his ship, the question whether there was an emergency justifying plaintiff in going under the car being for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. ¶350.]

6. TRIAL ¶261—INSTRUCTION—REQUEST.

The refusal of an entire instruction, incorrect in part, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. ¶261.]

7. RAILROADS ¶350—CROSSING ACCIDENT—PERSON PASSING BENEATH CAR—PUNITIVE DAMAGES—SUFFICIENCY OF EVIDENCE—SUBMISSION OF ISSUES.

Evidence, in an action for injuries from the moving of a car blocking a street and beneath which plaintiff attempted to pass, held to authorize submitting to the jury the question whether defendant willfully disregarded the rights of plaintiff and the traveling public, who had a right to use the street, and thereby rendered itself liable for punitive damages.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. ¶350.]

Appeal from Common Pleas Circuit Court of Charleston County; F. B. Gary, Judge.

Action by Malfino Lorenzo against the Atlantic Coast Line Railroad Company and another. From judgment for plaintiff, defendants appeal. Affirmed.

Mordecai & Gadsden & Rutledge, of Charleston, for appellants. Logan & Grace, of Charleston, for respondent.

FRASER, J. Malfino Lorenzo was a sailor on an Italian vessel that was lying at the wharf in Charleston. It was his first visit to Charleston. He, with four other sailors on the ship, went up into the city to purchase supplies. Between 10 and 11 o'clock at night the sailors were returning to their ship, on Columbus street, a much used public highway and one used by sailors and others in going between the water front and the business portion of the city. When they arrived at that portion of the street where the tracks of the defendant cross the street, they found box cars across the street blocking the same. The party waited a while, and then undertook to go under one of the cars. Lorenzo

was the last. When he was under the car it moved forward and broke his leg and crushed his foot. For this injury this action was brought, the complaint alleging negligence and willfulness for blocking the street for more than 10 minutes, and for an unreasonable time, for the failure to have a watchman to warn passengers along said street, and for suddenly moving the cars without the warnings required by the statute. The verdict was for the plaintiff, and the defendants appealed.

There are 12 exceptions, but the appellant states the questions at issue as follows:

"It will be unnecessary to repeat the exceptions here, as they are quite lengthy, but they may be divided into five divisions as follows:

"First. Exceptions 1 to 5 and exception 8 raise the question that the presiding judge erred in admitting testimony as to the blocking of the street by the defendant company on former occasions long antedating the one in question, such testimony, it is submitted, being irrelevant to the issue being tried by the jury.

"Second. Exception 6 assigns error in the refusal to grant the motion for nonsuit.

"Third. Exception 7 assigns error in the refusal to direct a verdict for the defendant.

"Fourth. Exceptions 9, 10, and 11 raise the question that the judge was in error in refusing to charge the jury as requested by the defendant in its sixth, seventh, and ninth requests to charge, the ground of these exceptions being that the defendant was entitled to have these propositions of law charged as presented, for the reason that the plaintiff would only be protected by the law in attempting to pass over the street under the car of the defendant if there were an emergency requiring him to go across the street at this place to reach his ship, and that if there were no such emergency, the plaintiff in doing so would be guilty of negligence or gross negligence amounting to willfulness as the jury might determine, and the plaintiff's cause of action, at common law or under the statute, either for compensatory or punitive damages, or both, thus defeated.

"Fifth. Exception 12 is upon the ground that there was no evidence of willfulness to go to the jury, and therefore a verdict could not be rendered for punitive damages, and the judge should have so charged."

[1] I. Was it error to admit evidence that the street had been frequently blocked, for an unreasonable time, on other occasions? It was not. Where the allegation is made of a willful violation of a duty, the jury may infer willfulness from long-repeated violations of the same duty, and *Kirkland v. Railway*, 97 S. C. 67, 81 S. E. 306, is full authority for it.

[2] II. The second and third questions may be considered together, as they raise the same questions, to wit: (a) Was there evidence of negligence and willfulness; and (b) incontrovertible evidence of contributory negligence?

(a) There was evidence that the street was blocked for 25 minutes; that the engine was not in sight; that the car was moved without warning; that there was nothing to warn passengers on the street that the cars might be moved at any time; that this street was the main thoroughfare for sailors who were entire strangers in the city, and that the

street was blocked for an unreasonable and unlawful length of time; and that the blocking of this street was habitual. It cannot be said that there was no evidence from which the jury might infer negligence or even willfulness.

[3] (b) The evidence of contributory negligence was not conclusive. The plaintiff was in Charleston for the first time. Charleston is a seaport city. Sailors and others, from distant parts of the world, are expected to come and may expect to find a safe approach from the water front to the business portion of the city. There is evidence that this was plaintiff's first visit to Charleston and he had the right to assume that the public highway, along which he would go, would be reasonably safe, and in case it was rendered temporarily dangerous, there would be something to give warning of the danger.

It is claimed that the cars themselves were the danger signal. This is not necessarily true in this case. There was evidence that the plaintiff and his companions waited for 25 minutes; that they could see no motive power attached; that they went up and down the track for some distance and could see no opening or end of the train; that they considered the matter, and came to the conclusion that the train was "dead," and would probably remain there for the night, and, having reached that conclusion, they went under the car. It may have been bad judgment, but was not inadvertence. The truth was for the jury.

It is said it was perfectly safe to go around the train. The record does not show that it would have been safe to go around. It was a question for the jury to say whether a prudent man in a strange city would have gone out of a public highway where he had a right to be, into a freightyard, where it was not clear that he had the right to go. We cannot say that the evidence was susceptible of no other construction than that the plaintiff was guilty of contributory negligence.

[4] III. Did the judge err in not charging that only an emergency could have justified the plaintiff in going under the standing car? An emergency may excuse a man for taking an obvious risk. The jury must first find that the risk was obvious. If the jury took the view that under all the circumstances the danger was not obvious, then the necessity for the emergency did not exist.

[5] The ninth request assumed that there was no emergency that called the plaintiff to his ship. What was an emergency that justified the plaintiff in going under the car was also a question for the jury. They might have thought that the prospect of spending the night in the street was an emergency.

If the jury believed that the plaintiff was justified in concluding from the lights before him, or the darkness that surrounded him, that the train was a "dead" train, then they might find that the risk was not obvious.

The plaintiff was not a trespasser; he was not on the car, he was on the public highway where he had a right to be. It may have been recklessness to have exercised the right at that moment, but that is another question.

[6] IV. The appellant complains, also, that at least a part of the seventh request to charge was unquestionably good law and should have been charged. Each request to charge is a unit. The requests to charge are handed up to the judge just before the argument begins, under some circumstances it may be after argument. He cannot fully determine the exact bounds of his charge until he has heard the whole case. He has only a short time to consider the requests, and cannot be expected to weed out the bad law and charge that which is good. Parties are required to state propositions of law that they desire charged, to state them clearly and succinctly, and cite the authorities relied upon. If the proposition is correct and applicable, then a failure to charge is reversible error. If not, it is not reversible error.

[7] V. Was there evidence from which the jury might infer a willful disregard of the rights of the plaintiff and the traveling public, who had the right to use Columbus street? There was such evidence.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(101 S. C. 424)

LANHAM v. HAYNES. (No. 9153.)
(Supreme Court of South Carolina. July 31, 1915.)

1. DEEDS \S 123—CONSTRUCTION—LIFE ESTATE.

Under a deed providing that, in consideration of the grantor's love and affection for his daughter, he granted unto her a certain tract of land, with all appurtenances thereto appertaining, and also the crop "during her natural life, free and unincumbered, not subject in any wise to the debts of her husband (or any future husband), * * * and at her death to be equally divided between the children of her body, share and share alike, a child or children of deceased child to represent his or her parent," and that, if the daughter "should die without children, * * * the said land is to revert back to my estate," the daughter took only a life estate, and at her death her children and grandchildren took an estate for life.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 351, 360-365, 416-430, 434, 435; Dec. Dig. \S 129.]

2. DEEDS \S 124—CONVEYANCE OF FEE—ESSENTIAL WORDS.

There can be no conveyance of a fee without the use of the word "heirs"; no other words being susceptible of being construed into a conveyance of the fee, regardless of the grantor's intention or the consequences to grantees or heirs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. \S 124.]

Appeal from Common Pleas Circuit Court of Spartanburg County; T. S. Sease, Judge.

Partition between the descendants of Frances Turner, deceased, in which land was sold by S. T. Lanham, Master, to John S. Haynes, who objected to the title. On application, he was ordered to complete his purchase, and he appealed. Reversed.

Carson & Boyd, of Spartanburg, for appellant. Nicholls & Nicholls and W. M. Jones, all of Spartanburg, for respondent.

WATTS, J. This is an appeal from an order of Judge Sease made in a rule to show cause upon an application of S. T. Lanham, Esq., master for Spartanburg county, against John S. Haynes, why he should not comply and to complete his purchase of a tract of land bid off by him at a public sale of said land by the master. Haynes made return to the rule, and averred his readiness and willingness to comply with his bid and pay for the property, but when he employed counsel to examine the title to the said property that he was advised by them that the title was not good, and for this reason he refused to comply with his bid, and desired the court to pass upon the title, and if it is adjudged good and valid, he is ready to comply with his bid.

[1] It appears that the sale was made in a partition proceeding among the descendants of Frances Turner, and that the title came to them from Burnell High through the following deed:

"State of South Carolina, Spartanburg District.

"Know all men by these presents that I, Burnell High, of the district and state aforesaid, for and in consideration of the love and affection I have for my daughter, Frances Turner, do grant, give, and release unto my daughter, Frances Turner, a certain tract of land lying and being in the district and state aforesaid, on Standing Stone, a branch of Lawson's fork, containing (196) one hundred and ninety-six acres, more or less, adjoining lands Anderson Bishop, W. P. Bishop, I. R. Poole, and others, with all the appurtenances thereto appertaining, and also the crop of all descriptions during her natural life, free and unincumbered, not subject in any wise to the debts of her husband (or any future husband), Henry Turner, and at her death it is to be equally divided between the children of her body, share and share alike, a child or children of deceased child to represent his or her parent. But if she, the said Frances Turner, should die without children, then and in that case the said land is to revert back to my estate. I do hereby appoint and constitute Wm. G. High as trustee to manage the tract of land and products above mentioned for the purpose set forth in said deed of trust.

"Whereunto I set my hand and seal this 13th day of September, 1860.

"Burnell High.

"Signed, sealed, and delivered in the presence of

"M. T. McKinney.

"John Tuck.

"State of South Carolina, Spartanburg District.

"Personally appeared before me M. T. McKinney and made oath that he saw Burnell High sign, seal, and deliver the within deed of trust for the use and purposes therein contained, and that he, with John Tuck, in the

presence of each other, witnessed the due execution thereof.

M. T. McKinney.
"Sworn to before me this 13th September, 1860.

J. B. Tolleson,
"Clerk and Magistrate Ex Officio."

He alleges that under this deed Frances Turner took only a life estate, and that at her death the property went to such children of her body as were in being at the time of the execution of the deed to take only a life estate; that the parties to this action are the children of her body, or their representatives, and that this sale conveyed only the life estate of such children as were in being when the deed was made, September 13, 1860; that at the death of such children the title reverts to the heirs of Burnell High, many of whom are not parties to this action.

His honor construed the deed to be a trust deed, and not to be construed by the strict technical rules of the common law, but by the intention of the grantor, and that it was the intention clearly of the grantor to convey the whole estate in land to Frances Turner for life, and to her descendants, if she left any surviving her, and to have the land revert to his estate only in case of her dying without leaving heirs of her body as specified in the deed, and, as she left surviving her such heirs of her body, there is no reversion, and the estate of Burnell High has no interest in the land, and he adjudged and decreed that the rule be sustained, and defendant, John S. Haynes, be required to comply with his bid. From this order defendant appeals, and alleges error on the part of his honor in holding that the children and grandchildren of Frances Turner took an estate in fee in the land conveyed by Burnell High to William G. High, and in not holding that the surviving children of Frances Turner took only a life estate under said deed, and at their death the land reverted to the estate of Burnell High.

Respondent's attorneys served notice they would ask that the order of Judge Sease be sustained on the additional ground that neither the heirs of Burnell High nor their ancestor or grantor have been in possession of the land within 40 years, and that they would be barred by section 134 of the Code from bringing action to recover the land or any interest therein.

[2] The appellant's exceptions must be sustained. There are no words of inheritance in the deed at all. There can be no conveyance of a fee without the use of the word "heirs," and no other words are susceptible of being construed into a conveyance of the fee, regardless of the grantor's intention or the consequences to grantees or heirs. Under the terms of the deed neither is there a conveyance of the fee nor the instrument of conveyance a trust deed. Under this deed neither Frances Turner nor her descendants took any estate greater than a life estate. Frances Turner, under the deed, took a life

estate; at her death her children and grandchildren took an estate for life; and, as far as this deed is concerned and under it, the respondent here has no title in fee simple that the master could convey to the appellant, and appellant should not be required to comply with his bid. The respondent does not show under the deed he claims under a fee-simple estate that may be conveyed. He may have a fee-simple title from other sources, but that is not before the court. There is no question that the title tendered is defective. The additional ground relied on by respondent has no application here, and cannot avail the respondent.

Judgment reversed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(101 S. C. 399)

GRAINGER v. GREENVILLE, S. & A. RY. CO. (No. 9147.)

(Supreme Court of South Carolina. July 28, 1915.)

DEATH \Leftrightarrow 26—ACTION FOR DEATH—ACTION FOR MENTAL AND PHYSICAL SUFFERING—STATUTORY PROVISIONS.

An action under Civ. Code 1912, §§ 3955, 3956, giving a recovery for wrongful death for the benefit of enumerated persons, does not bar an action by the administrator under section 3963 for damages for decedent's suffering.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 28; Dec. Dig. \Leftrightarrow 26.]

Appeal from Common Pleas Circuit Court of Greenville County; J. W. De Vore, Judge.

Action by J. B. Grainger, as administrator of Abel Grainger, deceased, against the Greenville, Spartanburg & Anderson Railway Company. From an order of nonsuit, plaintiff appeals. Reversed.

McCullough, Martin & Blythe, of Greenville, for appellant. Haynsworth & Haynsworth, of Greenville, and Gaston & Hamilton, of Chester, for respondent.

FRASER, J. The respondent states the question before the court as follows:

"This is an action by the administrator of the estate of Abel Grainger, deceased, for damages for the mental and physical anguish suffered by Abel Grainger, who was fatally injured while in the employ of defendant. The accident occurred November 21, 1912, and Abel Grainger died as result of the injuries on November 26, 1912. On February 21, 1913, J. B. Grainger, as administrator of the estate of Abel Grainger, deceased, brought an action in the court of common pleas for Greenville county against the defendant herein, which action purported to be for the benefit of the father (J. B. Grainger) and the mother of the deceased. That action resulted in a verdict for the plaintiff in the sum of \$3,000, the defendant thereupon appealed to the Supreme Court, and that appeal is now pending. Meanwhile, subsequent to the trial of the first case and pending the appeal, the plaintiff, on August 5, 1914, commenced the action at bar, in which he seeks, as administrator, to recover damages for the pain and suffering of plaintiff's intestate.

When this second case came on for trial the circuit court granted a nonsuit on the ground that this action could not be maintained while the first action was pending. From this order of nonsuit the plaintiff has now appealed.

"The question presented by this appeal is whether suit and recovery by the administrator under sections 3955, 3956, vol. 1, Code 1912 (Lord Campbell's Act), for the wrongful death of his intestate, will bar a subsequent suit by the administrator under section 3963, vol. 1, Code 1912 (the survival statute), for damages for the suffering of his intestate. In other words, did the Legislature intend to enable the administrator of one who came to his death as a result of injuries wrongfully inflicted to maintain two actions against the party committing the wrong?"

The respondent asked this court to review the cases on this subject, and that this court shall overrule some of its former decisions. Permission was given to review the cases. When a case is under review, then that case is, for the purposes of review, not authority. If it were otherwise, a review of a former decision would be a travesty. This requires of the court an entirely independent construction of the statutes. These sections of the statute are involved, to wit: Sections 3955, 3956, 3963, Code of Laws 1912, vol. 1. Section 3955:

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony."

This section provides only that the liability shall survive. This section confers a right of action on no one. It does not say who shall bring the action, nor for whose benefit the action shall be brought, nor the measure or elements of damage. If the statutes contained only section 3955, there would have been a mere naked liability not enforceable by any one for any purpose; a liability, but no right of action. At common law there was neither liability nor right of action, both died with the injured person. Section 3956 reads as follows:

"Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect or default was the result of recklessness, willfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided

among the before-mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate."

This section provides an officer to bring the action, it provides the persons for whose benefit the action shall be brought, it provides the measure of damages, and how the amount shall be ascertained. All of this was new. This statute provides for the enforcement of the liability in favor of the beneficiaries, but provides no means of enforcement of the liability to the deceased or his estate, and as there was no way provided for the enforcement, it was useless. When this condition was declared by this court the Legislature passed the act of 1905, now section 3963. Section 3963:

"Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding."

This section supplied the omission and made it emphatic; by it the cause of action shall survive, notwithstanding any law or rule to the contrary. It is as clear as if it had specifically named sections 3955 and 3956, and suits brought under those sections cannot abate an action brought under section 3963.

These two causes of action cannot be joined in one action, and judgment in one is not a bar to the other. The beneficiaries, the cause of action, the measure of damages, are all different.

This court is entirely satisfied with the Bennett Case, 97 S. C. 27, 81 S. E. 189, and it is affirmed by the reasons therein stated. Respondent's remedy, if any, is with the Legislature.

Judgment reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(117 Va. 633)

STRAUS v. FAHED et al.

(Supreme Court of Appeals of Virginia. June 10, 1915. Rehearing Denied June 24, 1915.)

1. CUSTOMS AND USAGES ⇐17—PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT—ADMISSIBILITY.

Plaintiff conveyed to defendants real estate subject to a mortgage, and defendants conveyed to him real estate also incumbered, paying a sum in addition as boot. In each of the conveyances the grantees assumed the incumbrances. Held that, in the absence of fraud, evidence of a local custom that in the exchange of real estate liens on the property are to be equalized was properly refused, the deeds which expressly defined the rights of the parties containing no such provision.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. ⇐17.]

2. APPEAL AND ERROR ⇐1068—DETERMINATION—MOOT CASE.

Where there could have been no other verdict than one for defendants, plaintiff's assignment complaining of error in the instruction need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. ⇐1068.]

Error to Law and Equity Court of City of Richmond.

Assumpsit by Arthur L. Straus against John and George E. Fahed. There was a verdict for defendants, and plaintiff brings error. Affirmed.

Smith & Gordon and Jas. F. Minor, all of Richmond, for plaintiff in error. Isaac Diggs, of Richmond, for defendants in error.

WHITTLE, J. Arthur L. Straus, the plaintiff in error, brought assumpsit to recover of John and George E. Fahed, defendants in error, \$2,367, which he alleged they assumed to pay in a contract of exchange of city lots to equalize the mortgages upon the respective properties. There was a verdict for the defendants, and we are asked to review the judgment rendered thereon.

The transaction between the parties was the equivalent in legal effect of mutual sales and purchases of real estate. The antecedent contract was fully consummated and merged in conveyances between the contracting parties. Straus caused lot No. 602 West Broad street, in the city of Richmond, to be conveyed to the Faheds, subject to a deed of trust of \$12,000, which the grantees assumed to pay; and the Faheds, in consideration thereof, conveyed to Straus a lot on the west side of Eighth street, between Franklin and Grace streets (paying him a certain amount of cash in addition as boot), subject to two deeds of trust, one for \$7,500, and the other for \$6,867, the payment of which Straus assumed.

[1] The record discloses no element of fraud or mutual mistake in the negotiations, and the deeds were executed, delivered, and accepted by the respective parties in good faith, and were admitted to record. In these circumstances we are of opinion that there was no error in the ruling of the trial court excluding evidence of an alleged custom in the city of Richmond that, in an exchange of real estate, liens on the property are to be equalized, and also in refusing an instruction on that theory of the case. The deeds, which were the final repository of the agreement of the parties, expressly defined their rights and liabilities with respect to liens; and therefore, upon familiar principles, contemporaneous parol evidence was inadmissible to alter or vary their terms.

[2] This view of the case is conclusive, and, since no other verdict than one for the defendants could properly have been sustained, it is unnecessary to notice the assignment

of error in regard to giving and refusing other instructions. *Fields v. Virginian Ry. Co.*, 114 Va. 558, 77 S. E. 501.

The judgment complained of must be affirmed.

Affirmed.

(16 Ga. App. 692)

PILGRIM HEALTH & LIFE INS. CO. v. GRAY.

GRAY v. PILGRIM HEALTH & LIFE INS. CO.

(Nos. 6021, 6022.)

(Court of Appeals of Georgia. Aug. 6, 1915.)

(Syllabus by the Court.)

1. INSURANCE \S 666—SICK BENEFITS—STIPULATION OF CONTRACT—WEEKLY REPORTS.

The contract provided that: "Sick benefits will not be paid unless member is confined to bed, and members will be required to furnish the company a certificate for each week during their disability or no benefits will be paid." There being no evidence to authorize the conclusion that any officer of the defendant company, empowered in its behalf to waive the conditions of the contract of insurance, waived the stipulation of the contract which required the plaintiff to make a weekly report of his condition during the continuance of the disability, and the plaintiff admitting that only one such claim was filed by him, a judgment in his favor for more than one week's disability was unauthorized.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1791; Dec. Dig. \S 666.]

2. COURTS \S 190—MUNICIPAL COURTS—APPEAL—MOTION TO DISMISS—TIME FOR FILING.

A motion to dismiss an appeal to the appellate division of the municipal court of Atlanta, upon the ground that there had not been an unconditional approval of the brief of evidence by the trial judge, came too late, under the provisions of section 3 of the act of 1911 (Acts 1911, p. 150), for the trial judge had necessarily passed upon the motion, by refusing it, before the appellant could appeal to the appellate division. Under the act of 1911, supra, the proper procedure would have been to move before the trial judge, upon the hearing of the motion for a new trial, to dismiss the motion because no proper brief of evidence had been filed. The judgment upon the cross-bill of exceptions is therefore affirmed.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 190; Appeal and Error, Cent. Dig. \S 103.]

Error from Municipal Court of Atlanta.

Action by Simon Gray against the Pilgrim Health & Life Insurance Company. Judgment for plaintiff, and defendant brings error, and plaintiff files cross-bill of exceptions. Reversed on main bill, and affirmed on cross-bill.

Lawton Nalley, of Atlanta, for plaintiff in error. C. D. Maddox, of Atlanta, for defendant in error.

BROYLES, J. Judgment on the main bill of exceptions reversed; on the cross-bill affirmed.

(16 Ga. App. 693)

DAVIS v. SKINNER. (No. 6203.)

(Court of Appeals of Georgia. Aug. 6, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 302—FINDING—EVIDENCE.

There was some evidence upon which the court, sitting both as judge and jury, was authorized to find for the defendant, and in such a case the Court of Appeals is without jurisdiction to disturb the finding, even though the evidence be weak and unsatisfactory, when the motion for a new trial contains no other assignment of error than the usual general grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1744-1752; Dec. Dig. \S 302.]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by H. Jeff Davis against C. W. Skinner. Judgment for defendant, and plaintiff brings error. Affirmed.

H. Jeff Davis, in pro. per. Brinson & Hatcher, of Waynesboro, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 693)

HARRISON et al. v. DOUGLAS. (No. 6223.)

(Court of Appeals of Georgia. Aug. 6, 1915.)

(Syllabus by the Court.)

1. INDEMNITY \S 15—LIMITATION OF ACTIONS \S 22—ACTION ON BOND—PLEADING—DEMURRE.

There was no error in overruling the demurrer to the plaintiff's petition.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. \S 38-40, 42-47; Dec. Dig. \S 15; Limitation of Actions, Cent. Dig. \S 100-111; Dec. Dig. \S 22.]

2. LIMITATION OF ACTIONS \S 22—ACTION ON BOND—ANSWER—DEMURRE.

The demurrer to so much of the defendant's answer as sought to set up the bar of the statute of limitations was properly sustained.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 100-111; Dec. Dig. \S 22.]

Error from City Court of Nashville; C. A. Christian, Judge.

Action by R. D. Douglas against W. G. Harrison and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. W. Powell and W. G. Harrison, both of Nashville, for plaintiffs in error. Knight & Chastain, of Nashville, and Walter R. Brown, of Atlanta, for defendant in error.

RUSSELL, C. J. On March 21, 1904, Harrison, as principal, and Tygart and Avera, parties of the first part, as sureties, entered into an obligation under seal, by which they bound themselves to Robert Dun Douglas, party of the second part, in the sum of \$1,000, on condition that the obligation should be void if the principal, Harrison, should pay over, deliver, and account to Robert Dun

Douglas and his associates, or to their principles or to other persons entitled thereto, all moneys, chattels, evidences of debt, and property of every description belonging to Robert Dun Douglas and his associates or to their principals, "which shall or may come into his possession, or under his control, in the course of any business that may be placed in his charge by said party of the second part and his associates, as agents aforesaid, and shall well and truly pay and discharge all debts which in course of such business may incur to said party of the second part and his associates, or to their principals." It was stated in the contract that Douglas and his associates did business under the name and style of the Mercantile Agency. The bond further expressly stipulated that:

"The true intent and meaning of the parties to this instrument is that, upon any default in the condition thereof, a cause of action herein shall accrue to the party of the second part, his executors, administrators, or assigns, who, upon a recovery thereof, shall be liable to account for the amount so recovered to any person, or persons, in respect to whose money, property, or debt, such default may have occurred."

[1] Robert Dun Douglas brought a suit on this bond in the city court of Nashville, to recover damages for alleged breaches of the contract. It was alleged that on or about February 22, 1908, the Mercantile Agency forwarded to Harrison an account of the Wheeling Potteries Company against F. H. Hall, of Adel, Ga., amounting to \$65.58, and that on some day between June 1, 1908, and the filing of the suit, Harrison collected from Hall, in settlement of the account, \$65.58, which he failed to remit to the petitioner and his associates, or to their principals. The second breach of the bond was alleged to consist in the fact that on or about December 20, 1907, the Mercantile Agency forwarded to W. G. Harrison the account of Regal Manufacturing Company against J. H. Kennon of Adel, Ga., amounting to \$46.95, and that about September 25, 1908, or some day between that time and the filing of the suit, Harrison collected the sum of \$46.95 from Kennon in settlement of the account, and failed to remit the same to the petitioner and his associates, or their principals. The damages sought to be recovered upon these two breaches are fixed in the petition by the amount alleged to have been collected from Hall and Kennon, together with interest. It is alleged that demand has been made on all three of the defendants to make good their bond, and a refusal on the part of each to do so is alleged. The defendants demurred generally to the petition, and also demurred specially upon the ground that the petition fails to show who are the associates of the plaintiff Robert Dun Douglas, and whether they are corporations or individuals, and that neither the residence of Robert Dun Douglas nor his associates is shown, nor where their places of business are; and that the petition does not show

whether the Mercantile Agency is a corporation or a partnership, or where its place of business is; also, upon the ground that the petition does not show where the accounts came from, and the allegation as to the collections made by the defendant Harrison is too vague and indefinite to put him on such notice as will enable him to answer the same. The defendants further demurred upon the ground that the claim was barred by the statute of limitations. The court overruled the demurrers to the petition.

We think the judgment overruling the demurrers to the petition was correct. The demurrers were predicated upon the theory that the action was either a suit upon an account or a suit to recover money had and received, whereas it was plain, from all of the allegations of the petition, that the action was a suit upon the bond, to recover damages for the breaches alleged. It is wholly immaterial to the defendant what is the residence of the plaintiff or of the persons alleged to be associated with him. It is likewise, under the terms of the bond, immaterial, so far as the rights of the defendants are concerned, whether the Mercantile Agency be a corporation, a partnership, or a mere trade-name. The court was clearly right in overruling the demurrer based upon the ground that the action was barred by the statute of limitations, although the defendant may have collected the accounts named in the petition more than five years prior to the suit; for the bond is under seal, and recovery may be had thereunder any time within twenty years. The petition alleged that the claims were sent to the defendant Harrison by the plaintiff and his associates, and were collected by Harrison, and that Harrison had not accounted for the collection. If these allegations are established by proof, the plaintiff is entitled to recover.

[2] The defendants filed an answer admitting the execution of the bond which is the basis of the action. They denied that the defendant Harrison ever received the claims mentioned in the petition from Robert Dun Douglas, though he admitted that he did receive such claims from R. G. Dun & Co., and averred that he never collected the amounts claimed from either Hall or Kennon, though he alleged also that whatever was collected was long ago remitted to the source from which the claims were received. The plaintiff demurred to the answer, upon the ground that the allegations as to payment of amounts collected by the defendant Harrison did not set out how, when, and to whom the payments were made by Harrison; and also demurred to that paragraph of the answer in which it was pleaded that the action was barred by the statute of limitations. The court overruled the demurrer to the answer, except the ground addressed to the paragraph in which the statute of limitations was

pleaded, and this was sustained, and this part of the plea stricken. The ruling of the court in sustaining so much of the demurrer to the defendants' answer as pleaded the bar of the statute of limitations was correct, for the reason, already stated, that the action was based upon the bond. If the point had been presented by cross-bill of exceptions, we should hold that, in response to the demurrer to the answer, the court should have required the defendants to state when, how, and to whom the alleged payments of the amounts collected on the accounts named in the petition were made. In the absence of exception, the judgment of the trial court on that point, in overruling the demurrer to the answer, is the law of the case, and the real issues in this case are whether the defendant Harrison received the accounts against Hall and Kennon from the plaintiff, or the plaintiff and his associates (under whatever name they may have been doing business, or wherever may have been the place of business from which the claims were sent to Harrison), and whether, after having collected the claims or any part of either of them, he failed to remit the proceeds either to the plaintiff and his associates or to their principals; the principal in Hall's case being the Wheeling Potteries Company, and in Kennon's case the Regal Manufacturing Company. If neither of the claims was sent to Harrison by Dun or any of his associates, he has a clear defense upon this ground. If neither of them was collected, his defense is equally valid. If the amounts collected by Harrison have been remitted by him to the principals, Wheeling Potteries Company or the Regal Manufacturing Company, and that fact is made to appear, there has been no breach of the terms of the bond. Though the plaintiff might have been entitled to know to whom, and how, and when the payments were made which are alleged by the defendant, because the person, corporation, or partnership to which the payments were made may or may not have been an associate of the plaintiff or may or may not have been a properly authorized agent or representative of the Wheeling Potteries Company or Regal Manufacturing Company, his failure to make timely exception to the ruling of the court in overruling his demurrers to the answer precludes his right in this case to now require such amendment. However, under the express terms of the bond, payment of any amounts collected upon the accounts named in the suit to any other person than Douglas and his associates, or to the Wheeling Potteries Company and the Regal Manufacturing Company, would afford the defendant no defense against the present action, if the claims mentioned in the petition were sent to Harrison by the plaintiff or by the plaintiff's associates.

Had the writ of error sought only to present for review the rulings upon the defend-

ants' answer, it would have been premature and subject to the motion to dismiss, made by counsel for the defendants in error, but the bill of exceptions is not subject to dismissal, for this court has jurisdiction of the question raised by the rulings upon the demurrer to the petition. The plaintiffs in error had the right to have the ruling of the lower court upon the demurrer to the petition reviewed, because, although, under the ruling as made, the case is still pending in the city court of Nashville, the case would have been finally disposed of in that court if the judge had ruled as the plaintiffs in error contend he should have done. There being no question of this court's jurisdiction to deal with the writ of error, we deem it proper at this time to dispose also of the question presented by the ruling of the lower court upon the demurrer to the answer. Judgment affirmed.

(16 Ga. App. 681)

GOLDBERG v. STATE. (No. 6545.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §988—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

There was ample evidence to authorize the conviction of the defendant, and the alleged newly discovered evidence is not only cumulative and impeaching in character, but would probably not produce any different result on another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. §988.]

2. ASSIGNMENTS OF ERROR—DENIAL OF NEW TRIAL.

There is no merit in the various assignments of error, and the court did not err in overruling the motion for a new trial.

Russell, C. J., dissenting.

Error from City Court of Savannah; Davis Freeman, Judge.

Sam Goldberg was convicted of crime, and brings error. Affirmed.

Morris H. Bernstein and Shelby Myrick, both of Savannah, for plaintiff in error. Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

WADE, J. Judgment affirmed.

RUSSELL, C. J., dissents.

(16 Ga. App. 682)

FUTCH v. STATE. (No. 6572.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

HOMICIDE §309 — INSTRUCTIONS — VOLUNTARY MANSLAUGHTER.

The evidence required either that the defendant be convicted of murder or that he be acquitted on the ground that the killing was justifiable homicide. It was therefore error for

the court to instruct the jury upon the law of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. ☞ 309.]

Error from Superior Court, Calhoun County; E. E. Cox, Judge.

Dick Futch was convicted of crime, and brings error. Reversed.

Smith & Miller, of Edison, E. B. Askew, of Arlington, C. J. Taylor, of Morgan, and W. D. Sheffield, of Tampa, Fla., for plaintiff in error. Claude Payton, of Sylvester, Hall Calhoun, of Arlington, R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper, of Atlanta, for the State.

WADE, J. Judgment reversed.

(16 Ga. App. 691)

SMITH v. STATE. (No. 6398.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW ☞1169—APPEAL—HARMLESS ERROR—EVIDENCE.

Testimony that the sole witness, as to the identity of the person who committed the crime, stated that the criminal was "a yellow negro with bushy hair and mustache," was admitted, and this description fitted the accused so far as it went. The testimony was thereafter withdrawn from the jury by the presiding judge, who expressly directed them not to consider it, but to "decide the case as if the same had not been delivered." The admission of this testimony was error; but in view of the positive identification of the defendant by an unimpeached witness for the state, and also in view of general character of the description in the statement objected to, which did not necessarily point to the accused, the testimony was not so damaging to the accused as to render it probable that the error of the court in admitting it was not cured by the subsequent withdrawal. *Thompson v. State*, 12 Ga. App. 201 (4), 76 S. E. 1072; *McDonald v. State*, 72 Ga. 55; *Rentfrow v. State*, 123 Ga. 539 (1), 51 S. E. 596.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 764, 3088, 3130, 3137-3143; Dec. Dig. ☞1169.]

2. CRIMINAL LAW ☞945—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.

The alleged newly discovered evidence is not of sufficient importance to authorize the inference that it would probably produce a different result on another trial, and without regard to the question as to whether it was merely cumulative and impeaching, or whether due diligence was exercised in discovering it, this court cannot say that the trial judge abused his discretion in refusing the grant of a new trial on this ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. ☞945.]

3. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

The evidence supported the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Lonnle Smith was convicted of crime, and brings error. Affirmed.

Jno. L. Booth and T. W. Rucker, both of Athens, for plaintiff in error. John B. Gamble, Sol. Gen., and Holden, Shackelford & Meadow, all of Athens, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 684)

WHITTEN v. RAILWAY POSTAL CLERKS INV. ASS'N. (No. 6178.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

1. BILLS AND NOTES ☞370—BONA FIDE HOLDER—DEFENSE—FAILURE OF CONSIDERATION.

According to the allegations of the petition, the defendant was presumptively the bona fide holder of the notes before their maturity, and therefore was not chargeable with the failure of the consideration of the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. ☞370.]

2. BILLS AND NOTES ☞163—NEGOTIABILITY—EXPRESS CONSIDERATION.

That the consideration of a promissory note otherwise negotiable is expressed in the note does not affect its negotiability, unless the consideration so expressed is a gambling, immoral, or illegal consideration. "A knowledge of the consideration of a negotiable promissory note by a purchaser thereof, for value and before maturity, is not sufficient to charge him with notice of the failure of such consideration." *Hudson v. Beat*, 104 Ga. 131, 30 S. E. 688.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 390-392; Dec. Dig. ☞163.]

3. BILLS AND NOTES ☞370—RIGHTS OF PURCHASER—KNOWLEDGE OF CONSIDERATION.

The rule that the purchaser of a note is not affected by his knowledge of the consideration is not changed by the fact that the consideration of the note is realty rather than personality.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. ☞370.]

4. PETITION—DEMURRER.

The court did not err in sustaining the general demurrer and dismissing the petition.

Error from Municipal Court of Atlanta.

Action by L. L. Whitten against the Railway Postal Clerks Investment Association. Judgment for defendant, and plaintiff brings error. Affirmed.

Dean E. Ryman, of Atlanta, for plaintiff in error. Evins, Spence & Moore, of Atlanta, for defendant in error.

RUSSELL, O. J. Judgment affirmed.

(16 Ga. App. 697)

WILLIAMS v. STATE. (No. 6597.)

(Court of Appeals of Georgia. Aug. 6, 1915.)

(Syllabus by the Court.)

1. WITNESSES ☞240—EXAMINATION—LEADING QUESTIONS.

It is within the legal discretion of the court to allow leading questions to be propounded by the party calling the witness, when from the

conduct of the witness, or for other reason, justice requires it; and the court did not abuse that discretion in allowing the questions complained of in the first ground of the amendment to the motion for a new trial. Penal Code 1910, § 1045.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 796, 837-839, 841-845; Dec. Dig. ¶ 240.]

2. WITNESSES ¶ 331½—RECEPTION OF EVIDENCE—PRIOR STATEMENTS OF WITNESS.

The court did not err in admitting testimony as to previous statements of a witness, offered merely for the purpose of showing that the state had been entrapped by this witness, especially in view of the instructions given the jury that this testimony had been allowed for that purpose alone.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. ¶ 331½.]

3. CRIMINAL LAW ¶ 1064 — PRESENTATION BELOW—ADMISSION OF EVIDENCE.

The 3d ground of the amendment to the motion for a new trial complains of the admission of certain testimony, but since it fails to set forth what particular objection was urged to this testimony when the testimony was offered, this ground cannot be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. ¶ 1064.]

4. CRIMINAL LAW ¶ 823—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS — KNOWLEDGE.

There is no merit in the fourth ground of the amendment to the motion for a new trial, which complains that the court instructed the jury that whether or not the defendant was guilty of the charge of receiving stolen goods was entirely a question of fact for their determination, without "using the expression 'receiving stolen goods knowingly,'" since the jury were fully instructed that the defendant could not be convicted unless he had knowledge that the goods received by him had been stolen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. ¶ 823.]

5. CRIMINAL LAW ¶ 810 — INSTRUCTIONS—REASONABLE DOUBT—CIRCUMSTANTIAL EVIDENCE.

The court instructed the jury that the case against the defendant depended upon circumstantial evidence, and that, to authorize a conviction, the proved facts must not only be consistent with the hypothesis of the guilt of the defendant, but must exclude every other reasonable hypothesis, and further charged them that "in order to convict the defendant, Clay Williams, the proven circumstances must not only be consistent with his guilt, but must exclude every other reasonable hypothesis save the guilt of the defendant;" and the fact that the judge elsewhere in his charge instructed the jury that unless they were satisfied of the guilt of the defendant, Williams, beyond a reasonable doubt, it would be their duty to return a verdict of not guilty as to him did not so negative the full and ample instructions in reference to circumstantial evidence as to require the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1963; Dec. Dig. ¶ 810.]

6. RECEIVING STOLEN GOODS ¶ 8—ELEMENTS OF OFFENSE—KNOWLEDGE—PROOF.

Knowledge that goods are stolen is an essential element of the crime of receiving stolen goods (Sanford v. State, 4 Ga. App. 449, 61 S. E. 741; O'Connell v. State, 55 Ga. 101), and this knowledge on the part of the accused must be proved to warrant a conviction under

Penal Code 1910, § 168 (Stripland v. State, 114 Ga. 843, 40 S. E. 993); but it may be inferred from circumstances (Birdsong v. State, 120 Ga. 850, 48 S. E. 329; Rivers v. State, 118 Ga. 42-45, 44 S. E. 859), where the circumstances shown would excite suspicion in the minds of ordinarily prudent men (Cobb v. State, 76 Ga. 664; Cobb v. State, 78 Ga. 801, 3 S. E. 628); and, "the rule is too well settled to be disturbed that the possession of stolen property immediately after it is stolen puts upon the possessor the burden of proving that his was not a guilty possession." Daniel v. State, 65 Ga. 199; Wiley v. State, 3 Ga. App. 120, 59 S. E. 438 (2).

(a) A witness identified the goods found in the shoe shop of the accused as the particular brand and kind of goods taken from the owner's possession, but there was some testimony showing that goods of the same brand and kind had been previously sold to the accused and were also sold generally by some other merchants in the same city, and the witness for the state admitted that he had not inquired, at all of the mercantile establishments in the city, to see that none of them handled the same kind and brand. There was no testimony to show any knowledge on the part of the accused that the property had been stolen at the time he received it, nor were there any circumstances in proof from which the jury could do more than surmise the existence of such guilty knowledge on his part. The verdict was therefore without evidence to support it, and consequently contrary to law, and the trial court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 15-18; Dec. Dig. ¶ 8.]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Clay Williams was convicted of receiving stolen goods, and brings error. Reversed.

Williford & Lambert, of Madison, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for the State.

WADE, J. Judgment reversed.

(16 Ga. App. 673)

SOUTHERN RY. CO. v. DUKE. (No. 6010.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ¶ 88—NEGLIGENCE ¶ 33—VOLUNTEER—PERSON ASSISTING DEPOT AGENT—DUTY OWED TO TRESPASSER.

One who, at the request of a depot agent of a railroad company, who has no apparent authority to employ other servants, voluntarily undertakes to assist a porter of the company in loading a trunk on one of its cars, is a mere volunteer, and the master owes him no duty except that which it owes to a trespasser; that is, not to injure him willfully and wantonly after his peril is discovered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. ¶ 88; Negligence, Cent. Dig. §§ 45-47; Dec. Dig. ¶ 33.]

2. MASTER AND SERVANT ¶ 306—INJURY TO TRESPASSER—OBVIOUS PERIL—PERSON ASSISTING RAILROAD PORTER.

Where the plaintiff and a railroad porter were lifting a trunk weighing 175 pounds on board a car, the position of the plaintiff at one end of the trunk was not so obviously perilous to the porter at the other end as to charge the porter (and through him the railroad com-

pany that employed him) with willful and wanton negligence in letting his end of the trunk fall to the ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1230-1232; Dec. Dig. ☞306.]

3. RAILROADS ☞273½.—INJURY TO TRESPASSER OR VOLUNTEER—LIABILITY.

As to one who is a mere trespasser or volunteer, the railroad company is not liable for injuries resulting from his undertaking to perform a voluntary service in its yard or at its depot, unless it be established that the injuries were caused by a willful and wanton act on the part of the company after discovery of his presence and danger.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. ☞273½.]

Error from City Court of Carrollton; James Beall, Judge.

Action by J. R. Duke against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

B. F. Boykin, of Carrollton, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. W. E. Spinks, of Dallas, and S. Holderness, of Carrollton, for defendant in error.

WADE, J. The plaintiff alleged in his petition that in March, 1911, he accompanied his daughter-in-law to the town of Villa Rica, in order that she might take passage on a train of the defendant company; that after arriving very early in the morning at the depot he delivered her baggage to a "night operator" to be checked, but this operator requested that the plaintiff wait until "the dayman" came on duty, and this he did; that when the depot agent arrived the said agent ordered the negro porter who stayed at the depot to check the said baggage, and, being himself otherwise engaged at the time, requested the plaintiff "to assist defendant's said porter in checking and tagging said baggage," and this the plaintiff did; that when the plaintiff and the porter "had checked and tagged said baggage, they placed it on a small hand wagon, for the purpose of transporting and loading it on the cars." The plaintiff further alleged that, when the train arrived which his daughter-in-law intended to board, he and the porter pushed the hand wagon across the railroad track "to the place for loading it [baggage] on the train," and that the "said porter then asked him to assist him in putting the trunk on the car, as it was rather heavy to lift, which petitioner undertook to do, he taking hold of one end of it, and said porter the other, and, as they lifted it from the wagon for the purpose of placing it on the car, said porter, without any notice or warning whatever, carelessly and negligently turned his end of said trunk loose, thereby permitting his said end to the same to fall, striking petitioner's left foot," and inflicting various injuries upon him, which he alleged to be permanent. The petition still further set forth that the acci-

dent "was caused by the negligence of defendant's said porter in turning his end of said trunk loose, and in not warning petitioner of the fact that he was going to, or had turned it loose, in time for petitioner to have gotten out of the way of it before it struck him, there being no necessity for said porter to turn said trunk loose when he did." By amendment it was alleged "that the agent in charge of the defendant company's agency at Villa Rica requested petitioner to assist in checking and loading the baggage of his daughter-in-law, agreeing to pay him therefor." The plaintiff further amended the petition by alleging that the trunk which he was assisting the negro porter to load on the defendant's car and which fell on his foot was very heavy, weighing 175 pounds, and, as he had hold of the trunk at one end and the porter at the other, "it was apparent to said porter that if he should drop his end of the trunk without first giving due notice to the plaintiff of this fact it would be impossible for him to extricate himself from his perilous position before being hurt"; that the peril was well known to "defendant's said porter at the time of and prior to the letting of his end of said trunk fall"; and that the plaintiff "was, at the time he received said injuries, on defendant's depot yards and grounds, which it had prepared for the purpose of accommodating its passengers and others who might have business with it in and about the operation of its passenger trains, when he was hurt." A demurrer to the petition as amended was overruled.

[1] 1. The petition as originally drawn did not attempt to make the plaintiff an employe or servant of the defendant company. The rule is well settled in Georgia that a mere volunteer has no right of action for injuries resulting to him in doing acts which he voluntarily undertakes without sufficient legal reason or excuse. In *Central of Georgia Railway Co. v. Mullins*, 7 Ga. App. 381, 66 S. E. 1028, this court said:

"One who, without any employment whatever, but at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for a master, is a mere volunteer, and the master does not owe him any duty, except that which he owes to a trespasser; that is, not to injure him willfully or wantonly after his peril is discovered."

See also *Rhodes v. Georgia Railroad Co.*, 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362; *Atlanta & West Point Railroad Co. v. West*, 121 Ga. 641, 49 S. E. 711, 67 L. R. A. 701, 104 Am. St. Rep. 179; *Jenkins v. Central of Georgia Railway Co.*, 124 Ga. 986-989, 53 S. E. 379.

The amendment reciting that "the agent in charge of the defendant company's agency" requested the plaintiff to assist the porter in checking and loading the baggage of his daughter-in-law, "agreeing to pay him there-

for," was insufficient to convert the plaintiff from a mere volunteer to an employé of the defendant company. In fact, the amendment does not even allege that the agent who agreed to pay the plaintiff to assist in loading this particular trunk intended to employ the plaintiff in behalf of the company, or that the defendant so understood it, but the allegation is that the agent requested the petitioner to assist, etc., and agreed to pay the plaintiff therefor; and, construed by the usual and ordinary rules, this would amount to an allegation that the agent himself was to pay for the services rendered, and not the defendant company. In addition to all this, it does not appear from any allegation in the petition as originally drawn or as amended that the depot agent had any authority to employ the plaintiff in behalf of the company to assist the porter in loading one trunk or any number of trunks on a train of the company, or that the agent sought to exercise any such authority in its behalf, and it cannot be said that the relation of master and servant was created by reason of any facts stated in the plaintiff's petition, even as amended.

[2] 2. The other amendment attempts to hold the defendant liable on the idea that the conduct of the porter, in dropping one end of a heavy trunk without giving due notice to the plaintiff of his intention, when he knew that the plaintiff was in a perilous position from which it would be impossible to extricate himself after the porter dropped his end of the trunk, amounted to a willful and wanton act of negligence on the part of the company. As to this, we think it sufficient to say that the facts alleged do not, in our opinion, show such a willful and wanton act on the part of the defendant or its porter as would authorize any recovery therefor. Under the allegations as made, there was negligence on the part of the porter, but, construing the petition most strongly against the pleader, we cannot say that the negligence as alleged amounted to willful and wanton negligence. Apparently it amounted to no more than simple carelessness in the performance of an act which the porter could not reasonably assume involved any serious elements of danger. Neither does it clearly appear from the petition, by reason of any facts therein stated, that the porter reasonably knew that his alleged carelessness would probably or even possibly result in injury to the plaintiff, or that the plaintiff, in sustaining one end of a trunk weighing 175 pounds, in an open unconfined space, was in a perilous position or would be placed in a perilous position by the dropping of the other end of the trunk of that weight a distance, not alleged, of perhaps only one or two feet, to the ground.

[3] 3. It is insisted that, even if it be conceded that the plaintiff was a mere volunteer, or even a trespasser, the company might nevertheless be held liable because of the in-

juries resulting to him, as the company "is bound to anticipate his presence and to take such measures as ordinary care and diligence would suggest to avoid injury to him." This view also does not demand discussion. As stated in *Central of Georgia Railway Co. v. Mullins*, supra, a railroad company is not liable to a mere volunteer who unnecessarily places himself in a dangerous position in the yard of the company for the purpose of performing a voluntary service, "unless it be established that the injuries were caused by the willful and wanton act of the company." We do not see how, under any view of the facts alleged in the petition as amended, it could be said that the injuries were caused by the willful and wanton act of the defendant; and, since the plaintiff was a mere volunteer in attempting to perform a service which brought about the injuries complained of, he cannot complain because the company failed to surround him with safeguards or assistance sufficient to prevent the possibility of injury, when the company could not possibly assume that he would undertake to do the act from which the injury resulted; bearing in mind that, under our construction of the petition, the agent, and not the company, engaged him to assist the porter in loading the trunk.

Judgment reversed.

RUSSELL, C. J. (concurring specially). It is clear that the plaintiff would not be entitled to recover, unless the jury would be authorized to find that his injury was the result of wantonness and willfulness on the part of the defendant's agent. Though inclined to hold that, under the facts stated, the trial judge did not err in submitting to a jury the question whether the dropping of the trunk, at the time and under the circumstances, evidenced such a reckless and utter disregard of the plaintiff's safety as to constitute wantonness, still, in view of the fact that the petition does not contain any distinct allegation that the negligence of the defendant's servant was either wanton or willful, and because perhaps it may be judicially inferred that wantonness could not arise in the dropping of a trunk which weighed only 175 pounds, and also in view of the fact that the plaintiff, by his last amendment, perhaps constituted himself a servant of the company, I doubtingly concur.

(16 Ga. App. 667)

INTERSTATE LUMBER CO. v. WHITFIELD-BAKER CO. (No. 6114.)

(Court of Appeals of Georgia. Aug. 4, 1915.)

(Syllabus by the Court.)

CONTRACTS — 164—CONSTRUCTION.

In construing a written contract, all writings which form a part of or enter into the contract should be construed together.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 746-748; Dec. Dig. § 164.]

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action by the Interstate Lumber Company against the Whitfield-Baker Company. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

Branch & Snow, of Quitman, for plaintiff in error. Bolling Whitfield, of Brunswick, for defendant in error.

BROYLES, J. The Interstate Lumber Company brought suit against the Whitfield-Baker Company for \$400, the balance of an account for lumber cut and delivered to the defendant. Upon an agreed statement of facts the case was submitted to the judge without the intervention of a jury. From the record it appears that the plaintiff received the order for the lumber from the defendant on February 4, 1910, and that delivery of the lumber was made to the defendant on March 2 and March 3, 1910. While the formal order sent by the defendant to the plaintiff specified February 26th as the date for delivery, yet the telegraphic and other written correspondence between the parties clearly indicated that the plaintiff would only accept the order at the price named in their (plaintiff's) communication and for delivery within four weeks from receipt of the order, and the letter from the defendant which closed the contract adopted the original proposal as to the time (four weeks) within which the lumber was to be delivered. While the lumber was not delivered by February 26th, it was delivered within four weeks from the receipt of the order. It did not appear in any of the correspondence between the parties, leading up to the order, that the time of filling the contract was of any special importance. The defendant, at the time of placing the order, gave no notice to the plaintiff that the lumber was intended for shipment on any particular boat, or that it was to be shipped at all, nor was the plaintiff notified by the defendant that unless the lumber was received by February 26th, extra port charges and demurrage would probably result. In our opinion, the damages which were set up as a recoupment to plaintiff's demand were not such damages as could reasonably have been expected to flow from the plaintiff's delay in shipping the lumber, even if we should hold that there was such a delay; nor does it appear from the record that such damages were within the contemplation of both parties at the time of the acceptance of the order. See *McNaughton v. Stephens*, 8 Ga. App. 545, 70 S. E. 61; *Alkahest System v. Curry*, 6 Ga. App. 625, 65 S. E. 580; *Albany Phosphate Co. v. Hugger*, 4 Ga. App. 771, 62 S. E. 533.

In our judgment the court erred in finding for the defendant.

In accordance with the request of counsel for the defendant made in his brief, direction is given that on the next trial of this case the agreed statement of facts may be reopened,

and each party to the suit shall be permitted, if it so desires, to submit additional evidence.

Judgment reversed, with direction.

(16 Ga. App. 668)

STUDEVANT v. BLUE SPRINGS LUMBER CO. (No. 6165.)

(Court of Appeals of Georgia. Aug. 4, 1915.)

(Syllabus by the Court.)

1. INJURY TO EMPLOYÉ.

The injury sued for occurred because the alleged superintendent of the defendant company, without warning to the plaintiff, pressed down upon a certain moving belt with an iron rod at the exact time the plaintiff was in the act of replacing that belt on a pulley.

(a) It is apparent, from the allegation in the petition that the belt "had previously slipped from said pulley and had been replaced without the use of said rod and without injury to any one," that the proximate cause was not the failure of the defendant to have the belt properly adjusted or to inspect it, but was the negligence of the alleged superintendent in attempting to use the iron rod.

2. MASTER AND SERVANT — 222—INJURY TO SERVANT — ASSUMPTION OF RISK — DIRECTIONS OF VICE PRINCIPAL.

The fact that the vice principal of the defendant company, who was in charge of the mill and the operation thereof, with authority to employ hands and give orders to the employes, all of whom were under his direction, including the plaintiff, directed the plaintiff to perform a particular act, would not relieve the plaintiff from the legal consequence of assuming the risk of an obvious danger and attempting to replace a belt while the machinery to which it was attached was in motion, where nothing appears to indicate any less certain, definite, and precise knowledge of the hazard thereby incurred than the superintendent himself was in possession of.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 648-651; Dec. Dig. 222.]

3. MASTER AND SERVANT — 190—INJURY TO SERVANT—NEGLIGENCE OF SUPERINTENDENT.

The defendant was not liable because of an injury that resulted from a negligent act of its superintendent or vice principal in the discharge of labors or duties outside of the nondelegable duties of the master (in the performance of which he was the master's representative), and while merely doing servant's work or engaged solely in executing the ordinary details of labor. *Dennis v. Schofield's Sons Co.*, 1 Ga. App. 480, 57 S. E. 925; *Standard Cotton Mills v. Collum*, 6 Ga. App. 426, 65 S. E. 195; *Hagins v. Southern Bell Telephone, etc., Co.*, 134 Ga. 641, 68 S. E. 428, 137 Am. St. Rep. 270, 20 Ann. Cas. 248; *Moore v. Dublin Cotton Mills*, 127 Ga. 600, 50 S. E. 839, 10 L. R. A. (N. S.) 772. The alleged superintendent was a mere fellow servant of the plaintiff as to the negligence on his part which brought about the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 449-474; Dec. Dig. 190.]

4. DEMURRER TO AMENDED PETITION.

The court did not err in sustaining the demurrer to the petition as amended.

Error from City Court of Quitman; Wm. H. Long, Judge.

Action between Grady Studevant and the Blue Springs Lumber Company. From a

judgment, plaintiff, Studevant, brings error. Affirmed.

O. M. Smith, of Valdosta, for plaintiff in error. Branch & Snow, of Quitman, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 686)

MITCHELL v. J. S. SCHOFIELD'S SONS CO. (No. 6218.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇨270—SAFE APPLIANCES—EVIDENCE.

It is the duty of a master who furnishes machinery for the use of his servant to exercise ordinary care to furnish machinery "equal in kind to that in general use." Civ. Code, 1910, § 3130. Whether a scaffold furnished by a master for the use of servants was equal in kind to those in general use is not shown by testimony that it was "about the same scaffold as that in general use by the three concerns" that the witness had worked for.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. ⇨270.]

2. EVIDENCE ⇨195—MODELS—STANDARD OF COMPARISON.

The court erred in admitting in evidence the model introduced as a model of the tank and scaffold on which the plaintiff's son was at work when injured; it appearing from the testimony of the person who constructed the model that in material particulars it was not a correct model.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 680; Dec. Dig. ⇨195.]

3. APPEAL AND ERROR ⇨1066—MASTER AND SERVANT ⇨291—PREJUDICIAL ERROR—INSTRUCTIONS.

The court, in charging the jury, committed error prejudicial to the plaintiff in not correctly stating her contentions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⇨1066; Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. ⇨291.]

4. MASTER AND SERVANT ⇨293—INJURY TO SERVANT—INSTRUCTIONS — DEFECTIVE APPLIANCES.

In connection with the instruction to the jury to see whether or not the defendant or its agent knew of the defect in the scaffold, if it was defective, the court should have instructed them to ascertain whether the master, in the exercise of ordinary care, ought to have known of the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. ⇨293.]

5. MASTER AND SERVANT ⇨295—INJURY TO SERVANT—INSTRUCTIONS.

The instruction to the jury that, if the plaintiff's son, "about the time he was going in and upon the scaffold," told the foreman that it was defective, and the foreman told him to go ahead and do the work, the master would be liable, was subject to the objection that the instruction tended to limit the consideration of the jury to a complaint of the servant and assurance of the master at or about the time the servant was going upon the scaffold to do the work wherein he was injured, though it

appeared from the evidence that this assurance was given when the scaffold was being built.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. ⇨295.]

6. NEGLIGENCE ⇨58—ANTICIPATED INJURY.

One may be liable for an injury which was the natural result of his negligence, though an injury of the particular kind produced, or an injury to the particular person injured, was not reasonably to have been expected by him, in the exercise of ordinary care and diligence; and it was error to charge the jury that the plaintiff would not be entitled to recover if, from a consideration of the evidence, it appeared that the homicide in question, "under the acts of negligence alleged in the writ, was not reasonably to be expected by the master or his agents, acting with ordinary care and diligence."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 71; Dec. Dig. ⇨58.]

Error from City Court of Macon; Robert Hodges, Judge.

Action by Mrs. M. E. Mitchell against the J. S. Schofield's Sons Company. Judgment for defendant, and plaintiff brings error. Reversed.

Mallory & Wimberly, of Macon, for plaintiff in error. Miller & Jones, of Macon, for defendant in error.

BROYLES, J. This was an action for damages by Mrs. M. E. Mitchell against Schofield's Sons Company for the homicide of her son. From the record it appears that the deceased was a boilermaker employed by the defendant company in the erection of a large creosote tank in the yards of the Central of Georgia Railway Company in Savannah, Ga., and, while so engaged, he was (in the course of his duties) standing, with several other workmen, upon the top of a scaffold inside the tank, fitting and riveting a steel plate to the top or roof of the tank; that while in this position the scaffolding collapsed, precipitating him and the other workmen with him to the floor of the tank, a distance of about 35 feet; and that he suffered injuries therefrom which resulted in his death the following day.

The plaintiff contended that the scaffolding was improperly constructed, and built of timber too small to support the weight of the workmen and the steel plates they were supporting. The plaintiff contended that the scaffold fell before the steel plate (that the deceased and other men who were riveting to the roof of the tank) fell. The evidence on this point was conflicting. The defendant contended that the steel plate fell first, struck the scaffold, and caused it to fall. The jury found for the defendant. The plaintiff excepted, and assigns error upon the admission and exclusion of certain evidence and upon various portions of the charge of the court.

[1] 1. The court erred in admitting the testimony of the witness T. F. Smith as to the method of construction of certain scaffolding

used by three concerns for whom the witness had previously worked. This testimony was inadmissible, for the reason that the witness could, under the law, testify only as to the character of scaffolding in general use for a purpose similar to that of the scaffold in the collapse of which the plaintiff's son was injured. Civil Code, § 3130, provides that the duty of the master is to furnish machinery "equal in kind to that in general use."

[2] 2. The second ground of the amendment to the motion for a new trial, complaining of the admission in evidence of a certain model of the tank and scaffold on which the plaintiff's son was at work when injured, is, in our opinion, well taken. "Where an article is introduced as a standard of comparison, preliminary evidence showing that in essential respects it offered a trustworthy standard of comparison is sufficient to render it admissible." 4 Enc. Ev. 240 (4b). The negative pregnant follows that the article is inadmissible when, as in this case, it is clearly shown that there were material inaccuracies in the comparative sizes of the braces and other parts of the scaffolding, as shown in the model.

[3] 3. In the motion for a new trial objection is taken to the following excerpts from the charge of the court:

(4) "She [the plaintiff] further contends that at the time he [the deceased, the plaintiff's son] was at work upon the scaffolding that it was a part of his duty to do this work, and she contends that in the placing of a certain metal sheet in and upon the top of the tank in whose erection he was engaged, and while thus engaged with other workmen, through the negligence of a fellow workman or workmen, the metal sheet was released, and the weight placed upon him, and that, notwithstanding the fact that he was in the exercise of ordinary care and diligence in his effort to control the weight of the metal sheet, the same fell in and upon him and the scaffolding, and that by reason of the negligence of the fellow servants in releasing the metal sheet the same struck the scaffolding, and the scaffold collapsed, precipitating her son to the ground, from which fall he received injuries, and subsequently died."

(5) "She further contends that, not only is the master negligent in failing to furnish to him a reasonably safe place to work, as charged in the declaration, but that the master is liable to her by reason of the fact that the negligence of the master, as contended for by her, was concurrent with the negligence of a fellow servant or fellow servants working upon the work upon which he was engaged, and that she is entitled to have and receive at your hands a verdict against the master, on account of the fact that the place was not a reasonably safe place to do the work; for whatever injury and damage may have been brought about by the concurrent negligence of the fellow servant or fellow servants."

The main contention of the plaintiff was that the scaffold gave way or collapsed before the section of steel fell, and that the falling of the scaffold was primarily due to weak and insufficient bracing and defective construction. She did not contend that the negligence of the master was concurrent with the negligence of a fellow servant. The trial

judge in his charge having erroneously stated the material contention of the plaintiff (and especially as it appears from the approved amended grounds of the motion for a new trial that counsel for the plaintiff stated, in reply to a question from the court, that plaintiff had "always contended that the metal sheet did not fall first, but that the scaffold gave way first"), it must be assumed that this error was harmful to the plaintiff. See, in this connection, *Fruit Despatch Co. v. Roughton-Halliburton Co.*, 9 Ga. App. 108 (2b), 70 S. E. 356; *Cooper v. State*, 2 Ga. App. 730 (1), 59 S. E. 20; *Pye v. Pye*, 133 Ga. 246 (2), 249, 65 S. E. 424; 38 Cyc. 1626 (b, c), 1632 (d); *Whelchel v. Gainesville, etc., Ry. Co.*, 116 Ga. 431 (3), 42 S. E. 776; *Vaughn v. Miller*, 78 Ga. 712 (1a).

[4] 4. In the sixth and seventh grounds of the amendment to the motion for a new trial it is complained that in charging the jury to ascertain whether or not the defendant or its agent knew of the defect in the scaffold, if it was defective, the court failed, in connection therewith, to instruct them to ascertain whether the master, in the exercise of ordinary care, ought to have known of the defects. We think that this exception was well taken. *Ocean Steamship Co. v. Matthews*, 86 Ga. 423, 12 S. E. 632; Civil Code, § 3130.

[5] 5. The court erred in the following charge complained of in the motion for a new trial:

"If you believe * * * that about the time he was going in and upon the scaffold he told the vice principal or foreman that the scaffold was defective, and the foreman told him to go ahead and do the work, the master would be liable."

This charge was erroneous for the reason that it limited the consideration of the jury to a complaint of the servant and an assurance of the master at or about the time the servant was going upon the scaffold to do the work wherein he was injured. It appears from the record that Mitchell (the plaintiff's son) and another workman told the defendant's foreman, at the time of the erection of the scaffold, that it was not being built sufficiently strong to carry the weight, and that he assured them, stating his greater experience, that it was perfectly safe, and directed them both to go on with the work. See, in this connection, *Bush v. Yellow Pine Co.*, 2 Ga. App. 295 (2), 58 S. E. 529; *Smith v. Southern Railway Co.*, 8 Ga. App. 822 (2), 70 S. E. 192; *Massee & Felton Lumber Co. v. Ivey*, 12 Ga. App. 583 (2), 77 S. E. 1130.

[6] 6. Error is assigned upon the following excerpt from the charge of the court:

"If, from a consideration of the evidence adduced upon the trial of the case, it appears that the homicide as set out in her writ, under the acts of negligence alleged in the writ, was not reasonably to be expected by the master or his agents, acting with ordinary care and diligence, I charge you that she would not be entitled to have and receive a verdict, it matters not how the homicide was brought about."

This, in our opinion, was a prejudicially erroneous statement of the doctrine of proximate cause, as applied to the facts in this case.

"In order that a party may be liable in negligence, it is not necessary that he should have contemplated or even be able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient, if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." 21 Am. & Eng. Enc. Law (2d Ed.) 487 (b); 29 Cyc. 495 (2); Cooley on Torts, 33, 35; Wharton on Negligence, §§ 77, 78; Thompson on Negligence, § 59; Colorado Mortgage Co. v. Giacomini, 55 Colo. 540, 136 Pac. 1039, L. R. A. 1915B, 364; Drum v. Miller, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528.

For the reasons above stated, the court erred in overruling the motion for a new trial, and the judgment is reversed.

(16 Ga. App. 678)

CURTIS v. STATE. (No. 6038.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

1. FORGERY — PAPERS SUBJECT.

The offense of forgery may be committed by forging a paper not purporting to be formally signed by any one, if the language of the paper clearly discloses who is the person intended to be considered and understood as the writer.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 2, 3, 8-15; Dec. Dig. —7.]

2. INDICTMENT AND INFORMATION — LANGUAGE OF STATUTE—FORGERY.

It is sufficient that the offense of uttering a forged paper is charged in the language of the statute which defines the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. —110.]

3. FORGERY — INDICTMENT—SUFFICIENCY.

It was not a good ground of demurrer to the indictment that the paper alleged to have been forged, which was addressed, "Mr. Griffin," did not of itself indubitably indicate the person intended.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. —29.]

4. CRIMINAL LAW — ACCOMPLICE—QUESTION FOR JURY.

There was no error in overruling the motion for a new trial. The evidence supported the allegations of the indictment, the question whether the main witness for the state was or was not an accomplice was one of fact for solution by the jury, and there was testimony all-unde sufficient to authorize the jury to find that the testimony of this witness was corroborated. The charge was full and fair, and the statement of the judge that "the defendant insists that the witness Selman was guilty himself of the crime of forgery," when considered with what preceded and followed it, is not subject to exception as being an expression of opinion by the court.

(a) In a criminal trial it is not conclusively to be presumed, as against the defendant on trial, that an alleged codefendant is an accomplice, or that such codefendant was guilty of the offense, although he may have previously entered a plea of guilty to the felony which he

was alleged jointly with the accused to have committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 724, 726, 730-751, 1098, 1138, 1719-1721, 1781, 1750, 1754, 1758, 1759, 1769; Dec. Dig. —323, 742, 762.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

O. W. Curtis was convicted of forgery, and brings error. Affirmed.

Eubanks & Mebane and F. W. Copeland, all of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., of Rome, and W. B. Shaw, of La Fayette, for the State.

RUSSELL, C. J. [1-3] 1. The defendant was indicted for the offense of forgery. He demurred generally to the indictment, and on the ground that the alleged forged order which was set forth in the indictment was not such an order as could be the subject of a forgery, because it showed that no person signed the order. The order alleged to have been forged was as follows:

"Rome, Ga., August 18, 1911. Mr. Griffin, please let Charlie Barron have \$40.00 to oblige Shaw Buchanan, he wanted to go home and I sent him to you."

We think that the order can be reasonably construed as purporting to be signed by Shaw Buchanan, and that the words "to oblige Shaw Buchanan" are equivalent to the very ordinary expression "and oblige" Shaw Buchanan, a form with which orders and letters are frequently concluded. It was further contended in the demurrer that:

"The indictment fails to allege how or in what way, manner, or means the defendant uttered and published the alleged forged paper."

We think this point is controlled by the ruling of the Supreme Court in Thomas v. State, 59 Ga. 784, and that an indictment charging the uttering of a forgery may be confined to the language employed in defining the offense in the Penal Code, § 232. Another ground of the demurrer was that the order was addressed merely "Mr. Griffin," and contained nothing that would indicate that it was intended for W. J. Griffin, the person whom it was alleged that the defendant intended to defraud. We do not think this was good ground of demurrer. The fact that the person intended was W. J. Griffin could be shown by evidence outside of the paper itself.

[4] 2. The evidence showed that a boy named Will Selman carried the order which we have recited to the store of the Griffin Hardware Company, in Floyd county, Ga., and presented it to Mr. W. J. Griffin. A Mr. Graham was interested with Griffin in the Griffin Hardware Company. Mr. Graham was not in the store at the time, and there are circumstances from which it can be inferred that the defendant knew of Graham's absence, and that the order would be presented to Griffin. Shaw Buchanan worked for Graham in the sawmill business, and

Griffin was accustomed to pay, for Graham, orders drawn by Shaw Buchanan. Griffin paid Will Selman the \$40, and Selman carried the money to Curtis, the defendant who gave him the note or order, and who was engaged in the undertaking business. It was proved that Selman was, at the time he testified, a convict, who had pleaded guilty to uttering the forgery in question, and there was proof that his general reputation was bad. It was contended that he was an accomplice, and that his testimony was not corroborated. Selman testified that, though he had pleaded guilty, he was in fact innocent of the offense of uttering the forged paper, because he carried the note from Curtis to Griffin without any knowledge of its contents, or any intent to defraud, and the proof showed that he could neither read nor write. The issue was raised, therefore, as to whether Selman was or was not an accomplice, and we are of the same opinion as the trial court, who instructed the jury that although Selman may have entered a plea of guilty of forgery, if they believed from the evidence that he in truth and in fact took the order without knowing what was in it, and carried it to Griffin and got the money and turned it over to the defendant, Curtis, without any intention to defraud any one, and was merely an innocent participant in the crime, he would not be an accomplice. The jury had the right, therefore, to find the defendant guilty upon Selman's testimony, even in the absence of any corroboration, if they found that he was not an accomplice. On the other hand, there was sufficient testimony, as shown by the record, to corroborate the testimony of Selman, even if the jury found him to be an accomplice, for there was not only evidence by comparison of the order with papers admitted to have been executed by the defendant, and testimony of a person familiar with his handwriting that in his best opinion the order was written by the accused, but the books kept by the defendant in his undertaking establishment were submitted to the jury and taken with them to the jury room for comparison with the order. It cannot be said, therefore, that there was no corroboration of Selman's testimony.

There was no error in overruling the motion for a new trial.

Judgment affirmed.

(16 Ga. App. 668)

LAMB v. GORMAN. (No. 5982.)

(Court of Appeals of Georgia. Aug. 4, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1026, 1061—HARMLESS ERROR—DIRECTION OF VERDICT.

The action of the court in directing a verdict, where no other verdict than that directed could have been legally rendered under the evidence submitted, is not such an error of law as can be reviewed or as will afford ground for

reversal. A court of review will not concern itself with harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4029, 4030, 4137, 4209-4211; Dec. Dig. \S 1026, 1061.]

2. LANDLORD AND TENANT \S 109—SURRENDER OF PREMISES—ACCEPTANCE BY LANDLORD.

While acts which are equivalent to, or which may reasonably be construed to be equivalent to, an agreement on the part of a tenant to abandon, and on the part of the landlord to resume, possession of the premises may amount to a surrender by operation of law, still, to constitute a surrender by operation of law, there must not only be a surrender by the tenant, but also an acceptance thereof by the landlord as a surrender. "A mere giving of the keys to the landlord does not of itself show a surrender." 24 Cyc. 1373 (c).

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 350-360, 363-365, 368-371; Dec. Dig. \S 109.]

3. LANDLORD AND TENANT \S 109—SURRENDER OF PREMISES—ACCEPTANCE BY LANDLORD.

In the present case the defendant undertook to show the landlord's acceptance of his surrender of the premises leased to him under a written contract. But conceding the defendant's evidence upon this point to be true, a verdict for the plaintiff was demanded. There was no evidence that the landlord, in accepting the keys, accepted them as a surrender of the premises, or that the defendant was expressly or impliedly released as a tenant at the time the keys were delivered or thereafter. The letters written by the plaintiff's agent to the defendant showed nothing more than a willingness to release the defendant from the contract upon conditions which were not accepted by the defendant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 350-360, 363-365, 368-371; Dec. Dig. \S 109.]

4. DENIAL OF NEW TRIAL.

There was no error in overruling the motion for a new trial.

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by Mrs. B. V. Gorman against C. C. Lamb. Judgment for plaintiff, and defendant brings error. Affirmed.

Hewlett, Dennis & Whitman, of Atlanta, for plaintiff in error. C. D. Maddox, of Atlanta, for defendant in error.

RUSSELL, C. J. [1-4] The propositions of law announced in the headnotes decide the points raised in the record, and perhaps do not require elaboration to be understood. A brief statement of the facts as disclosed by the record, however, may make clearer our exact meaning. Mrs. Gorman, under a written contract, leased to Lamb a storehouse in the city of Atlanta for a term of two years, commencing on October 1, 1912, with the rent payable monthly in advance. The first month's rent of \$20 was paid by Lamb. About the 1st of November Lamb sent the keys of the storehouse by one Williams to O. D. Gorman, the husband and agent of the plaintiff. The keys were sent without any previous notice of an intention

to do so, and without any agreement with the opposite party to the contract. Williams was not introduced as a witness, and, so far as the record discloses, neither the plaintiff nor her agent had any conversation with Lamb about the keys, nor was there any statement by the plaintiff or her agent that the keys were accepted for any purpose whatever, or that Lamb would be released as the lessee. The suit was for the rental from October 1, 1912, to May 9, 1913, amounting to \$146, and, upon proof that the first month's rent had been paid, the trial judge directed a verdict for \$126. The defendant sought to charge the plaintiff with the value of a counter left in the store at the time that he abandoned it, but there was no evidence that the plaintiff had converted the counter to her own use, or had refused any demand for its delivery. As to the counter the defendant himself testified only that he left the counter, worth about \$15, when he moved out of the premises. It is to be borne in mind that the contract of rental was in writing and embraced a period of two years, and, though the plaintiff's agent testified that he had secured another tenant on May 9, 1913, the contract expressly provided that the lessor, at her option, upon a breach of the contract, might sublet the premises as agent of the lessee and to minimize the damage resulting from the breach of the contract, and that such subletting should not be deemed in any sense a breach of the contract on the part of the lessor. Under the contract, then, the landlord had the right to sublet the premises, whether there was a surrender of the premises which was accepted by the landlord, or whether the tenant had breached the contract by abandoning the lease without any agreement whatsoever with the landlord. The only question in the case therefore is whether there was such a total failure of evidence in behalf of the defendant who set up the defense that the premises had been surrendered to the agent of the landlord, and that he had thereby been released from the contract, as demanded a finding in favor of the plaintiff. In other words, did the testimony for the defendant warrant any inference upon which a jury could have found that the defendant or her husband, who was her agent, had released the defendant from the contract? If any such inference can be drawn from the testimony there would be such conflict in the evidence as could only be settled by the intervention of a jury. If the deduction that the landlord agreed to the defendant's abandonment of the premises and consented to retake possession thereof could not legally have been drawn by a jury, then the action of the court in speeding the trial by directing a verdict was harmless to the defendant.

According to the defendant's testimony, he moved out of the premises without any notice whatever to the landlord or her agent,

and before he sent the keys by Williams. It is true he left in the store a counter worth \$15, for which he has never since made any demand, but he does not testify that he sent any message by Williams, or is there any testimony that he requested through Williams that the plaintiff should release him from the contract of rental. There was nothing that the plaintiff's agent could do but accept the keys; for it was plain, from the fact that the defendant was sending the keys, that the storehouse had already been vacated. However, in the defendant's testimony there is nothing that indicated on the part of the plaintiff's agent a willingness that the storehouse should be vacated and the contract terminated. On the contrary, the defendant testified:

"A day or two thereafter I received a letter from Mr. Gorman, requesting me to call at his office to see him, and stating that he thought we could make some arrangement by which I could continue to conduct my dairy business on the premises."

So far from indicating any definite agreement on the part of the plaintiff to accept the keys as an evidence of surrender of possession, this letter merely indicated uncertainty on the part of the plaintiff as to what to do under the existing conditions, and perhaps a willingness to modify some term of the contract if, after a conference, an agreement could be reached as to the modification. The defendant further testified:

"I think I also received another letter shortly thereafter, making substantially the same request."

According to the defendant's testimony, the plaintiff was so anxious not to resume possession of the premises and not to accept the tenant's surrender of possession that the plaintiff's agent later told the defendant that if the defendant would go back and open up his business, he would help the defendant in every way he could, and was willing to allow him as much as 12 months' free rent, if necessary. When a landlord rents a building and puts a tenant in possession of the premises, with consequent liability for rent, the possession of the premises cannot be surrendered by the tenant during the term of the lease, unless the surrender be accompanied by an agreement on the part of the landlord to retake possession. Otherwise any tenant, by moving out between dark and daylight, might surreptitiously avoid a rent contract upon the ground that he had surrendered possession. A landlord may retake possession either for himself or for the purpose of renting to another tenant, upon the surrender of possession by a tenant, but, to complete the evidence of surrender, there must be evidence of something more than an inability on the part of the landlord to compel the tenant to remain in possession. There must be either an express agreement to the surrender of possession on the part of the tenant, or such circumstances as compel the conclusion that the

landlord consented to retake possession of his property. Under the defendant's own evidence, the plaintiff's agent was so unwilling to accept the defendant's surrender of possession that he tentatively suggested a modification of the terms of the contract for the first year; but the defendant cannot take advantage of this suggestion, because it did not purport to affect the contract as a whole or deprive the plaintiff of the increased rental of \$25 for the second year, which the contract provided for. The tentative proposals testified to by the defendant did not look to the cancellation or avoidance of the contract, which was for two years, and furthermore, since the defendant did not accept the proposal or act thereon, the contract, so far from being abrogated, was not even modified.

There being no evidence that the plaintiff at any time consented to the defendant's abandonment of the premises, the action of the court in directing a verdict affords the plaintiff in error no ground for complaint.

Judgment affirmed.

(16 Ga. App. 655)

GARFIELD OIL MILLS v. STEPHENS.

(No. 5830.)

(Court of Appeals of Georgia. Aug. 4, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 222—PRESENTATION BELOW—JOINDER OF MOTIONS.

It is not necessary at this time to decide whether a motion in arrest of judgment can be joined with a motion to set aside a judgment. The judgment striking those paragraphs of the plaintiff's motion as to which exception is taken was in any event correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1156, 1333-1336; Dec. Dig. \S 222.]

2. JUDGMENT \S 267—MOTION IN ARREST—TIME FOR FILING.

Treated as a motion in arrest of judgment, the motion was too late, since it was filed after the date on which the term of the city court at which the judgment was rendered was closed as a matter of law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 488-497; Dec. Dig. \S 267.]

3. APPEAL AND ERROR \S 1072—HARMLESS ERROR—MOTION—GROUNDS.

Whether the matter dealt with in the stricken paragraphs of the motion could or could not properly be treated as equivalent to a motion for a new trial, and whether these allegations could or could not be joined with a motion in arrest of judgment, it was not error for the trial judge to overrule these grounds, nor was it error prejudicial to the plaintiff to strike them on oral motion, since, considered as grounds of a motion for a new trial, they were insufficient, and the plaintiff in error could not complain that the same result was less technically reached by dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4233½; Dec. Dig. \S 1072.]

4. COURTS \S 159, 169—JURISDICTION—AMOUNT INVOLVED—REDUCTION OF JUDGMENT.

The court did not err in permitting the defendant to reduce the amount of the judgment

so as to bring the amount within the jurisdiction of the monthly term. The jurisdiction of a court is determined by its power or its lack of power to deal with a plaintiff's petition. It is the amount laid in the plaintiff's suit that fixes the jurisdiction, and not the verdict or amount proved, and all over the amount so laid can be written off.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 413-425, 428-436, 443, 456, 458, 466; Dec. Dig. \S 159, 169.]

5. MOTION IN ARREST AND TO SET ASIDE JUDGMENT.

There was no error in overruling the motion.

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by the Garfield Oil Mills against J. N. Stephens. Judgment for defendant, and plaintiff brings error. Affirmed.

J. S. Adams, of Dublin, for plaintiff in error. Ira S. Chappell, of Dublin, for defendant in error.

RUSSELL, C. J. Garfield Oil Mills sued Stephens upon open account for the sum of \$86.69. The suit was brought to a monthly term of the city court of Dublin; the process requiring the defendant to appear at the April monthly term, 1913. At that term the defendant filed his answer and a plea of set-off and recoupment, alleging that the plaintiff owed him the sum of \$277.89, and praying for a judgment against the plaintiff; and at the same term he also demanded a trial by jury. The amount involved being over \$50, and the defendant having exercised his right to demand trial by jury under the terms of the act establishing the court (Acts 1900, pp. 117, 124), it followed, as the legal result, that the case was transferred from the April monthly term of the court to the June quarterly term, and thereafter stood for trial at the succeeding quarterly terms until it should be disposed of. For reasons not disclosed by the record, the case was not tried until the March quarterly term, 1914. At that term the plaintiff, through its counsel, made a motion for a continuance, which was overruled. The case was then submitted to a jury, and a verdict was returned in favor of the defendant for \$148.33; this being the full amount of the excess of the defendant's demand over that of the plaintiff. Afterwards, during the same term, as appears from the recitals of the bill of exceptions, the plaintiff filed its motion to arrest the judgment and set aside the same. The defendant filed no answer to the motion, but moved to strike the seventh, eighth, and ninth paragraphs, which embodied a motion to set aside the judgment and declare it void for the following reasons: (7) Because the plaintiff is a corporation, and on March 10, 1914, when the case was tried and the judgment rendered, R. J. Walsh, the manager of the corporation, and the only person who had control, knowledge, and management of

the case, and who resided approximately 75 miles from the city of Dublin, where the case was being tried, was unable to be present, "there being sickness in the family of said Walsh," and he had no opportunity to communicate this fact to the court, nor was his counsel aware of the condition of Walsh's family; (8) because the court overruled a motion for continuance when the case was called for trial; (9) because, if Walsh had been present, the plaintiff could and would have shown by his testimony that the plaintiff had furnished the defendant the sum of \$2,159.55 to buy cotton seed, and that the defendant had paid back in the purchase of seed only the sum of \$2,072.86, including his commissions. In other words, if Walsh had been present, the plaintiff could and would have shown by his testimony the correctness of each and every item of debits and credits set forth in the bill of particulars attached to the original petition, and there was no other person connected with the plaintiff corporation who was in a position to testify to these facts.

Upon the defendant's oral motion the court struck from the petition to vacate the judgment the foregoing paragraphs. This action of the court restricted the scope of the motion to set aside the judgment to the inquiry whether the court had jurisdiction of a set-off or recoupment amounting to over \$100, and whether the amount found in favor of the defendant could be credited only so far as necessary to extinguish the plaintiff's demand, leaving the defendant to sue in a subsequent action for the remainder of his claim, or whether the court could render judgment in favor of the defendant for such an amount of the defendant's demand in excess of the plaintiff's account as might be shown by the evidence, or only for such an amount as might be within the jurisdiction of the monthly terms of the city court of Dublin. Of course, together with this inquiry, there was also raised the question as to whether the pleadings of the defendant upon which the judgment in his favor was based were so fatally defective that no legal judgment could be rendered thereon; for the reason, as alleged, that the quarterly term of the city court of Dublin could not entertain a case brought to the monthly term and was without jurisdiction to render the judgment. The plaintiff offered to submit proof in support of the seventh, eighth, and ninth paragraphs of its motion, the substance of which we have already given, and the court, by refusing to hear this testimony, again adjudged that the facts stated in these paragraphs, even if proved, afforded no reason for setting aside the judgment. Thereafter, upon motion of counsel for the defendant, the court permitted the defendant to write off \$48.33 from the judgment of \$148.33, thus reducing the judgment to \$100, and thereupon overruled the motion to set

aside the judgment for \$100 in favor of the defendant. The motion to set aside and arrest the judgment was filed on April 27, 1914, and was heard May 12, 1914, on which date the court passed the order overruling the motion, to which exception is taken.

[1, 2] It is not necessary at this time to decide whether a motion in arrest of judgment can be joined with a motion to set aside a judgment. The rights of the present plaintiff in error are not affected by any decision upon that question, because apparently the judgment was correct upon the merits, and the question whether a motion in arrest and a motion to set aside a judgment can be joined in the same proceeding does not appear to have been expressly raised in the lower court so as to require an adjudication by this court upon the point. Whether the petition to set aside the judgment be treated as a motion in arrest or as a motion to set aside a judgment, or as a joinder of the two, we think the judge could very well have dismissed the proceeding upon the ground that it was filed too late; and it is only because the motion was not given that direction in the lower court that we shall consider the assignments of error.

It is insisted by learned counsel for the plaintiff in error that the contention of counsel for the defendant in error that the motion was filed too late is de hors the record; it being recited in the bill of exceptions that April 27, 1914, the day on which the motion was filed, was "during the regular March quarterly term, 1914, of said court." Ordinarily, of course, recitals in a bill of exceptions are conclusive, and it is only when the recitals of fact in the bill of exceptions are in conflict with statements of the transcript of the record that such recitals of fact can be questioned. However, the recitals of fact in the bill of exceptions, though accepted as true, are not necessarily conclusive when it affirmatively appears that they rest upon conclusions not warranted by law. The statement of fact embodied in the present bill of exceptions is that the motion to set aside the judgment was filed on April 27, 1914, and this follows what also purports to be a statement of fact—that the motion was filed during the regular March quarterly term, 1914, of the court. This court, however, is judicially compelled to know that, under section 19 of the act establishing the city court of Dublin (Acts 1900, p. 117), the monthly terms of this court are required to be held on the second Monday in each month, and the quarterly terms to be held on the first Mondays in March, June, September, and December, and we know, as a matter of common knowledge, that the 27th of April is necessarily subsequent to the second Monday in that month. Consequently we know that the April monthly term began prior to April 27, 1914, and, as the March quarterly term, 1914, must, as a matter of law, have been closed at least five days be-

fore the time set for the beginning of the April monthly term, this court must have knowledge that a paper filed on April 27, 1914, was not filed during the March quarterly term of the city court of Dublin. Under the express provisions of Civil Code, § 4877, the judges of the superior and city courts must adjourn the terms of their courts at least five days before the commencement of the next regular term, and, the record being silent upon the subject, it must be conclusively presumed that the March quarterly term adjourned in accordance with law at least five days before the April monthly term, 1914. The identical question was raised and was ruled upon in *Coulson v. State*, 13 Ga. App. 148 (3), 152, 78 S. E. 1108, in which we held that the judge of a city court has no power to keep a term of his court open by adjournment from one day until another beyond the next regular term. If a timely motion to dismiss the present proceeding had been made upon the ground that the motion was filed too late, the trial judge, no doubt, would have dismissed it, but the point is not before us, and we shall confine our rulings to the assignments of error to which learned counsel for plaintiff in error restricts his argument.

The right of the Garfield Oil Mills to have the judgment against it set aside depended upon the provisions of sections 5957 and 5960 of the Civil Code.

Section 5957 provides:

"When a judgment has been rendered, either party may move in arrest thereof, or to set it aside for any defect not amendable which appears on the face of the record or pleadings."

Section 5960 declares:

"A judgment cannot be arrested or set aside for any defect in the pleadings or record that is aided by verdict or amendable as a matter of form."

A motion in arrest of judgment differs from a motion for a new trial in that the motion in arrest of judgment must be predicated upon some defect appearing on the face of the record or pleadings, while extrinsic matter which might authorize the setting aside of a verdict must generally be presented by a motion for a new trial. There are instances in which so-called motions to set aside judgments have been granted where based upon matters not appearing in the record, but in those cases the motions, though denominated as motions to set aside judgments, were filed during the term at which the judgment was rendered, and were treated as motions for a new trial, and, in fact, were motions for a new trial. *Wright v. Bank of Southwestern Georgia*, 13 Ga. App. 347, 79 S. E. 184. See *Benford v. Shiver*, 13 Ga. App. 135, 78 S. E. 860. The difference between a motion in arrest of judgment and a real motion to set aside a judgment for defects appearing from the record is that a motion in arrest of judgment must be made during the term at which the judgment was

rendered, while a motion to set aside a judgment may be filed at any term of the court within the statute of limitations. Civil Code, § 5958; *Haskens v. State*, 114 Ga. 839, 40 S. E. 997. Whether a motion in arrest of judgment and a motion to set aside a judgment may or may not properly be joined in the same proceeding, it is apparent that, if the purpose of the motion was to arrest the judgment, the proceeding would have to be filed during the term at which the judgment was rendered; and, if that portion of the proceeding which purported to be a motion to set aside a judgment amounted, in fact (as in *Benford v. Shiver*, supra), to no more than a motion for a new trial, the so-called motion to set aside would likewise have to be filed before the adjournment of the term at which the judgment was rendered. In the present case, therefore, conceding that the validity of the motion to set aside the judgment upon the grounds stated in the seventh, eighth, and ninth paragraphs of the plaintiff's motion is controlled by the ruling in *Benford v. Shiver*, supra, still we know of no rule by which a motion for a new trial can be joined in the same proceeding with a motion in arrest of judgment, and the trial judge, therefore, did not err in striking, for this reason, the seventh, eighth, and ninth paragraphs.

[3] Even if the matter contained in these paragraphs, which really constitute proper matter for a motion for a new trial, could have been joined with a motion in arrest of judgment, it would not have been error for the trial judge to overrule these grounds, nor was it error prejudicial to the plaintiff to strike them on oral motion, since, considered as grounds of a motion for a new trial, they were insufficient. Admitting all the facts stated in the seventh paragraph of the plaintiff's motion, and treating it as a valid motion to set aside the verdict and to grant a new trial, no reason is shown which would have required the trial court to grant a continuance. It is stated that there was sickness in the family of the plaintiff's only witness, but it is not stated that this sickness required the attention of the witness. It is stated that the witness lived approximately 75 miles from the city of Dublin, where the trial was had, but it is not stated why he had no opportunity to communicate the reasons for his absence to the court. That a witness was 75 miles from a court, in this day of telegraph, telephones, and automobiles, does not compel the conclusion that he could not by the exercise of due diligence have communicated with the court if sickness came suddenly upon his family. Certainly, if the sickness of some member of the family of the witness which required his special attention had been existing for some time before the court convened, a palpable lack of diligence on his part would be apparent. The eighth paragraph of the motion is too incomplete to present an assignment

of error. The statement in the ninth paragraph that, if Walsh had been present, the result of the trial would have been different, is matter of conjecture. But, even if the result would have been different if Walsh had been present and had testified as it was alleged he would have done, the court would not have been authorized to set aside the verdict rendered at a proper time and place, and in which the defendant had a property right, unless and until it had been made plainly to appear to the court that there was a good reason for the absence of the witness. If the seventh, eighth, and ninth paragraphs of the motion could be treated as a technical motion to set aside a judgment, the court did not err in striking it upon oral motion (equivalent to a general demurrer), as being fatally defective. If this part of the motion be treated as grounds of a motion for a new trial, they should have been overruled by the court, and the plaintiff in error cannot complain that the same result was less technically reached by dismissal.

[4] The court did not err in permitting the defendant to write off \$48.33 from the judgment and to bring the judgment down to \$100, so as to bring it within the jurisdiction of the monthly term. The jurisdiction of a court is determined by its power or its lack of power to deal with a plaintiff's petition. It is the amount of damage laid in the plaintiff's suit that fixes the jurisdiction, and not the verdict or amount of damage proved, and all over the amount so laid can be written off. *Velvin v. Hall*, 78 Ga. 136. A "court acquires jurisdiction by the suit of plaintiff, and then is required to hold it until justice is done between the parties." *Simon v. Myers*, 68 Ga. 79. Counsel for the plaintiff in error relies on the decision in *Ware v. Fambro*, 87 Ga. 515, in which it was held that where, in a suit in a justice's court, the defendant pleaded a set-off of \$100, and, on the appeal trial in that court, the jury found for the defendant an amount in excess of the plaintiff's demand of more than \$100 as principal, it was held that the court could not do more than order the claim of the plaintiff to be credited on that of the defendant, and thus defeat a recovery by the former. The contention of the plaintiff is that, the defendant having pleaded an amount in excess of the jurisdiction of the monthly term of the city court of Dublin, no verdict or judgment whatever could be rendered in the defendant's favor for any amount in excess of the plaintiff's demand; that is, that the defendant could only have the plaintiff's demand credited on his demand, thus defeating the plaintiff's action, and requiring the defendant, if he wishes to recover the remainder, to sue therefor in some other court. The case of *Ware v. Fambro* is not in point, nor is the ruling therein applicable to the case at bar. The decision in the *Ware Case* was based upon the provisions of section 4166

of the Code of 1873 (Civil Code of 1910, § 4759), which relates entirely to suits in justice's courts. There is good reason for this provision as related to justice's courts, because they are not courts of record, but it is expressly confined to these courts. The contention that, since the defendant had filed a plea asking judgment against the plaintiff for an amount over \$100 (the limit of the amount within the jurisdiction of the monthly term of the court to which the plaintiff had filed its suit), there could be no recovery in any amount by the defendant, is untenable, because the plaintiff's suit fixes the jurisdiction of the court; and, no matter what amount the defendant pleads, he cannot recover anything in excess of the specific amount to which the jurisdiction of the court is confined. Just as an appeal to a court of larger jurisdiction does not confer upon that court greater jurisdiction than that of the court originally trying the case, and if the jury find an amount in excess of the jurisdiction of the original court the verdict may be written off so as to bring it within the jurisdiction of the lower court, so in this case it was proper for the defendant to write off the excess, as he was permitted by the court to do. The jurisdiction was fixed by the plaintiff's suit, and, the verdict for \$148.33 as rendered being over the jurisdiction, it was proper for it to be written down to a sum within the jurisdiction. *Giles v. Spinks*, 64 Ga. 205, 207 (2). It must be conceded, since the jurisdiction of the monthly term is fixed at \$100, that the defendant might, upon a plea of set-off, recover \$100, regardless of what was the amount of the plaintiff's original demand (provided it was not more than \$100); and, since the defendant could not recover more than \$100, it was proper for the court to direct that it be reduced to that amount.

[5] The original judgment was not void, but merely voidable. It is questionable whether the court, at the time the judgment was amended, had jurisdiction to amend it, but the plaintiff in error, having instituted the proceedings which called the attention of the court to the defect and induced the amendment, is estopped from raising the point that the amendment was made in vacation.

Judgment affirmed.

(16 Ga. App. 689)

SMITH v. KNOWLES. (No. 6175.)

(Court of Appeals of Georgia. Aug. 4, 1915.)

(Syllabus by the Court.)

EXECUTION — 188, 194 — PROPERTY SUBJECT — SUFFICIENCY OF EVIDENCE — CLAIM CASE.

The sole complaint of the plaintiff in error is that the verdict is without evidence to support it. Various facts and circumstances in proof support the verdict, and it was within the

province of the jury to accept this proof in preference to other evidence.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 560, 562, 563, 571-574; Dec. Dig. §§ 188, 194.]

Error from City Court of Floyd County; J. H. Reece, Judge.

Claim case by Claude Smith against W. A. Knowles. Judgment for Knowles, and claimant brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error. Dean & Dean and L. H. Covington, all of Rome, for defendant in error.

WADE, J. Knowles sold to John Smith a tract of land, for which he took Smith's note and made him a bond for title. A judgment was obtained against Smith on this note, a deed of reconveyance was duly executed, and the land was levied upon on June 19, 1913, and on September 23, 1913, 1,146 bundles of fodder and 20 acres of corn in the field were likewise levied upon under and by virtue of the execution issued upon the purchase-money judgment. Claude Smith, a son of the defendant in *fi. fa.*, filed a claim to the fodder and corn levied on, and on the trial of the issue raised thereby the jury found the property subject to the execution. A motion for a new trial, based on the general grounds alone, was overruled by the trial judge, and the case brought here for review. The claimant testified that he was 23 years old, and was a son of the defendant in *fi. fa.*; that the corn and fodder levied upon were his property when levied on and at the time he testified; and that the defendant in *fi. fa.* had no right, title, or interest therein, nor possession thereof. The defendant in *fi. fa.* likewise testified that the title to the crop levied on was in the claimant, and that he himself had never had any right, title, interest in or possession of the crop at any time; that the crop was grown on lands he had purchased from Knowles, and the *fi. fa.* levied thereon grew out of the land deal between Knowles and himself. The return of the officer did not show that the property levied on was in the possession of the defendant in *fi. fa.* The officer testified that no one was living on the land when he made the levy, and that he found some of the fodder in the barn and some in the dwelling on the place; that the corn had not been gathered at the time of the levy, but was matured; that he did not inform the defendant in *fi. fa.* about the levy. One Salmon swore that he was familiar with the land on which the crop was raised, and knew who cultivated the crop on that place during the year 1913; that he saw John Smith's boys at work on this farm; that the claimant was the largest boy, and that the youngest was 10 or 12 years old; that he had a conversation with

the claimant during September, 1913, and the claimant said that he was not then subject to road tax; that he could not say how many days he saw the boys working on the farm; that he saw some of them plowing one day, and frequently saw them "chopping around there"; that the boys did most of the work on the crop, and he thought they were "laying by" their corn the last time he saw them at work; that the fodder levied on was pulled by John Smith, the defendant in *fi. fa.*, "and his boys or family," but he did not see the defendant in *fi. fa.* pull any fodder; that he had a conversation with Claude Smith, the claimant, as to what the latter was getting for the work he was doing in raising the crop levied on, and he said that he was hired by his father. Several witnesses testified to the general bad character of the defendant in *fi. fa.*, and that they would not believe him on oath. The defendant in *fi. fa.* and the claimant were reintroduced, and explained that the former did pull some of the fodder levied on, but that he did so at the instance of the claimant, who paid him therefor. There was testimony going to show that before the levy on the crop the bond for title held by the plaintiff in *fi. fa.* was transferred by him to the claimant for a valuable consideration.

There was direct testimony, it is true, both from the defendant in *fi. fa.* and from the claimant, that the title to the property levied upon was in the claimant at the time the levy was made, and the defendant in *fi. fa.* swore that he had never at any time had title to this crop; and yet there was proof, by an apparently disinterested witness, that the claimant himself had admitted, during the time that he was actually cultivating the crop, and on more than one occasion, that he was cultivating it as a hired hand for the defendant in *fi. fa.*, and this statement was not denied by the claimant in his testimony. There was also testimony that the crop was made by the labor of the "boys" of the defendant in *fi. fa.*, including the claimant, and the testimony showed that the youngest of these boys was only 10 or 12 years old; and the claimant did not attempt to explain why the father permitted his minor son or sons to work on the crop, if the title thereto was altogether in the claimant or if the father had no interest therein. There was evidence that the bond for title under which the defendant in *fi. fa.* held possession of the land had been transferred for some valuable consideration to the claimant; but what that consideration was, and how much the claimant actually paid, or even agreed to pay, for the transfer, the claimant was unable to say, notwithstanding the apparently vital importance of the transaction to a young man just starting out in life, who did not claim to be more than 23 years of age, and who, as an

uncontradicted witness testified, had even stated during the year he was making the crop in question that he was not old enough to be subject to road duty, and to whom the transaction must have appeared huge. The claimant was unable to produce the bond for title, which, if he had regarded it as anything more than a means to enable him or his father to defeat the just demands of the plaintiff in *fi. fa.*, he would doubtless have preserved with the utmost care, and could even have had recorded, together with the transfer thereon, under the provisions of Civil Code, § 4213.

As so often held by the Supreme Court and this court, a claim case is in the nature of an equitable proceeding; and, looking at the proved facts in a broad and comprehensive way, and bearing in mind that under the testimony adduced at the trial the jury were authorized to find that the defendant in *fi. fa.* had been duly impeached, and that his testimony was unworthy of credit, and in view of the admission by the claimant, against his interest, that he was "hired" by his father, proved, and not denied, we cannot say that the verdict finding the property subject to the *fi. fa.* was wholly without evidence to support it, and therefore contrary to law; and, since the case was fairly submitted to the jury (as we conclude from the fact that no exceptions are made to the charge of the court or on account of anything which transpired during the trial), we feel that the jury, who heard the witnesses testify and observed their manner at the time, were in a position to perhaps correctly determine that the circumstances in proof which tended to show title in the defendant in *fi. fa.* actually outweighed in probative value the direct testimony of the unimpeached claimant, delivered in his own behalf.

Judgment affirmed.

(16 Ga. App. 760)

ROBERTSON et al. v. SMITH et al.
(No. 4878.)

(Court of Appeals of Georgia. Oct. 7, 1913.
Dissenting Opinion Aug. 20, 1915.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES §157—LIABILITY ON OFFICIAL BOND—UNLAWFUL HOMICIDE.

Suit cannot be maintained upon a sheriff's bond for an unlawful homicide committed by a deputy sheriff, unless the wrongful act was done in the prosecution of some official duty.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 354-371; Dec. Dig. §157.]

2. SHERIFFS AND CONSTABLES §157—LIABILITY ON OFFICIAL BOND—HOMICIDE.

A homicide committed by a deputy sheriff while investigating a crime, but not in the prosecution of any official duty or upon one having any connection with the crime, is not

such official misconduct as will subject the sheriff and his sureties to a suit upon his bond.

[Ed. Note.—For the other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 354-371; Dec. Dig. §157.]

Russell, J., dissenting: An action for damages lies in favor of any person who may be injured by the act of an officer done *colore officii*. In the absence of a special demurrer, the plaintiff's petition set forth a cause of action, and the trial judge did not err in overruling the general demurrer.

Error from City Court of Macon; Robt. Hodges, Judge.

Action by M. E. Smith and others against George B. Robertson and others. Demurrers to petition overruled, and defendants bring error. Reversed.

See, also, 85 S. E. 991.

Jno. P. Ross, Miller & Jones, and Walter Miller, all of Macon, for plaintiffs in error. Johnson & Johnson, of Gray, and J. E. Hall, of Macon, for defendants in error.

POTTLE, J. This was an action by a widow to recover of the sheriff of Bibb county and the sureties upon his official bond for the homicide of the plaintiff's husband by one of the sheriff's deputies. The petition is substantially as follows: The deputy was sent by the sheriff to make an arrest at a time when the deputy was under the influence of whisky and not in a condition, mentally or physically, to perform the duties of his office, and this fact was known to the sheriff, or could have been ascertained by the exercise of ordinary care. After the deputy reached the scene of the alleged crime, he "made an unwarranted, illegal, and indefensible attack upon" the plaintiff's husband, and "without any justification or mitigation therefor, while acting as deputy sheriff as aforesaid," shot the plaintiff's husband, who shortly thereafter died as a result of the wounds thus inflicted. The deputy has been convicted of the murder of the plaintiff's husband and is now serving a life sentence therefor. The killing occurred in Jones county. The sheriff was negligent in sending out the deputy while he was under the influence of alcoholic drink, and was also negligent in selecting a deputy addicted to the use of such stimulants. The act of the deputy was in law the act of the sheriff, and he and his sureties are liable to the plaintiff in damages for the deputy's breach of official duty. Both the sheriff and his surety demurred on the ground that no breach of official duty by the sheriff was alleged, it appearing that the homicide was the personal act of the deputy and wholly outside the scope of his official duty. The demurrers were overruled, and the defendants excepted.

[1] 1. The sheriff's bond was in the language of the statute and was conditioned to "faithfully perform all and singular his duties as sheriff of said county during the term for

which he has been elected, by himself, his deputies, or jailor, and upon the terms required by law." Civil Code, § 4906. Do the facts pleaded show such official misconduct on the part of the sheriff as would authorize a recovery upon his bond? Unless they do, no recovery can be had upon the bond, even though the sheriff might be subject to suit as an individual for the consequences of his agent's negligence. *Williams v. Board of Education*, 4 Ga. App. 637, 62 S. E. 154. The obligation of a surety is strictly construed in his favor, and before he will be liable the case must be clearly within the terms of his bond. The duties of a sheriff are set forth in section 4914 of the Civil Code, and generally he is bound to perform such duties as are imposed upon him by law or which necessarily appertain to his office. He is liable upon his bond to any person injured, "as well by any wrongful act committed under color of his office as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law." Civil Code, § 291. For the official misconduct of a deputy, suit may be brought upon his or the sheriff's bond, at the option of the injured party. Civil Code, § 295. If therefore the petition sufficiently charges official misconduct on the part of the deputy, the suit upon the sheriff's bond can be maintained.

Some of the cases hold that if the act of the officer be illegal, as, for example, an attempt to execute a process void upon its face, no suit upon the official bond will lie even though the act was done under color of official authority. See *Turner v. Collier*, 4 Heisk. (Tenn.) 89; *State v. McDonough*, 9 Mo. App. 63; *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738; *Chandler v. Rutherford*, 101 Fed. 774, 43 C. C. A. 218. In other cases it is held that the mere fact that the officer's act was illegal will not prevent a suit upon his bond, if he was in fact acting under color of his office. *Yount v. Carney*, 91 Iowa, 559, 60 N. W. 114. Some of the decisions also draw a distinction between acts done *virtute officii* and those performed *colore officii*; but there is no difference between the two under our statute. Suit may be brought upon the sheriff's bond for any wrongful act "committed under color of his office" by himself or his deputy, as well as for the improper performance of a duty imposed by law. Thus if a sheriff in executing a writ of possession remove a person not mentioned in the writ, such removal, being done *colore officii*, amounts to official misconduct. *Jefferson v. Hartley*, 81 Ga. 716, 9 S. E. 174, citing with approval *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 236, 23 L. Ed. 337. We cannot agree with counsel in the broad proposition that a sheriff would never be liable upon his bond for the consequences of an illegal arrest; that is, one made without a warrant or not under such circumstances as are enumerated in section 917 of the

Penal Code. If the wrongful act be done under color of his office, that is, under "a pretense of official right to do an act, made by one who has no such right," then, under the express terms of our statute, the action will lie. See *Luthur v. Banks*, 111 Ga. 377, 36 S. E. 826. But if the act be neither in virtue of his office nor under color thereof, there is no official misconduct and no breach of the official bond. *Williams v. Board of Education*, supra; *Luthur v. Banks*, supra; *Renfro v. Colquitt*, 74 Ga. 618; *Gerber v. Ackley*, 32 Wis. 233; *Cornell v. People*, 37 Ill. App. 490; *People v. Beach*, 49 Colo. 516, 113 Pac. 513, 37 L. R. A. (N. S.) 873. The cases of *Reynolds v. Dale*, 33 Ga. 585, and *McDonald v. Sowell*, 129 Ga. 242, 58 S. E. 860, 12 Ann. Cas. 701, were rules against the sheriff for contempt, and did not involve the question of liability to suit upon the sheriff's bond for acts done *colore officii*.

[2] 2. If the petition had alleged that the deputy, while acting under color of his office and while attempting in his official capacity to arrest the plaintiff's husband, or while engaged in the performance of any other official duty, wrongfully killed the deceased, a case might have been stated. But there is no allegation that when the homicide took place the deputy was doing any act under color of his office. So far as appears, he was not attempting to apprehend the plaintiff's husband, had no reason to suspect him guilty of the crime under investigation, and the homicide was in no way connected with the performance of any official duty. If the deputy had been performing or attempting to perform any official duty, he stepped aside and committed a crime solely as an individual, for which neither the sheriff nor his sureties were liable on his official bond. The case stated in the petition is one where the deputy was sent to perform an official duty and on the way wrongfully and unjustifiably killed a man in no way concerned in or connected with the performance of the official act. The act of the deputy in killing the plaintiff's husband was not official misconduct, but solely the reckless and wrongful act of the individual. The averment that in performing the act he was acting as deputy sheriff is a mere conclusion, not admitted by the demurrer.

The demurrer should have been sustained. Judgment reversed.

RUSSELL, J. (dissenting). I cannot see how a sworn and bonded officer who sends a drunken deputy to perform a specific duty can be excused if this deputy whom he sent forth commits a murder while still acting under color of office though only ostensibly prosecuting his quest. In my opinion, the plaintiff's petition states a case of official misconduct, and the plaintiff is entitled to something more substantial than the mere comment that the killing of Smith by Norton,

viewed merely as the act of an individual, must be regarded as lamentably reckless and wrongful. No special demurrer was filed, and, in the absence of a special demurrer, the facts stated, in my judgment, authorize the statement of the petition that Norton killed Smith, the plaintiff's husband, while "acting as deputy sheriff as aforesaid." If (as must be conceded) the killing was not done *virtute officii*, it was done *colore officii*. Even if the petition be subject to special demurrer, it is very plain to me that it was fully able to withstand the general demurrer. I am therefore of the opinion that the learned trial judge correctly overruled the general demurrer interposed to this action against Norton, Robertson, and the American Bonding Company, as surety on Robertson's bond.

According to the allegations of the petition, Robertson was the sheriff and Norton was his deputy. Robertson was notified that a crime had been committed in the eastern portion of Bibb county, and was requested to send an officer to make certain arrests. Robertson was personally present when Norton started on that mission, and he either personally dispatched Norton as his deputy to make the arrests, or ratified the selection of Norton as the officer to perform that duty. Therefore, from the inception of the transaction, Norton was acting *colore officii*. As alleged in the petition, Norton was considerably under the influence of whisky at the time he started on his trip to make the arrests, and this fact was known to Robertson, the sheriff. So far as appears from the petition, the killing of the plaintiff's husband, for which Norton has been convicted, was committed in pursuance of Norton's purpose of making an arrest which related back to Robertson's instructions to that effect. The petition alleges that Robertson was negligent in choosing Norton to go on the mission described, under the facts already stated, and was negligent in placing it in the power of Norton, clothed as he was with the authority of a deputy sheriff, to commit the crime which Norton thereafter committed, and that Robertson and the sureties on his official bond are civilly liable for the homicide. The sending of a drunken deputy, in my judgment, is such official misconduct on the part of a sheriff as will authorize a recovery on his bond in favor of any one who may be injured by the deputy while endeavoring to make the arrest.

The decision in *Williams v. Board of Education*, 4 Ga. App. 637, 62 S. E. 154, is not in point. It is true that the obligation of a surety is stricti juris, and a surety cannot be held liable unless his liability is clearly within the terms of the bond; but, "if the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable." *Knowlton v. Bartlett*, 1 Pick. (Mass.) 273.

Under the provisions of section 291 of the

Civil Code, a sheriff is liable upon his bond to any person injured by any wrongful act committed under color of his office, or by his failure to perform, or by an improper or negligent performance of, the duties imposed upon him by law. A mere illegal arrest is a breach of a bond requiring a sheriff to faithfully perform his duties and to discharge all duties required by law. *Yount v. Carney*, 91 Iowa, 559, 60 N. W. 114. There is no distinction in Georgia between acts done by a deputy *virtute officii* and acts done *colore officii*. Civil Code, § 291. This section declares that:

"Every official bond executed under this Code is obligatory on the principal and sureties thereon * * * for the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law."

It is therefore not a question whether Norton was acting by virtue of his office, but whether he was acting under color of his office.

It is argued that Norton did not have authority by virtue of his office to murder Smith under any circumstances, and did not have authority to cross the Bibb county line into Jones county for the purpose of arresting or making an assault upon him. If a sheriff and the surety on his bond were liable only for acts which were absolutely legal, there could never be any recovery upon a bond, and there would not be any necessity for his filing a bond. In the case of *Jefferson v. Hartley*, 81 Ga. 716, 9 S. E. 174, a sheriff, in executing a writ of possession, removed from the premises a person not mentioned in the writ and not within the legal operation of the writ. The sheriff did not have any authority under the law to remove such person. Nevertheless, the Supreme Court held that the removal amounted to official misconduct, and that by such removal the sheriff subjected himself and the sureties on his bond to an action in behalf of the person aggrieved. The decision in that case is also authority for the proposition that there is no necessity for bringing a separate action against a sheriff, but a recovery can be had upon the official bond. In the opinion (81 Ga. page 719, 9 S. E. page 175) Chief Justice Bleckley cited with approval the decision of the Supreme Court of the United States in the case of *Lammon v. Feusler*, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337, in which it was held that:

"The taking by a marshal of the United States, upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond for which his sureties are liable."

The court there said:

"The marshal, in serving a writ of attachment on mesne process, which directs him to take the property of a particular person, acts officially. His official duty is to take the property of that person, and of that person only; and to take only such property of his as is

subject to be attached, and not property exempt by law from attachment. A neglect to take the attachment property of that person, and a taking, upon the writ, of the property of another person, or of property exempt from attachment, are equally breaches of his official duty. The taking of the attachable property of the person named in the writ is rightful; the taking of the property of another person is wrongful; but each, being done by the marshal in executing the writ in his hands, is an attempt to perform his official duty, and is an official act."

The court quoted from *State v. Jennings*, 4 Ohio St. 418, as follows:

"The authorities seem to us quite conclusive that a seizure of goods of A. under color of process against B. is official misconduct in the officer making the seizure, and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is that the trespass is not the act of a mere individual, but is perpetrated colore officii."

And the court quoted with approval from the opinion of Chief Justice Shaw of the Supreme Court of Massachusetts, in *Lowell v. Parker*, 10 Metc. 309, 313 (43 Am. Dec. 436), as follows:

"He was an officer, had authority to attach goods on mesne process, on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods; that is, the goods of Bean for whose use and benefit this action is brought, and who therefore may be called the plaintiff. He therefore took the goods colore officii, and, though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

See, in this connection, *Johnson v. Williams*, 111 Ky. 289, 63 S. W. 759, 54 L. R. A. 220, 98 Am. St. Rep. 416; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Shields v. Pfanz*, 101 Ky. 407, 41 S. W. 267; *Brown v. Weaver*, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512. As was said in the case of *Johnson v. Williams*, supra:

"An official act does not mean what a deputy might lawfully do in the execution of his office. If, so, no action could ever lie against the sheriff for the misconduct of his deputy. It means therefore whatever is done under color or by virtue of his office.' To hold the deputy and his sureties liable to the sheriff on his bond, it is not necessary that the deputy should be acting under color of some writ, but if he is acting under color of his office, and professing so to act, and inducing others interested to believe he is acting colore officii, he and his sureties would be bound by such acts. No other rule would be safe. Sureties are not needed on a sheriff's bond, if they are only to be held when he acts legally. They vouch for his acts, and bind themselves to make good any damage he may cause to any one while acting under color of his office."

Under these decisions, the question is not whether Norton had the official right to arrest or to kill Smith. And the question as to whether he had a warrant, or did not have a warrant, is likewise immaterial. The question whether he remained in Bibb county, or went just over in Jones county to attempt to arrest Smith and there killed Smith, should not influence the decision of the case. Norton left for the purpose of making an official

arrest. He was clothed with the powers of a deputy sheriff, having been so clothed by Robertson, the sheriff. Under the allegations of the petition, he was acting throughout the transaction under the color of his office. Robertson put it in his power, acting under the color of the office of a deputy sheriff, to do the injury which he did. Under the decisions cited, Norton's act was done colore officii, and the sheriff and the surety on his bond are liable.

(16 Ga. App. 767)

ROBERTSON et al. v. SMITH et al.

(No. 6100.)

(Court of Appeals of Georgia. July 31, 1915.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES ⇨157—LIABILITY ON OFFICIAL BOND—ACT OF DEPUTY—STATUTE.

A sheriff's bond is obligatory on the principals and sureties thereof for any breach of the condition by a deputy, although not expressed, unless otherwise declared by law, and for the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by failure to perform, or by the improper or neglectful performance of those duties imposed by law. Civ. Code 1910, § 291.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 354-371; Dec. Dig. ⇨157.]

2. SHERIFFS AND CONSTABLES ⇨162—ACTION ON OFFICIAL BOND—CONDITION PRECEDENT.

No preliminary recovery against the sheriff is required to entitle the injured party to sue on the bond. *Jefferson v. Hartley*, 81 Ga. 716 (2), 9 S. E. 174.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 388-390; Dec. Dig. ⇨162.]

3. SHERIFFS AND CONSTABLES ⇨168—ACTION ON OFFICIAL BOND—SUFFICIENCY OF PETITION.

The petition as amended set forth a cause of action, and the general demurrer thereto was properly overruled.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 398-404; Dec. Dig. ⇨168.]

Error from City Court of Macon; Robert Hodges, Judge.

Action by M. E. Smith and others against G. B. Robertson and others. Demurrer to petition overruled, and defendants bring error. Affirmed.

John P. Ross, Miller & Jones, and Wallace Miller, all of Macon, for plaintiffs in error. Johnson & Johnson, of Gray, and J. E. Hall, of Macon, for defendants in error.

BROYLES, J. It appears from the record that in rendering the judgment overruling the demurrer to the petition in this case, Judge Robert Hodges of the city court of Macon delivered an opinion. That opinion, quoted below, so exactly expresses the views of this court upon the issues involved that we adopt it as our opinion.

"On a former trial of this case the sheriff and the surety on the sheriff's bond interposed a demurrer to the original petition, which was overruled, and, on exceptions by the sheriff and the sureties, the judgment overruling the demurrer was reversed. In the opinion reversing the judgment overruling the demurrer the Court of Appeals, per Pottier, J., says: 'If the petition had alleged that the deputy, while acting under color of his office and while attempting in his official capacity to arrest the plaintiff's husband, or while engaged in the performance of any other official duty, wrongfully killed the deceased, a case might have been stated.' *Robertson et al. v. Smith et al.*, 85 S. E. 988. On motion to make the remittitur the judgment of the trial court the plaintiffs offered an amendment, alleging, in substance, that a communication was received at the sheriff's office that certain negroes had shot at a child in the eastern part of the county; that thereupon the sheriff collected certain deputies, including Norton, to go to the scene of the alleged shooting and arrest the parties charged with the offense; that Norton and the other deputies, in executing this order, stopped a certain wagon on the road and arrested the negroes therein. After this was done some one pointed to a wagon in which Smith was riding and said, 'There go the rest of them,' whereupon Norton pursued Smith and assaulted him. The amendment further alleges that Norton attempted to arrest Smith, and shot him, conveyed him to jail, and declined to enlarge him to go to the hospital to receive treatment for his wound from which he subsequently died. The amendment concludes that, 'In so acting, the said W. B. Norton thought or pretended to think that the said R. V. Smith was one of the persons who had committed the alleged offense, and in so doing the said William B. Norton was acting under color of his office as deputy sheriff.' The amendment was allowed, and the defendants renewed their demurrers to the petition as amended.

"Taking the allegations of the petition and amendment as true, the principal in the bond, the sheriff, acted both *virtute officii* and *colore officii*. He received the message as conservator of the peace *virtute officii*. His order to his deputies to arrest the persons charged with the offense was given *colore officii*; for he had no warrant, no crime had been committed in his presence, and, so far as he knew personally, the persons charged with the offense were not endeavoring to escape. He received the message and acted upon it not as an individual. On the contrary, he acted upon it officially, through his deputies. This order was so given 'under pretense of official right to do an act, made by one who has no such right.' Norton, in pursuance of the order of his chief, arrested certain negroes on the road. Clearly this arrest was a trespass by the deputy *colore officii*, for which the sheriff and his surety would be liable. In pursuance of the information, 'There go the rest of them,' Norton followed a wagon in which Smith was riding, and, thinking or pretending to think that Smith was one of the parties charged, shot him, arrested him, and imprisoned him in the county jail. It is alleged that Norton refused to enlarge Smith for medical treatment, and that he subsequently died from his wound. The arrest of the negroes was a trespass by Norton, made in pursuance of the [sheriff's] order to 'arrest the persons who were charged with having done the shooting.' Norton arrested Smith in pursuance of a statement by some one, 'There go the rest of them.' His conduct in this regard was in accordance with the instructions of the sheriff. He received the information, 'There go the rest of them' as a deputy sheriff, and he acted on it as a deputy sheriff. Upon this information he arrested Smith, imprisoned him, and declined to enlarge him. The sheriff

and his deputies have control of the jail. Norton arrested and imprisoned the wounded man as deputy sheriff *colore officii*. He declined to enlarge him as jailer and deputy sheriff. He acted on the sheriff's orders as deputy sheriff, arrested the negroes as deputy sheriff, arrested Smith when charged with the alleged offense, put him in jail, and declined to enlarge him as deputy sheriff. If the arrest and detention of Smith in the jail were acts *colore officii*, it must follow that the shooting of Smith, which was an incident to the arrest, was equally so, and Smith's homicide was the consequence of an act done under pretense of official right when no such right existed.

"Actions of this character against sureties are divided into three classes: (1) Acts done by the principal *virtute officii*; (2) acts done by the principal *colore officii*; and (3) acts done by the principal in an individual and personal capacity. For acts covered by the first two classes the surety is liable in this state. For acts arising under the last division the surety is not liable. An officer's acts are done *colore officii* when they are of such a nature that his official position does not authorize the doing of such acts though they are done in a form that purports they are done by reason of official duty and by virtue of his office. The test of liability in all cases of this character is found in the answer to the query: Did the principal act in an individual capacity? If he did, the surety is not liable; aliter, if he did not so act. So in this case the question is: Did Norton act by reason of the fact that he was a deputy sheriff? The answer must be in the affirmative, for the first act in the tragedy alleged is an order given to and received by him as deputy sheriff, and throughout the entire transaction no inference or deduction can be drawn from the pleadings that he ever did other than act as deputy *colore officii*.

"If the decision reversing the judgment overruling the demurrer to the original petition be sound in principle, the objection therein made to the original petition seems to have been met by the amendment offered, and the demurrer to the petition, as amended, must be overruled."

In *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337, the Supreme Court of the United States held that a United States marshal was liable upon his bond for seizing the property of one person upon a writ of attachment issued against the property of another. It is insisted, however, by counsel for plaintiff in error that that case is distinguished from the instant one by reason of the fact that in the former the unauthorized act of the officer was committed while proceeding under a valid writ and by virtue of a mandate of law. In our opinion this distinction is immaterial, for in the case at bar it was the duty of the sheriff to seek out and arrest the persons who had shot at the child, and he improperly and negligently performed this duty by sending out an intoxicated deputy, without a warrant, to make the arrest. See, in this connection, *Lowell v. Parker*, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; *Johnson v. Williams*, 111 Ky. 289, 63 S. W. 759, 54 L. R. A. 220, 98 Am. St. Rep. 416. While counsel for the plaintiff in error has cited some cases from other states which seem to hold against the ruling here, our view is sustained by the weight of authority in this state and elsewhere.

Judgment affirmed.

(143 Ga. 846)

DOUGLASS v. W. L. WILLIAMS ART CO.
et al. (No. 541.)

(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

1. **CONTRACTS** \S 9—**VALIDITY—UNCERTAINTY.**
Under the facts of this case, the court did not err in sustaining the demurrer and dismissing the petition.

[Ed. Note.—For other cases, see **Contracts**, Cent. Dig. \S 10-20; Dec. Dig. \S 9.]

Fish, C. J., and Beck, J., dissenting.

(Additional Syllabus by Editorial Staff.)

2. **CONTRACTS** \S 1—**DEFINITION**—“**AGREEMENT.**”

A “contract” is an “agreement” between two or more parties for the doing or not doing of some specified thing, there being no difference between a contract and an agreement [citing **Words and Phrases**, Second Series, **Agreement**. See, also, **Words and Phrases**, First and Second Series, **Contract**.]

[Ed. Note.—For other cases, see **Contracts**, Cent. Dig. \S 1; Dec. Dig. \S 1.]

3. **APPEAL AND ERROR** \S 681—**RECORD—MATTERS PRESENTED FOR REVIEW.**

A proffered amendment, not incorporated in the bill of exceptions nor attached as an exhibit properly identified, is not before the court, though specified as a part of the record; hence the disallowing of the amendment cannot be considered.

[Ed. Note.—For other cases, see **Appeal and Error**, Cent. Dig. \S 2883, 2884; Dec. Dig. \S 681.]

Error from Superior Court, Bibb County;
S. P. Gilbert, Judge.

Action by C. H. Douglass against the W. L. Williams Art Company and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

C. H. Douglass brought suit against the W. L. Williams Art Company and W. L. Williams, and alleged substantially as follows: On or about August 13, 1913, acting through its president, W. L. Williams, and its duly authorized agent, C. Watson Jones, it entered into a contract with the plaintiff, whereby it sold to him 1,000 certain advertising tickets, bearing defendant's name thereon, for the purchase price of \$20, and obligated itself by a written agreement made and delivered to the plaintiff, which is as follows (omitting dates, etc.):

“To Whom it May Concern: This will introduce to you Mr. C. Watson Jones, who is fully authorized to place with you tickets bearing our name (W. L. Williams Art Company) and calling for one 11x14 photographic enlargement matted to 16x20 absolutely free of charge, when presented with any merchant's indorsement who have purchased tickets from Mr. Jones. Although we would prefer to frame these pictures, we desire it to be fully understood that the holders of these tickets, presenting them with proper indorsement as above indicated, are in no way required to buy frames or in any other manner be at any expense whatever in securing portraits. Positively all arrangements for above proposition must be made with Mr. Jones. Yours very truly, [Signed] W. L. Williams Art Company, W. L. W., Pres.”

At the time of entering into the contract, the plaintiff was a merchant engaged in the sale of cigars and tobacco, soda water, etc. Acting in pursuance of the contract, and with a view of advertising and promoting the business and patronage of the Douglass Theater, of which plaintiff is the proprietor, he gave to each of the patrons of the theater, who had spent as much as \$1 for admissions, one of the tickets, duly signed by plaintiff, and entitling the holder thereof to one photographic enlargement according to the contract. The giving of these tickets to the patrons of the theater proved to be a good advertising project, and materially increased the attendance and door receipts of the theater. The defendant, after duly honoring about 15 of the first of the tickets that were presented, did, on or about the 15th of September, 1913, refuse to honor any more of the tickets, or to carry out his contract with plaintiff, and refused to furnish any more of the photographic enlargements to the holders of the tickets; and since this time the defendant has refused to furnish the photographic enlargements, though often requested by the holders of the tickets and by plaintiff to do so, greatly to the injury and damage of the plaintiff in specified amounts.

The plaintiff offered an amendment to the petition. He excepted to its rejection, and to the sustaining of general and special demurrers to the petition.

C. J. Johnson, of Macon, for plaintiff in error. Feagin & Hancock, of Macon, for defendants in error.

HILL, J. (after stating the facts as above). [1, 2] The plaintiff must stand or fall by the case as made by his petition. He does not sue upon a parol contract entered into between himself and the defendants, and breached by the latter; but he sues upon what he terms “a written agreement” which is set out in the foregoing statement of facts. A “contract” is an agreement between two or more parties for the doing or not doing of some specified thing. There is no difference between a “contract” and an “agreement.” 1 **Words and Phrases** (Second Series) 171, 172; **Turner v. Lorillard Co.**, 100 Ga. 645, 28 S. E. 883, 62 Am. St. Rep. 845. The paper sued on is lacking in the elements necessary to constitute a valid written contract; and, as the plaintiff has elected to stand on this paper, he must fall in his suit. It does not appear from the paper that the plaintiff is a party to it; no consideration is expressed in it, nor any time specified within which it is to be performed. It is generally so lacking in definiteness that it cannot be considered as a valid contract between the plaintiff and the defendant; nor does the petition allege such facts as, taken in connection with the

paper, would authorize the plaintiff to recover. The most that can be said of the paper is that it is a power of attorney authorizing C. Watson Jones, as agent of the defendants, to "place" tickets bearing defendant's name with "whom it may concern," as therein mentioned. But, in that view, no such case is alleged as would entitle the plaintiff to recover. In any view of the case as made by the plaintiff, we think that the demurrer was properly sustained, and that the court did not err in dismissing the petition.

[3] The proffered amendment was not incorporated in the bill of exceptions, nor attached thereto as an exhibit properly identified; but the plaintiff in error sought to bring it before this court by specifying it as a part of the record. Under such circumstances, the exception to the order of the court disallowing it cannot be considered. *Holmes v. Cobb Real Estate Co.*, 142 Ga. 56, 82 S. E. 496.

Judgment affirmed. All the Justices concur, except FISH, C. J., and BECK, J., dissenting.

(144 Ga. 33)

CROSSLEY v. J. I. CASE THRESHING MACH. CO. (No. 515.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(*Syllabus by the Court.*)

PROOF—DIRECTED VERDICT—RIGHT TO.

The verdict directed in favor of the plaintiff was demanded by the evidence, and there was no error in refusing a new trial.

Error from Superior Court, De Kalb County; C. S. Reid, Judge.

Action by the J. I. Case Threshing Machine Company against J. W. Crossley. There was a judgment for plaintiff and defendant brings error. Affirmed.

L. B. Norton, of Lithonia, and Alonzo Field, of Atlanta, for plaintiff in error. Payne & Jones, of Atlanta, and A. C. & J. H. McCalla, of Conyers, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(144 Ga. 44)

WILLIAMS et al. v. RANDOLPH et al. (No. 527.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(*Syllabus by the Court.*)

PROOF—SUFFICIENCY—DIRECTED VERDICT.

Under the evidence in this case, the verdict was demanded, and the court did not err in directing a verdict for the plaintiff.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Abb Randolph and others against J. B. Williams and others. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

Guyton Parks and West & Dasher, all of Macon, for plaintiffs in error. Harris & Harris and Feagin & Hancock, all of Macon, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(144 Ga. 58)

WILLIAMS v. FLOYD. (No. 540.)

(Supreme Court of Georgia. Aug. 14, 1915.)

(*Syllabus by the Court.*)

APPEAL AND ERROR ⇐1078—**BRIEFS—REVIEW.**

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial. No other exception was referred to in the brief of counsel for the plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. ⇐1078.]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action between Lucius Williams and Berry Floyd. There was a judgment for Floyd, and Williams brings error. Affirmed.

J. H. Smith, of Eden, for plaintiff in error. J. P. Duke, of Pembroke, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 75)

WRIGHT, Comptroller General, v. UNION TANK LINE CO.

(Supreme Court of Georgia. July 13, 1915.)

(*Syllabus by the Court.*)

1. SUBMISSION OF CONTROVERSY ⇐13—**CONSTRUCTION—AGREED STATEMENT OF FACTS.**

This was a suit by an equipment company against the comptroller general of the state to enjoin the levy (under the Civil Code of 1910, § 990) of an ad valorem tax on cars of the company which were allowed to be moved, in the regular course of business, on the lines of railroad track in this state. It was alleged that the method proposed by the comptroller general, if carried into effect, would impose a tax on property outside the state. The case was tried upon an agreed statement of facts. Held that, while some of the expressions used in the agreed statement of facts, if taken alone and dissociated from the context, might have the appearance of conceding that the comptroller general was seeking to tax property outside of the state, yet, when taken as a whole and in connection with the allegations of the petition, it is evident that the parties did not intend any such concession.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. §§ 13, 14; Dec. Dig. ⇐13.]

2. CONSTITUTIONAL LAW ⇐283—**TAXATION** ⇐113—**DUE PROCESS OF LAW—ASSESSMENT FOR TAXATION—PROPERTY OUTSIDE OF THE STATE.**

Civ. Code 1910, § 990, is to be construed in connection with sections 989 and 1031, which, by reference, are made parts thereof. So construed, provision is made for a method of taxing cars of equipment companies moved on the lines of railroads in this state on the track-mile-

age basis of apportionment. The method so employed does not contemplate taxation of property outside of the state, and is not violative of the due process clause of the federal or the state Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 891, 892, 904-906; Dec. Dig. § 283; Taxation, Cent. Dig. § 207; Dec. Dig. § 113.]

3. TAXATION §165—RAILROAD COMPANIES—FRANCHISE TAXES.

The agreed statement of facts in this case shows the following: The Union Tank Line Company is incorporated in the state of New Jersey. It has offices in New York. It rents tank cars to the Standard Oil Company, a Kentucky corporation. The agreements and settlements are made outside of this state. The cars are furnished for use by the Standard Oil Company. The railroad companies, in lieu of providing tank cars, pay to the Union Tank Line Company three-fourths of a cent per mile for each mile the car is moved over its tracks. The Standard Oil Company transports a large amount of oil to Jacksonville, Fla., and Savannah, Ga., mainly by marine transportation. From these points oil is sent out, mainly by means of tank cars, to different points in the interior. A number of these cars come into Georgia, and are used there and elsewhere. Held, that this does not authorize the imposition upon the Union Tank Line Company of a franchise tax in addition to the tax upon its tangible property in this state, the value of which is arrived at by the rule indicated in the preceding headnote.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 287; Dec. Dig. § 165.]

Lumpkin and Hill, JJ., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Union Tank Line Company against W. A. Wright, Comptroller General. From a judgment for plaintiff, defendant brings error. Affirmed in part, and in part reversed.

The Union Tank Line Company, a New Jersey corporation, was engaged in the business of renting out tank cars to be employed in transporting oil and other like fluids over railroads throughout the United States. It had no office or agent in Georgia; nor did it have any property or do any business in Georgia, except by permitting its cars to be brought into and carried out of the state, and used, while in the state, by those having them for the time being. The contracts for the rental of the cars were made beyond the limits of the state, and the tank company also received its remuneration for the rent of its cars at its office outside of the state. In addition to the rents which it received from its customers (shippers of oil), it received, from the several railroads over which its cars were moved, a stated sum per mile for each mile that the cars were moved while on the several lines of the respective railroads. Under a contract of rental, executed outside of the state, different cars were supplied to one of its customers from time to time, which passed in and out of the state, and between intermediate points in the state, in the movement of oil in the reg-

ular course of business. The officers of the tank company wrote the comptroller general, asking for a form of tax returns "required to be made by equipment companies under section 990, Code Georgia." No forms had ever been prepared for equipment companies, and the comptroller general forwarded forms prepared for express companies, explaining certain alterations to be made. After some correspondence the tank company made a return for the year 1913. The prepared return contained, among other things, the following:

"Value of All Real Estate Owned by Company in or out of Georgia: \$.... None.	Number of Miles of R. Lines in Georgia over which Sleeping Cars are run: 6976½.
Total value of Sleeping or Palace Cars and all other Cars and Equipments, and all other Personal Property: \$10,518,333.16.	Value Franchise:\$ No Franchise.
Total Number of Miles R. R. Lines over which Sleeping Cars are Run: 251,999.	Total Value of Property Taxable in Georgia: \$47,310.00

Union Tank Line had an average of 57 tank cars in Georgia during 1913, in which, at a value of \$830.00 per capita, equals: \$47,310.00."

Acknowledging receipt of this return, the comptroller general on March 16, 1914, wrote to the officers of the company as follows:

"I acknowledge receipt of your letter of March 12th, together with the inclosure of the 1914 return as for the year ending December 31, 1913, but the return is for taxation this year, though the mileage figures, of course, have to be based on the previous year's business. Returns should, of course, be made for back years, as this is the first year your company has ever made a return for taxation. Unfortunately our courts have held that back taxes can be collected for only seven years, 1907, 1908, 1909, 1910, 1911, 1912, and 1913. Special blanks are now being prepared for equipment companies, and I will mail you a supply for the years mentioned within the next few days—just as soon as they are received from the printer.

"As to the return filed, you have furnished the data desired, but have made an error in the application of same. After giving the mileage for the company everywhere and for Georgia, you then go ahead and assign 57 tank cars for this state and value them at \$830 each, making the total for Georgia \$47,310. This is an incorrect method. If you were to be allowed to assign so many cars to the state for taxation, there would be no need for the mileage figures to be furnished. The value to be assigned to Georgia must be in the same proportion to the entire valuation for the entire company as the mileage in Georgia bears to the entire mileage everywhere. Thus: 251,999 : 6,976.5 :: \$10,518,333.16 : _____. The \$10,518,333 multiplied by 6,976.5 gives 73,381,150.174.5, which divided by 251,999 gives \$291,196, the proper valuation to be assigned to Georgia. Or, to work it out by percentage instead of proportion, 6,976.5, the Georgia mileage, is 2.76846 per cent. of 251,999, the entire mileage. Georgia is therefore entitled to 2.76846 per cent. of the entire valuation. This per cent. of \$10,518,333 is \$291,195.84, or the same sum arrived at by proportion, if we call the 84 cents an even dollar. Unless decimals are extended almost indefinitely, there is, of course, always this slight difference.

"The correct valuation for Georgia of your physical property is therefore \$291,196, under

the return you have made. A franchise value should also be returned. And whatever the value you place on the franchise for the entire country, 2.76846 per cent. of the same must be assigned for Georgia. Thus, if you value your franchise at \$1,000,000, the franchise value assigned to Georgia would be \$27,685. Please let me hear from you in regard to the franchise. The returns for the seven years back you need not bother with until you receive the blanks mentioned in the foregoing."

Nothing further having been heard by the comptroller general from the company, on April 7, 1914, he assessed the physical property of the company at \$291,196 and franchise at \$27,685, the franchise being doubled, as prescribed in section 8 of the act of 1902 (Civil Code, § 1029), making the total valuation for each of the years 1907-1914, inclusive, \$346,566. On the same day the comptroller general informed the tank company, by letter, of the assessment. The letter also contained the following:

"Under the law you have twenty days from this date in which to decide whether to accept this valuation or submit to arbitration the question of the value of your company's property. Unless within twenty days you notify me of your intention to arbitrate, and also furnish me with the name of your arbitrator, the assessments will stand."

The company acknowledged receipt of the letter, and considerable correspondence ensued; but it did not offer to arbitrate. After the time for arbitration was over, the company, by its attorney, on May 26, 1914, offered to make returns for the years 1907 to 1912, inclusive, similar to that tendered for the year 1913, hereinbefore set out, except that there was a variance as to values. These returns were also rejected. After this the tank company instituted an action for injunction to prevent the levy and collection of the taxes as contended for by the comptroller general. The court refused to dismiss the petition on general demurrer. By consent the trial proceeded before the judge, under an agreed statement of facts, without the intervention of a jury. A judgment was rendered for the plaintiff, and the defendant accepted.

Warren Grice, and Clifford Walker, Attys. Gen., for plaintiff in error. King & Spalding, of Atlanta, and Campbell, Harding & Pratt, of New York City, for defendant in error.

ATKINSON, J. [1] 1. From what has been said it is to be observed that the case relates to two matters, namely: A tax assessment against tangible property of the company; and, second, a claim of right to assess a franchise tax. We will consider each in the order named above. While some of the expressions used in the agreed statement of facts, if taken alone and dissociated from the context, might have the appearance of conceding that the comptroller general was seeking to tax property outside of the state, yet, when taken as a whole, it is evident that the parties did not intend any such

concession. The effort was to tax property in this state, and in doing so to apply the statute designed as a rule to ascertain the property so coming into the state and its proper valuation. The correspondence between the officers of the tank company and the comptroller general, set out in the statement of facts, formed a part of the petition for injunction, which is to be taken most strongly against the plaintiff. It referred in express terms to Civil Code, § 990, and showed that both parties contemplated that the return which the comptroller general was insisting upon was such as should be made under the requirement of the statute. It was contended by the plaintiff that the effect of carrying out the scheme of the statute would tax property out of the state. The comptroller general denied that such would be the effect, and proposed only to tax cars in pursuance of the statute. The attack made by the plaintiff, being upon this method of taxing, resolved itself merely into an attack upon the constitutionality of the statute. Whether it was unconstitutional was a question of construction and of law, which the parties would not yield in the pleadings or in the statement of facts. A construction of the latter as a concession by the comptroller general that he was attempting to tax cars that had not come into the state would make the comptroller general assume a right to do a thing for which he had never contended, and be outside of the real issue—the constitutionality of the scheme of the statute.

[2] 2. In determining as to the constitutionality of the scheme of the statute referred to, resort must be had to its provisions. The statute is embodied in the Civil Code, § 990, which is as follows:

"Any person or persons, copartnership, company or corporation wherever organized or incorporated, whose principal business is furnishing or leasing any kind of railroad cars except dining, buffet, chair, parlor, palace, or sleeping cars, or in whom the legal title in any such cars is vested, but which are operated, or leased, or hired to be operated on any railroads in this state, shall be deemed an equipment company. Every such company shall be required to make returns to the comptroller general under the same laws of force in reference to the rolling stock owned by the railroads making returns in this state, and the assessment of taxes thereon shall be levied and the taxes collected in the same manner as provided in the case of sleeping cars in section 989."

"The last sentence of the foregoing excerpt, by referring thereto, makes as a part of the statute the laws "of force" in this state "in reference to the rolling stock owned by the railroads making returns in this state." In the same manner it makes Civil Code, § 989, a part of the statute. The only law which refers to taxation of "rolling stock" of railroads paying taxes in this state is embodied in Civil Code, § 1031, and is evidently the law on that subject referred to in section 990. Section 1031 is as follows:

"Railroad companies operating railroads lying partly in this state and partly in other states

shall be taxed as to the rolling stock thereof and other personal property appurtenant thereto, and which is not permanently located in any of the states through which said railroads pass, on so much of the whole value of rolling stock and personal property as is proportional to the length of the railroad in this state, without regard to the location of the head office of such railroad companies."

The other section (989) referred to in section 990 is as follows:

"Each nonresident person or company whose sleeping cars are run in this state shall be taxed as follows: Ascertain the whole number of miles of railroad over which such sleeping cars are run, and ascertain the entire value of all sleeping cars of such person or company, then tax such sleeping cars at the regular tax-rate imposed upon the property of this state in the same proportion to the entire value of such sleeping cars that the length of lines in this state over which such cars are run bears to the length of lines of all railroads over which such sleeping cars run. The returns shall be made to the comptroller general by the president, general agent, or person in control of such cars in this state. The comptroller general shall frame such questions as will elicit the information sought, and answers thereto shall be made under oath. If the officers above referred to in the control of said sleeping cars shall fail or refuse to answer, under oath, the questions so propounded, the comptroller general shall obtain the information from such sources as he may, and he shall assess a double tax on such sleeping cars. If the taxes herein provided for are not paid, the comptroller general shall issue executions against the owners of such cars, which may be levied by the sheriff of any county of this state upon the sleeping car or cars of the owner who has failed to pay the taxes."

The several Code sections embody the statutory scheme for taxing cars of equipment companies whose cars are handled over the railroads in this state. Owing to the nature of the business, it is difficult to ascertain the number of cars of equipment companies that come into this state and designate the identity of each car or its value. The purpose of the statute is to provide a reasonable method for determining the fact that cars come into this state and the values thereof, to the end that the equipment companies allowing their cars to come into this state may bear their just proportion of taxes leviable in this state. The scheme of the statute is what is sometimes called the track-mileage basis of apportionment, or what in a more general way is termed the unit rule. The comptroller general followed the statute. The unit rule has been upheld by the Supreme Court of the United States in regard to railroads, telegraph companies, and sleeping car companies. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613. And this principle of average has been approved in regard to refrigerator cars. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708. It

has even been held that the unit rule of valuation could properly be applied to the valuation of property of express companies within a certain state, though there was no physical connection with property beyond the state. On this subject the Supreme Court of the United States was divided as to the applicability of the rule to express companies, but the majority held that it was applicable. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960. While in some of the decisions of that court it has been said that special circumstances might exist which would require a modification of the rule, such as the existence of "terminal facilities of an enormous value" in one state and not in another, yet, in the opinion of the Chief Justice in *Adams Express Co. v. Ohio State Auditor*, supra, which was concurred in by a majority of the court, it was said (165 U. S. 227, 17 Sup. Ct. 311, 41 L. Ed. 683):

"Special circumstances might exist, as indicated in *Pittsburgh, Cincinnati, etc., Railway v. Backus*, 154 U. S. 421, 443, 14 Sup. Ct. 1114, 38 L. Ed. 1031, which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis."

We deem it proper to follow the decision of the majority. In the case before us there is no contention that the tank company owns any terminals of great value outside of the state of Georgia, or any real estate so located, or that there is any property which is not employed in the business. The provision in section 1031, supra, that such company shall be taxed as to cars "thereof and other personal property appurtenant thereto, and which is not permanently located in any of the states through which said railroads pass," negatives the intent to tax cars which do not come into this state. Any one of the cars of the company might be brought into Georgia as required. These cars are not like wagons or automobiles, disconnected from a railroad, which may be carried to any point about the country. They necessarily travel over the tracks of railroads. One car may be called into service in this state as well as another. The company has an arrangement with railroads in this state to charge them mileage for the use of their cars in hauling them over their tracks. It seems to us, therefore, that the case falls within the rule laid down by the Supreme Court of the United States, as above men-

tioned, and that there are no such circumstances as to bring it within the ruling made in *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761, where it was held that:

"A state assessment upon an express company of another state proportioned to mileage is bad when it appears that the total valuation is made up principally from real and personal property, not necessarily used in the actual business of the company, and which is permanently located in the state where the company is incorporated."

It will be seen that the facts in that case are quite different from the one under consideration. If the unit rule can never be applied where the company has assets in more than one state, and where there is an inequality in the amount of such assets in proportion to mileage in the respective states, the rule might as well be declared abolished at once; because practically all large companies doing business in different states have a considerably larger amount of assets in one state than in another. It rarely, if ever, occurs that there is anything like an exact proportion between assets and mileage in the respective states where business is done. So that, to announce that the mileage rule is sound, and then to modify it to the extent of saying that it does not apply, or must be changed, whenever the company shows a disproportion of assets used in the business in different states, will in most cases be equivalent to abolishing it as a rule and making it a mere circumstance for consideration by the assessing authorities.

Our statutes provide ample means for attacking the validity of a tax, or for arbitrating the valuation placed upon property by the comptroller general. Civil Code, §§ 1045, 1046, 1050-1054. Nor does the law providing for such an assessment of property of certain character, in order to determine its value, contravene the provision of the state Constitution requiring taxes upon property to be uniform and ad valorem. *Columbus Southern Railway Co. v. Wright*, 89 Ga. 574, 15 S. E. 293.

[3] 3. Under the agreed statement of facts we do not think that the tank company is exercising any franchise in the state of Georgia which is taxable as such, as distinguished from the consideration of the unit or mileage rule in fixing the value of the property within the state. It was agreed that the company had no agency in Georgia, conducted no business here, and exercised no franchise here, unless it did so under the following agreed facts: The company is incorporated in the state of New Jersey; it has offices in New York; it rents tank cars to the Standard Oil Company, a Kentucky corporation. The agreements and settlements are made outside of this state. The cars are furnished for use by the Standard Oil Company, and the railroad company, in lieu of providing tank cars, pays to the tank company three fourths of a cent per mile for hauling each car. The Standard Oil company brings a large amount

of oil to Jacksonville, Fla., and Savannah, Ga., mainly by marine transportation. From those points oil is sent out by means of the tank cars to different places in the interior. A number of these cars come into Georgia and are used there and elsewhere. Under such facts, we are unable to see what special franchise the company exercises under any grant from this state. It is at least doubtful whether the tax authorities of Georgia could tax a franchise, strictly so called, which was granted by another state, as distinguished from intangible property. We hold, therefore, that while the purpose of the cars for use may be considered in determining the value of those in Georgia, the company does not exercise in this state any such franchise as can be separately taxed. It is true that section 990 of the Civil Code uses broad language in defining equipment companies, and that, if that language be construed in connection with section 1019, it may be argued with some force that the tank company came within the purview of those sections. But, in the light of the agreed statement of facts above mentioned, we think it is excluded from the operation thereof.

Judgment affirmed in part and reversed in part. All the Justices concur, except LUMPKIN and HILL, JJ., dissenting: We concur in the ruling that what is known as the "unit rule" of assessment, such as has been held to be legal in regard to sleeping car companies, express companies, and the like, may be applied to railroad equipment companies. We do not contend that sections 989 and 990 of the Civil Code of 1910 are unconstitutional. But, upon mature reflection, we are unable to concur with the majority of the court in the construction which they have placed upon the agreement of facts upon which the case was submitted for the determination of the trial court. In that agreement is recited the correspondence between the comptroller general and attorneys on the subject, and the returns which were tendered by the company through its attorneys are set out. But the agreement of facts also contains, among other things, the following:

"On April 7, 1914, when the defendant entered an assessment in his office of property and franchises of the plaintiff, as shown hereinbefore, he had no other information for any of the years 1907 to 1914, inclusive, than was contained in the said return filed by plaintiff on March 18, 1914, and embraced in this statement, and which was refused by the defendant, and did not know what cars defendant had had in Georgia during any of said named years, nor did he ascertain the value of such cars, but his act was taken on such information hereinbefore shown, and that the assessment so entered by the defendant in his office against the plaintiff's property during said period for each of said years embraces the valuation of about 300 cars in excess of what plaintiff actually had in the state of Georgia during said years, of the approximate value of \$250,000 each year, and that the true value of a tank car is about eight hundred and thirty (\$830) dollars per car; that for the year 1914 the assessment entered against plaintiff by defendant covered the value of at

least 350 cars in excess of the number of cars plaintiff actually had in the state of Georgia for the time the said tax was assessed."

Later in the agreement occurs the following:

"The foregoing returns tendered by the plaintiff and rejected by the defendant embrace the full number of cars in said state belonging to the plaintiff for each of the said years, at their full value, and the same are embraced in the Schedule A referred to," etc.

In the petition there are the following allegations:

"Plaintiff avers that the mileage of railroad traversed by its cars in the several states has no relation whatever to the number of cars in use or located in such state; that in several states other than Georgia plaintiff does, at different localities, what might be called a strictly local business; large numbers of these cars are there located, which are moved on a local mileage of limited distance, confined entirely within such state."

The answer admitted the allegations of fact contained in each of the several paragraphs of the petition, but denied the conclusions of law therein set up, and alleged that the plaintiff did exercise a franchise in the state of Georgia of the value of \$27,685, and on April 7, 1914, "this defendant did assess the property of complainant of Georgia at a total valuation of \$343,566 for taxation for the years 1914, 1913, 1912, 1911, 1910, 1909, 1908, and on said last-named day notified the company that they would have 20 days from said date in which to decide whether to accept this valuation or to submit to arbitration the question of valuation of its property."

We have not undertaken to set out the entire agreement of facts, but we think that those portions which are stated above will suffice to show that the actual application sought to be made of the "unit rule" in this case was illegal. We do not contend that a proper assessment on the basis of the "unit rule" cannot be made, but we are constrained to think that the agreement shows that what has been done would have the effect of taxing property outside of the state.

(144 Ga. 35)

FLEMING v. SIBLEY et al. (No. 521.)
(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. APPEARANCE \S 9—EXECUTORS AND ADMINISTRATORS \S 525—JUDGMENT \S 16—LIABILITY AS INDIVIDUALS—NONRESIDENCE.

A suit was brought in the city court of Richmond county, on certain promissory notes, against the executors of a named decedent, who had been a resident of Richmond county, where his estate at the time of filing suit was being administered. The executors filed a petition

in the superior court of Richmond county, setting up that there were certain equitable defenses which could not be pleaded in the city court, and praying that the plaintiff be enjoined from prosecuting his suit in the city court, and that his claims and the issues made by the equitable defenses be determined in the superior court. The plaintiff in the suit in the city court, after having specifically answered the allegations in the equitable petition, made further answer by way of cross-petition seeking certain affirmative relief, and praying that the two named executors be made parties to the cross-petition in their individual capacity, and that another person, who was a distributee of the estate of the decedent, also be made a party, so that personal judgments could be obtained on account of distributions which had been improperly made to them from the estate of the said decedent, which was insolvent. The three persons thus sought to be made parties by the cross-petition were residents of the state of Alabama. They were made parties by an order containing the provision that they might show cause why they should be stricken from the suit as parties. They made a motion to be stricken as parties, because of their nonresidence in Georgia. Upon the hearing their motion was granted. Held: (a) The court did not err in dismissing the executors as parties defendant, in their individual capacity, to the cross-petition. (b) Nor in dismissing, as a party defendant to the cross-petition, the other distributee referred to. The fact that this distributee had, in connection with the prayer that she be dismissed from the case upon the ground of nonresidence, prayed that the restraining order which had formerly been granted as against her be dissolved, was not such an appearance as gave the court jurisdiction over her, as the dissolving of that restraining order was a necessary incident to her dismissal from the case.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. \S 42-52; Dec. Dig. \S 9; Executors and Administrators, Cent. Dig. \S 2344-2349; Dec. Dig. \S 525; Judgment, Cent. Dig. \S 22, 24; Dec. Dig. \S 16.]

2. INJUNCTION \S 192—RELIEF—GROUNDS.

All three of the persons referred to having been dismissed as parties to the case as individuals, there was no error in refusing the injunctive relief sought in the cross-petition.

[Ed. Note.—For other cases, see Injunction; Cent. Dig. \S 412; Dec. Dig. \S 192.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by F. E. Fleming against J. W. Sibley and others, who filed a cross-petition, to which plaintiff also filed a cross-petition seeking to make other persons parties in their individual capacity. Defendants' motion to be stricken as parties was granted, and plaintiff brings error. Affirmed.

Wm. H. Fleming, of Augusta, for plaintiff in error. Callaway, Howard & West, Boykin Wright, and Irwin Alexander, all of Augusta, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(144 Ga. 12)

KEHOE IRON WORKS v. ROURKE.
(No. 491.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***VERDICT—DIRECTION—PROPRIETY.**

The verdict was properly directed.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between the Kehoe Iron Works and John Rourke. There was a judgment for the latter, and the former brings error. Affirmed.

O'Byrne, Hartridge & Wright, of Savannah, for plaintiff in error. Osborne & Lawrence and John Rourke, Jr., all of Savannah, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(143 Ga. 802)

PRITCHETT v. STUBBS et al.

(Supreme Court of Georgia. Aug. 13, 1915.)

*(Syllabus by the Court.)***EVIDENCE—448—DOCUMENTARY EVIDENCE—PAROL EVIDENCE RULE.**

The written contracts on which the cause of action was predicated were unambiguous; and the court erred in allowing parol evidence to explain the intention of the parties, and in charging the jury with reference to the effect of such evidence on the contracts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. 448.]

Error from Superior Court, Laurens County; W. W. Larsen, Judge.

Action by Maude S. Pritchett against L. Q. Stubbs and others. There was a judgment for plaintiff for an insufficient amount, and she brings error. Reversed.

Mrs. Ella Tucker Stubbs died intestate, leaving as her heirs at law her husband, John M. Stubbs, and four children. She owned, at the time of her death, 35 acres of land in the city of Dublin. John M. Stubbs acquired the interest of all of his children, except Mrs. Maude S. Pritchett. He remarried, and died in 1907 intestate, leaving as his heirs at law his widow, Mrs. V. L. Stubbs, and his children, L. Q. Stubbs, Mrs. Ethel S. Stanley, and Mrs. Maude S. Pritchett. His widow and L. Q. Stubbs qualified as administrators on his estate. On March 5, 1908, an agreement was entered into between the administrators of the estate and the heirs, wherein it was recited:

"Whereas it appears that it would be to the interest of all parties concerned to allow said administrators to administer the above-described real estate, and administer the same as the estate of the said John M. Stubbs, it is hereby agreed between Mrs. V. L. Stubbs and L. Q. Stubbs as administrators of John M. Stubbs and also as heirs at law of John M. Stubbs, and Mrs. Maude S. Pritchett as heir at law of Mrs. Ella Tucker Stubbs and also as heir at law of John M. Stubbs, and Mrs. H. M. Stan-

ley as heir at law of John M. Stubbs, that: (1) Mrs. Maude S. Pritchett, upon conditions hereinafter specified, hereby agrees and allows the said administrators of John M. Stubbs to take charge of and administer her one-fifth interest, undivided, in the estate of said Mrs. Ella Tucker Stubbs, as above described, the same to be administered as if it was the property of the estate of John M. Stubbs. (2) For said one-fifth undivided interest of Mrs. Maude S. Pritchett in and to the land hereinbefore described, Mrs. V. L. Stubbs and L. Q. Stubbs, administrators of John M. Stubbs, and heirs at law of John M. Stubbs, the same being approved and agreed to by Mrs. H. M. Stanley as heir at law of John M. Stubbs, hereby agrees to pay to the said Mrs. Maude S. Pritchett, independent of her interest as heir at law of John M. Stubbs, the sum of nine thousand and five hundred (9,500) dollars, same to be paid out of the proceeds of the first sale of any of the property hereinbefore described, and before any other claims are paid, and continuously until the nine thousand five hundred (9,500) dollars has been fully paid, and, if said sum is not fully paid by October 15, 1908, to pay said Mrs. Maude S. Pritchett from said date, October 15, 1908, until paid, interest on the amount then unpaid, at the rate of eight per cent. per annum. It is further agreed that said administrators shall not charge any commission on said sum, nine thousand five hundred (9,500) dollars."

Subsequently to the agreement, the widow applied for a second and third year's support, and the administrators applied for leave to sell the real estate of their intestate. Caveats to both applications were interposed by Mrs. Stanley. On September 10, 1910, the parties to the first agreement entered into a second written agreement, by the terms of which the widow was to receive a certain amount as her second and third year's support, and Mrs. Stanley was to withdraw and dismiss her objections to the sale and to the allowance of the year's support; and the cost of the litigation, exclusive of attorney's fees, was to be paid as a part of the administration of the estate. The fifth paragraph of this agreement, after reciting that "the administrators having already divided the real estate of said estate which lies within the city of Dublin, into lots, and having platted the same," contained an elaborate agreement for the partition of the entire 35 acres and for the sale of some of the lots. The eighth paragraph was as follows:

"The first moneys realized from the sale of property of the estate except the sale of any one or more of the four lots mentioned above, shall be applied in discharge of the indebtedness of said administrators to Mrs. Maude S. Pritchett under certain contract to pay her nine thousand five hundred (9,500) dollars principal, in settlement of her interest in the estate of her mother, Mrs. Ella Tucker Stubbs; and next to a discharge pro rata of the other indebtedness of the estate."

It was stipulated in the tenth paragraph that:

"It is distinctly understood and agreed that from the date of this agreement that all property belonging to said estate is vested in the administrators with the right to sell at public or private sale," etc.

Certain property of the estate was sold, and from the proceeds of the sale the ad-

ministrators tendered to Mrs. Pritchett \$9,500, as being the amount, under the second agreement, that she was entitled to receive as the purchase price of her interest in her mother's estate. The tender was declined on the ground that she was entitled, in addition to the sum tendered, to interest thereon at 8 per cent. from October 15, 1908, according to the terms of the original agreement, wherein she consented that her interest might be administered by the administrators of her father as his estate. The suit is brought to recover the \$9,500 and interest at 8 per cent. from October 15, 1908. The court ruled that the eighth paragraph of the second contract was ambiguous, and allowed parol testimony to show that the parties intended that no interest was to be paid on the \$9,500. It appeared that, after the tender of the principal sum to the plaintiff, the defendants deposited the same in a bank. The jury returned a verdict for the plaintiff for the principal sum of \$9,500, with interest at the rate received on the deposit, less the taxes. The plaintiff moved for a new trial, which was refused, and she excepted.

Hines & Jordan, of Atlanta, and M. H. Blackshear, of Dublin, for plaintiff in error. J. H. Hall, of Macon, and Davis & Sturgis, of Dublin, for defendants in error.

EVANS, P. J. (after stating the facts as above). The parol evidence rule precludes inquiry into the intention of the parties to an unambiguous written instrument. The court was of the opinion that the second contract between the parties was ambiguous as to the payment of interest to Mrs. Pritchett upon the sum agreed to be paid for her share in her mother's estate. Parol evidence was allowed to show the intention of the parties, and the jury were instructed concerning its effect; and these rulings are the subject-matter of the exceptions. We do not think that the second contract is ambiguous, or discloses an intent that it was intended to supersede the first. On the contrary, the second contract is both supplementary to and complementary of the first. The purpose of both contracts was to include in the administration of John M. Stubb's estate the one-fifth share of Mrs. Pritchett, inherited from her mother. In the first contract the administrators and heirs of John M. Stubbs agreed, in consideration of Mrs. Pritchett's permitting her one-fifth share in the land which she inherited from her mother to be administered as a part of the estate of her father, John M. Stubbs, to pay to her the sum of \$9,500 and interest on the whole or any part unpaid after October 15, 1908. It was by virtue of this contract that the administrators took charge of Mrs. Pritchett's share in her mother's estate, and administered it as belonging to her father's estate. The second contract could not be a full substitute for the first, for the obvious reason that it did not purport to con-

tain any agreement by which the estate of John M. Stubbs, or his administrators, acquired title to this undivided one-fifth interest of Mrs. Pritchett. Moreover, the second contract bears internal evidence that its covenants rest upon the existence of the first. It is recited in the fifth paragraph that the administrators had made a partition of the entire 35 acres. This division was predicated upon the basis that the estate of John M. Stubbs owned the Dublin land as an entirety. The eighth paragraph refers to an indebtedness to Mrs. Pritchett under the first contract; that is, the obligation to pay the money issuing out of the first contract. The promise of the eighth paragraph is to pay the indebtedness arising under the first contract, which was described by stating the principal of that indebtedness. Under the plain and unambiguous contracts, Mrs. Pritchett is entitled to be paid, for her share in her mother's estate, \$9,500 principal, and interest on so much of the principal as was unpaid on October 15, 1908, from that date at the rate of 8 per cent. per annum. The court erred in allowing parol evidence, and in charging the jury with reference to its effect on the contracts.

Judgment reversed. All the Justices concur.

(144 Ga. 11)

CENTRAL OF GEORGIA RY. CO. v.
SWANN.

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. TRIAL. \S 235—INSTRUCTIONS—"PREPONDERANCE OF EVIDENCE."

In all civil cases the issues are to be determined according to the "preponderance of evidence," by which is meant that superior weight of evidence which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other. Civ. Code 1910, \S 5730, 5731.

(a) Accordingly, on the trial of an action against a railroad company by a mother for the homicide of her child, the charge, "If, after the plaintiff has shown her dependence upon her son and his killing by the defendant's train, the evidence leaves the matter in such doubt that you are unable to say from the evidence in the case whether the railroad company was at fault as complained of, or not, as above explained to you, then the burden would not have been carried, and you should find the issue of such negligence against the railroad company," was erroneous on the ground that it ignored the rule of law providing for the determination of issues upon a preponderance of evidence. Central of Georgia Ry. Co. v. Stiles, 139 Ga. 49, 76 S. E. 570.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 539-541, 543-548, 551; Dec. Dig. \S 235.]

For other definitions, see Words and Phrases, First and Second Series, Preponderance.]

2. INSTRUCTIONS—NECESSITY OF REVIEW.

Other grounds of the motion for new trial, which contain excerpts from the charge, are without merit, and not of such character as to require elaboration.

3. PROOF—SUFFICIENCY—REVIEW.

As the evidence may not be the same on another trial, no decision will now be made as to the sufficiency of the evidence to support the verdict.

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Action by Naomi Swann against the Central of Georgia Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. S. H. Sibley, of Union Point, and J. Hines Wood, of Sandersville, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(144 Ga. 10)

THOMPSON v. CITIZENS' BANK.
(No. 486.)

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. NOTES—ACTIONS—MATTERS IN CONTROVERSY.

A bank having suffered a loss causing a deficit in its capital, the stockholders entered into an agreement with the bank to the effect that each shareholder should execute to the bank his promissory note for the face value of each share of stock held by him, and that, if any part of the money so lost to the bank should be recovered by it, the amount thereof should be credited pro rata on the several notes executed by the stockholders. In pursuance of this agreement, the shareholders executed their several promissory notes. Subsequently, when the bank brought suit on one of the notes, the defendant pleaded the contract above mentioned, and alleged that the bank had collected stated amounts of the deficit, that the proportion thereof due defendant under the agreement was sufficient to reduce his liability to a stated amount, and that he tendered the balance. Held:

The controversy was between the bank and the maker of the note, no question involving the rights of creditors and third persons being involved.

2. CONTRACTS —245—MERGER IN SUBSEQUENT NOTE.

The note did not purport to express the entire antecedent contract out of which it sprang, and the latter was not merged into it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. —245.]

3. EVIDENCE —442—PRIOR AGREEMENTS—PAROL.

It was error to strike so much of the plea of the defendant as set up the matters referred to in the preceding note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. —442.]

4. EVIDENCE —444—PAROL—CONDITIONAL LIABILITY.

So much of the amendment to the plea as sought to set up an agreement that the note was not to be an asset of the bank, being contradictory to the terms of the note, does not set forth a good defense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. —444.]

Fish, C. J., and Hill, J., dissenting.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by the Citizens' Bank against Arthur Thompson. There was a judgment for plaintiff, and defendant brings error. Reversed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. Smith & Kirkland, of Swainsboro, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., and HILL, J., dissenting. An absolute, unconditional promissory note cannot be changed into a conditional obligation by parol evidence, in the absence of fraud, accident, or mistake. Haley v. Evans, 60 Ga. 157, and cases cited; Stripling v. Holton, 68 Ga. 821, and cases cited; Johnson v. Nisbet, 137 Ga. 150, 72 S. E. 915.

(143 Ga. 805)

SAMPLES v. GEORGIA & F. RY. CO.

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. CARRIERS —254—CARRIAGE OF PASSENGERS—RETURN TICKETS.

Where a railway company sold a ticket from one point to another, with a coupon attached for a return passage to the starting point, at a less rate than the regular fare, it had the right to make a reasonable regulation limiting the time within which the coupon for the return passage might be used; and if the purchaser, after the expiration of the limit of time specified on the face of the coupon for its use for return passage, boarded a train of the company and tendered the coupon in payment for transportation, refusing to pay the full fare, but offering to pay something in addition to the ticket, the company had the right to eject such person from the train, and the exercise of that right in a proper manner and at a proper place furnished no cause of action against it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1020-1026; Dec. Dig. —254.]

2. CARRIERS —363—CARRIAGE OF PASSENGERS—EJECTION.

Where a person without a ticket authorizing him to ride upon a train enters it and refuses to pay the proper fare, he may be ejected; and, as a general rule, the carrier is not required to consult the mere convenience of such person in regard to the location, but may stop the train and eject him at once. Nevertheless this must be done without the use of unnecessary force and in a decorous manner; and there may be special circumstances as to time, place, sex, or infirmity of the person, or the like, which would render the ejection at a particular place or in a particular manner improper and cause the carrier to be liable for damages arising therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1445, 1446; Dec. Dig. —363.]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by Mrs. Fannie T. Samples against the Georgia & Florida Railway Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

Mrs. Fannie T. Samples brought suit against the Georgia & Florida Railway Com-

pany, alleging in substance as follows: On December 31, 1911, she purchased from the agent of the defendant company at Millen, Ga., a ticket from Millen to Stillmore, with a coupon attached thereto for a return trip. The coupon insured her return from Stillmore to Millen at any time until January 8, 1912. It was sold to her at a reduced rate, the full fare from Millen to Stillmore and return being \$1.90, and she having paid for the ticket \$1.50. She took passage on the train of the defendant from Millen to Stillmore on December 31, 1911, and presented her ticket to the conductor, who detached the ticket and returned the coupon to her, and she was transported to Stillmore. On January 11, 1912, she boarded the train of the defendant at Stillmore, in order to return to Millen. In a few moments after starting, the conductor called for her ticket, and she presented the coupon to him. He refused to accept it, and demanded that she pay full fare from Stillmore to Millen, amounting to 90 cents, and told her that unless she paid it he would eject her from the train. She offered to pay the difference between the reduced fare which she had paid for the ticket and coupon and the full fare from Millen to Stillmore and return, being 40 cents; but this was declined. He also refused to repay to the plaintiff the amount paid by her for the ticket in excess of the fare from Millen to Stillmore, amounting to 55 cents. She asked him to carry her to Millen, and stated that if the agent at that point would not accept the 40 cents, which she offered to pay, she would pay the full fare; but this was declined by the conductor. She then requested that the conductor, if he intended to eject her, put her off at Oak Grove church, at a public crossing about a mile from Stillmore. Instead of doing so, he carried her on across the Canoochee river about four miles from Stillmore, and put her off in the woods two or three miles from any residence. He ejected her in an abrupt and vindictive manner, saying, "Come, get out of here," in a loud, bolsterous, scolding, and commanding tone, without any provocation therefor, and took her by the arm and forced her from the train in the woods. She was thus forced to walk a distance of 200 or 300 yards across the Canoochee river on a trestle, that being the only way to get to any one she knew, or to any convenient and safe point; and she was compelled to walk 3 or 4 miles. She was subjected to great humiliation, and was caused great mental pain and anguish, and, by reason of the weather being very cold, and her journey perilous and fatiguing, the shock was so severe that it produced nervous prostration and caused her great physical pain and suffering. The court dismissed the petition on general demurrer, and the plaintiff excepted.

Williams & Bradley, of Swainsboro, for plaintiff in error. Saffold & Jordan, of Swainsboro, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. In selling a ticket with a coupon for return passage to the initial point, a railroad company may fix a reasonable limitation as to the time within which such coupon must be used. *Southern Railway Co. v. Watson*, 110 Ga. 681, 36 S. E. 209. If, under a reasonable regulation of the company, the limitation as to the time within which the coupon could be used, expressed on the face of the coupon, had expired, and the purchaser nevertheless boarded the train, sought to use the expired coupon for transportation, and declined to pay the full fare of one without a ticket, the company had a right to eject her from the train, and the fact of such ejection furnished her no cause of action. *Southern Railway Co. v. Howard*, 111 Ga. 842, 36 S. E. 213. The plaintiff had no right to use the coupon, which showed on its face that it had expired, in payment or part payment of fare for her return passage from Stillmore to Millen. Her offers to pay less than the full fare between those points, and to pay full fare if the conductor would carry her to her destination and the agent at that point should decline to accept the amount which she was willing to pay, gave her no right to remain upon the train. The return coupon which she had purchased had expired, and she knew it. She was in the position of one who boards a train without a ticket, for the expired coupon was no ticket giving her any right of passage. So far therefore as the suit was based upon the fact of ejection of the plaintiff from the train, it was demurrable.

[2] 2. The next question is whether the allegations as to the manner and place of the ejection set out a cause of action. In *Southern Railway Co. v. Watson*, supra, it was held that if the time within which a ticket could be used was limited by a reasonable regulation of the carrier, and if after the expiration of such limit the holder entered a train and tendered the expired ticket for transportation, and refused to pay fare, he could be ejected from the train "in a decorous and proper manner by the conductor." In 2 *Hutchinson on Car.* (3d Ed.) § 1082, it is said that a passenger who refuses to obey a reasonable regulation of the carrier forfeits his right to be carried, and at once puts himself in the condition of an intruder, and may be ejected at any point upon the carrier's route at which he may choose to put him off; and that a railway carrier need not delay the removal until the train reaches a station, but may stop and expel him at once. In some states there are statutes as to the place at which the ejection may take place. In section 1083 it is said that, even in the absence of a statute, regard must be had for the age, sex, and condition of the passenger, and the circumstances, such as the state of the weather, time of day, condition of the country, etc., for he must not be ejected at an unreasonably unsuitable place or time;

and that female passengers, and passengers who are sick or suffering from some mental or physical infirmity, cannot be ejected at times or places where the carrier should know that their sex or condition would especially expose them to insult or injury. In section 1084 it is declared that, in general, it may be said that while the carrier may not be required to pay regard to the mere convenience of the passenger, when he has forfeited his right to be carried by his misconduct or refusal to comply with his regulations, the carrier cannot eject him in such manner as to endanger his safety, as by ejecting him while the train is in motion, or in a dangerous place, without liability for the consequences. To this the author adds that the carrier cannot use more force than may be necessary, and that, if unnecessary violence be used, it will be no defense that the passenger has offended against the reasonable rules of the carrier, and has thereby subjected himself to the carrier's right to expel him. And it is said that:

"Not only the unnecessary force, but any circumstances of insult or indignity in the manner of expulsion, may be shown in an action by the passenger."

See, also, *Elliott on Railroads* (2d Ed.) §§ 1598, 1637.

In *Jackson v. Alabama, etc., R. Co.*, 76 Miss. 703, 25 South. 353, a female took passage on a train at night at a flag station, without procuring a ticket, as there was no ticket office at that place, but believing that she had more money than was requisite to pay her fare to her destination. Soon after the train had left the flag station, the plaintiff was approached by the conductor and requested to pay her fare. She vainly searched for the money which she had on her person when she boarded the train, and informed the conductor that she had lost it in getting on the train or after doing so. Failing to find it, she was immediately ejected from the train at a point about one mile east of the flag station and about three miles west of the next station. The night was dark, cold, and rainy; and the place of her ejection was in a swamp, with water on the sides of the track and remote from any habitation. She urged the conductor not to eject her there, but without avail. She made her way back on foot to the flag station, and, finding no one there, and no place of shelter, she continued her walk to her father's house, three

or four miles away. As a result she became sick. It was held that the declaration stated a cause of action. The court said:

"The question is not whether a railway company has the right to eject one from its trains who has neither a ticket nor the means of paying fare. That is universally conceded. The question is whether, at the time and place and under the circumstances, the right of ejection in this instance was properly exercised."

In the case at bar the company had the right to eject the plaintiff from its train. But it could not do this without regard to the place where or the manner in which it was done. It was alleged that, when the conductor informed the plaintiff that he would have to eject her unless she paid full fare, she requested that he would put her off at a public crossing about a mile from the starting point, but that, instead of doing so, he carried her three or four miles from the point from which she started, crossing a river, and put her off in the woods two or three miles from any residence; that she was thereby forced to walk across the river on a trestle, a distance of 200 or 300 yards, and to walk in all three or four miles through a country unknown to her, she being a resident of another state; that the manner of the conductor was abrupt; that in a loud, bolsterous, scolding, and commanding tone, without any provocation, he commanded her to, "Come, get out of here," and took her by the arm and forced her from the train; that the plaintiff was further subjected to great humiliation and caused great mental anguish and pain; and that, by reason of the weather being cold, and her journey on foot being perilous and fatiguing, the shock was so severe that it produced nervous prostration, and caused her great physical pain and suffering. These allegations were sufficient to show that the right of ejection was exercised in an improper manner and at an improper place, and they were not subject to general demurrer. Accordingly, it was error to dismiss the action on such demurrer. Under the allegations of the petition, this case is not controlled by the decision in *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. R. 183, or *Williamson v. Central of Georgia Ry. Co.*, 127 Ga. 125 (4a), 126, 56 S. E. 119, or similar rulings.

Judgment reversed. All the Justices concur.

(144 Ga. 54)

DAVIS v. STATE. (No. 542.)
(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

RAPE —51—EVIDENCE—SUFFICIENCY.

The sole error complained of is that the verdict is without evidence to support it. There was evidence tending to show that the alleged victim was about 15 years old. Her father had recently moved into the neighborhood. The defendant, a married man, and who was unacquainted with his alleged victim, was seen to enter the house. She testified that about 8 o'clock in the morning the defendant, who was a stranger to her, entered her home when she was alone and engaged in starching clothes, seized her, and threw her on the bed, and had carnal knowledge of her forcibly and against her will. She made no outcry, because he choked her and threatened to kill her if she did. Upon accomplishing the carnal act, he left the house, and she immediately ran to the house of a neighbor, about a hundred yards away, to whom she made complaint. This neighbor testified that, about 15 or 20 minutes after she saw the defendant enter the house, the alleged victim came screaming to her and made complaint of the defendant's carnal assault. The mayor of the town in which the crime is alleged to have been committed testified that he passed the scene of the alleged crime between 8 and 9 o'clock, that he saw several excited women and the victim, and that the victim repeated to him the charge against the defendant. The defendant offered no evidence, and in his statement to the jury denied that he was present at the time and place of the alleged crime. *Held*, that the evidence is sufficient to support the verdict. *Buchanan v. State*, 137 Ga. 774, 74 S. E. 536.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. —51.]

Error from Superior Court, Washington County; R. N. Hardeman, Judge.

John Davis was convicted of rape, and he brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(143 Ga. 849)

JEFFERS v. STATE. (No. 544.)
(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW —762—TRIAL—INSTRUCTIONS.

On the trial of one charged with rape, the court instructed the jury: "In determining the issues of this case, you will consider all the facts and circumstances of the case; the time and place where the offense is charged to have been perpetrated; the time that the complaint was made; and the manner in which it was made; * * * also, the failure of the party claiming to have been injured to make complaint; the reason for not complaining or the reason for making complaint; the circumstances under which the complaint was made. Weigh and consider all the circumstances in determining, in reaching a finding in this case. If the injured party failed to make complaint

at the first opportunity, you will consider whether there was or was not sufficient or reasonable cause or excuse for not complaining at first, or as soon as she was likely to have made complaint; if there was no reasonable excuse for making complaint, that would be a circumstance you would consider in reaching the truth of this transaction, that is, as to whether it was reasonable or unreasonable and whether it should have been made earlier under the circumstances of the case. But, should you find that the injured party was a child of tender years, that also would be a circumstance that you would consider with the other testimony in the case in reaching your conclusion in the matter." *Held*, that the judge in so instructing the jury expressed or intimated his opinion as to what had been proved, viz., that the female alleged to have been raped made complaint that the accused had committed the offense upon her. Accordingly, under the mandatory provisions of the Civil Code 1910, § 4863, the judgment must be reversed, and a new trial granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. —762.]

2. CORROBORATION—SUFFICIENCY OF EVIDENCE.

The facts set out in the motion for a new trial do not require a discussion of the question whether there was evidence corroborating that of the female alleged to have been raped, or whether an omission to give a charge on the subject of corroboration was error. The judgment being reversed on another ground, no opinion is expressed on the sufficiency of the evidence.

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

F. W. Jeffers was convicted of rape, and he brings error. Reversed.

J. H. McLarty and J. S. James, both of Douglasville, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

FISH, C. J. Judgment reversed. All the Justices concur.

(144 Ga. 32)

TERRELL v. TERRELL. (No. 514.)
(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES —164—EASEMENT—DAMS—PRESCRIPTION.

It is settled doctrine in this state that the owner of a milldam who maintains the same at a given height for a period of 20 years, which dam during that period causes water to back and overflow land of another, may obtain a prescriptive easement of flowage over the lands of the upper riparian owner. *Columbus Power Co. v. City Mills Co.*, 114 Ga. 558, 40 S. E. 800; *Monroe v. Estes*, 139 Ga. 729, 78 S. E. 130; 40 Cyc. 676.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 210-212, 215; Dec. Dig. —164.]

2. INSTRUCTIONS—NUISANCE—SUFFICIENCY.

So far as the question as to whether the maintenance of the dam in question in the case at bar might have been a continuing nuisance, on the ground that it caused injury to the health of the complainant and members of his family, is involved in the case, it was

submitted to the jury under instructions quite as favorable to the plaintiff as he had a right to ask.

8. INSTRUCTIONS—NEW TRIAL—GROUND.

Even if the instruction of the judge as to the burden of proof on the question of the acquirement of prescriptive right was not entirely accurate, under the evidence such inaccuracy is not ground for a new trial.

4. EVIDENCE ⚡208—ADMISSIONS—PLEADINGS IN FORMER SUIT.

The exception to the admission in evidence of the record in a prior suit is without merit, as the declaration in that case contained admissions which were material and competent upon the issues involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. ⚡208.]

5. EXCEPTIONS—MERIT.

There was no merit in the other exceptions to the charge of the court and the rulings made pending the trial.

Error from Superior Court, Clayton County; C. S. Reid, Judge.

Action between T. J. Terrell and F. L. Terrell. There was a judgment for the latter, and the former brings error. Affirmed.

J. F. Golightly, of Atlanta, for plaintiff in error. W. L. Watterson, of Jonesboro, and J. W. & J. D. Humphries, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(144 Ga. 22)

GEORGIA R. & BANKING CO. v. RADFORD. (No. 506.)

(Supreme Court of Georgia. Aug. 11, 1915.)

(Syllabus by the Court.)

1. TRIAL ⚡191—INSTRUCTIONS—ADMITTED FACTS.

On the trial of a suit brought against a railroad company to recover damages for personal injuries alleged to have been received as a passenger while traveling as such upon a train of the railroad company, where the answer of the defendant did not admit that the plaintiff was a passenger on its road, although the plaintiff and his wife so testified, it was error to charge the jury, "On the other hand, the defendants in this case, the railroad companies, I believe, admit that he was a passenger;" and to again charge the jury: "If you find the plaintiff was a passenger on defendant's train, and that part of it is admitted." But whether or not this inadvertence on the part of the court would require a new trial under the facts of the

case need not be decided, as a reversal is granted on other grounds.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. ⚡191.]

2. APPEAL AND ERROR ⚡1067—TRIAL ⚡210—INSTRUCTIONS—WEIGHT OF EVIDENCE—REVIEW—HARMLESS ERROR.

Where the evidence is conflicting as to the existence of a particular fact, concerning which there is positive testimony on the one hand and negative testimony on the other, in instructing the jury as to the weight to be given testimony of this character according to the rule laid down in Civ. Code 1910, § 5751, it is error not to also instruct the jury that in weighing such testimony they should take into consideration the credibility of the witnesses. *Southern Ry. Co. v. O'Bryan*, 115 Ga. 659, 42 S. E. 42; *Georgia Ry. & El. Co. v. Wheeler*, 141 Ga. 363, 80 S. E. 993; *Ware v. House*, 141 Ga. 410, 81 S. E. 118.

(a) In this case (in which the plaintiff prevailed) the positive testimony was delivered by the plaintiff himself and his wife; and a number of witnesses, some of whom were passengers on the same train with the plaintiff, with opportunity for knowing what occurred at the time of the alleged injury, testified that they had no knowledge of certain things testified to by plaintiff and his wife. Under these circumstances, instructions to the jury as outlined in the preceding headnote, without qualification as to the credibility of the witnesses, constituted harmful error requiring a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⚡1067; Trial, Cent. Dig. §§ 490-494, 501; Dec. Dig. ⚡210.]

3. APPEAL AND ERROR ⚡843—REVIEW—DETERMINATION.

As the case goes back for another trial, no opinion is expressed on the ground of the motion for a new trial making the contention that the verdict is excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. ⚡843.]

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by H. L. Radford against the Georgia Railroad & Banking Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming, of Augusta, and E. P. Davis, of Warrenton, for plaintiff in error. El. T. Shurley and L. D. McGregor, both of Warrenton, and Westmoreland, Hill & Smith, of Atlanta, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(144 Ga. 31)

FAIRBURN BANKING CO. v. SUMMERLIN et al. (No. 512.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. ERROR NOT EXCEPTED TO.

There was no complaint that any error of law was committed on the trial. The only question dealt with in brief of counsel for the plaintiff in error is decided in the following notes.

2. EXECUTORS AND ADMINISTRATORS §365—ADMINISTRATOR'S SALES—VALIDITY.

The mere fact that the purchaser at an administrator's sale was the son of the administrator was not of itself sufficient to render the sale void. Such relationship was a circumstance which could be considered, in connection with other facts and circumstances, in determining whether the sale was collusive and fraudulent. Cain v. McGeenty, 41 Minn. 194, 42 N. W. 933.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1498-1503; Dec. Dig. §365.]

3. EXECUTORS AND ADMINISTRATORS §365—SALES—CHILDREN.

The reasoning in the cases of Lowery v. Idleson, 117 Ga. 773, 45 S. E. 51, and Broadhurst v. Hill, 137 Ga. 833(3), 839, 74 S. E. 422, wherein it was held that an administrator could not sell to his wife and an administratrix could not sell to her husband, does not apply with equal force in the case of a sale by an administrator to his son.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1498-1503; Dec. Dig. §365.]

4. ADMINISTRATOR'S SALE—FRAUDULENT SALE—EVIDENCE.

The evidence did not require a finding that the administrator's sale was fraudulent.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Fairburn Banking Company against Homer Summerlin, administrator, and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

J. H. Longino, of Fairburn, and J. F. Goightly, of Atlanta, for plaintiff in error. Colquitt & Conyers and J. P. Haunson, all of Atlanta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(144 Ga. 1)

BOWEN et al. v. GASKINS et al. (No. 508.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. JUDGMENT §475—COLLATERAL ATTACK—FRAUD—COURT OF ORDINARY.

The court of ordinary is a court of general jurisdiction; and, unless the want of jurisdiction appears on the face of the record, its judgments cannot be collaterally attacked for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 910; Dec. Dig. §475.]

2. EXECUTORS AND ADMINISTRATORS §358—SALE OF LAND—JUDGMENT—RECORD.

The transcript of the record of the court of ordinary, to which objection was made, dis-

closed jurisdiction in the court, and was relevant to the issue.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1469-1479; Dec. Dig. §358.]

3. EXECUTORS AND ADMINISTRATORS §397—SALE OF LAND—CONVEYANCE.

Where an administrator, pursuant to an order of the court of ordinary authorizing the sale of wild land of his intestate at private sale, executes a deed and leaves blanks for the names of the grantees to be afterwards filled in by the attorney employed by the heirs to represent the estate, and where the names of such grantees are filled in by the attorney before the delivery of the deed to the purchasers, who are ignorant of the circumstances attending its execution, such deed will operate to pass the title of the grantor to the grantees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1598-1604; Dec. Dig. §397.]

4. INSTRUCTIONS—SUFFICIENCY.

The issues made by the pleadings and evidence were submitted to the jury under appropriate instructions.

5. TRIAL §112—ARGUMENT OF COUNSEL—TIME.

Prima facie the time fixed by the rules of court for the argument of cases is sufficient; and the discretion of the judge in refusing additional time to counsel is not abused where it does not appear that the issues are so complicated, or the evidence so voluminous, as to make the case exceptional.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 273, 274; Dec. Dig. §112.]

6. PROOF—SUFFICIENCY.

The evidence authorized the verdict, and no sufficient cause is shown for the grant of a new trial.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between J. B. Bowen and others and F. W. Gaskins and others. There was a judgment for the former, and the latter bring error. Affirmed.

L. E. Heath, of Douglas, and W. G. Harrison, of Nashville, for plaintiffs in error. Hendricks & Hendricks and C. A. Christian, all of Nashville, for defendants in error.

EVANS, P. J. The plaintiffs brought suit to enjoin the defendants from committing certain alleged trespasses on lot of land No. 30 in land district 10 of Berrien county. The plaintiffs based their title upon a grant to Barnet Goslin, dated August 4, 1841, and a deed from his administrator de bonis non, dated November 4, 1908. The defendants in their answer admitted that they claimed from a common grantor, but averred that Barnet Goslin prior to his death had conveyed the lot in controversy to J. D. Shanks, from whom they derived their title.

[1] 1. The defendants offered an amendment to their answer, setting up that the administration upon Goslin's estate in Taylor county, and the deed of his administrator, were void, for the reason that at the time the administration was sued out the court of ordinary of Taylor county was without jurisdiction over the estate of Barnet Goslin,

for the reason that the decedent never lived or died in that county, which fact was well known to the heirs of Barnet Goslin and their attorney who applied for administration on his estate; that the attorney fraudulently represented that the court did have jurisdiction; and that the decedent Barnet Goslin had prior to his death conveyed the lot of land in controversy. The application for administration was by a daughter of the decedent, who alleged that her father died a resident of Taylor county, that administration had been granted in that county upon his estate, but that the administrator had died without fully administering the same, and that other property belonging to the estate had been discovered; and prayed for the appointment of the clerk of the superior court as administrator de bonis non. The application showed on its face that the court of ordinary of Taylor county had jurisdiction of the subject-matter. The rule is clear that the court of ordinary is a court of general jurisdiction, and that, where it appears upon the face of the proceedings that the court has jurisdiction of the subject-matter, its judgments cannot be collaterally assailed for fraud. *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134; *Alabama Great Southern Ry. Co. v. Hill*, 139 Ga. 224, 76 S. E. 1001, 43 L. R. A. (N. S.) 236, 34 Ann. Cas. 1914D, 996; *Medlin v. Downing*, 128 Ga. 115, 57 S. E. 232.

[2] 2. The court allowed in evidence, over objections, certified copies, from the court of ordinary of Taylor county, of the application of Angelina L. Green, a daughter of Barnet Goslin, that letters of administration de bonis non upon her father's estate issue to the clerk of the superior court; of the order for citation, the citation based thereon, and the order appointing the administrator; of the application of O. T. Montfort, administrator, for leave to sell the lot of land in controversy, the citation thereon; and the order of the court of ordinary giving the administrator leave to sell the land (the same being wild land) at private sale. The objections were because: (a) Of failure to identify the decedent with the grantee under whom the parties claimed; and (b) the applicant for administration was not entitled to have the clerk appointed as administrator. Clearly the evidence was not open to these objections. The various steps in the administration of Barnet Goslin's estate were in compliance with the statute, and showed jurisdiction in the court of ordinary, and were not open to collateral attack.

[3] 3. It appeared from the evidence that the deed from O. T. Montfort, as administrator of Barnet Goslin, to the plaintiffs, was executed under these circumstances: The heirs at law of the decedent employed an attorney to procure administration and represent the heirs in the administration of their ancestor's estate. He accordingly, on the application of a daughter of the decedent, caused the clerk of the superior court to be

appointed administrator. He negotiated the sale of the land to the plaintiffs for \$1,000, a sum satisfactory to all of the heirs. The attorney, who resided in a distant city, prepared a deed for the administrator to execute. Not having a memorandum of the grantees' names, he left blanks in the deed, and wrote to the administrator that he would insert them before delivery. The administrator signed the deed with blanks left for the grantees' names. They were afterwards inserted by the attorney who represented the administrator and the heirs, who delivered the deed to the purchasers, with their names inserted; but the purchasers were ignorant of the circumstances attending the execution of the deed, and paid the full purchase price. Objection was made to the deed being received in evidence, and to the court's statement in the presence of the jury that the deed was not a forgery, and to the refusal of a request to charge that the blanks left in a deed could not be filled in except by authority under seal. It was also insisted, under the general grounds of the motion for new trial, that the deed was void and insufficient as a muniment of title. In *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549, it was held:

"A deed duly signed, sealed, and attested, but without any grantee named and without the amount of the purchase money stated—these being left blank—is inoperative as a muniment of title, and cannot be completed by a third person in the absence of the grantor, without authority under seal."

In the opinion Judge Nisbet referred to the divergent decisions in England and this country on this subject, declaring them to be in distressing conflict, and expressed some misgiving whether reason and common sense did not condemn the ruling. Shortly afterwards, in *Drumright v. Philpot*, 16 Ga. 424, 428, 60 Am. Dec. 738, Judge Lumpkin said he yielded reluctant assent to the ruling in *Ingram v. Little*, and called attention to the fact that the doctrine had been repudiated by Lord Mansfield, and that Chief Justice Marshall had expressed himself dissatisfied to the extent to which it had been carried. In *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867, it was held that a criminal recognizance signed by a surety, in which the obligee's name was inserted after signature by the sheriff, under parol authority from the surety, was valid and binding on the surety; and in *Weaver v. Carter*, 101 Ga. 206, 213, 28 S. E. 869, *Simmons, C. J.*, was of the opinion that the decision in *Ingram v. Little* was practically overruled in *Brown v. Colquitt*. In *Smith v. Farmers' Mutual Ins. Co.*, 111 Ga. 737, 36 S. E. 957, *Cobb, J.*, states:

"It may be safely said, in view of the foregoing, that the doctrine announced in *Ingram v. Little* is not, at this time, to be regarded as the law of this state."

"It seems to be the modern rule that parol authority to fill a deed is sufficient, and therefore not only may a deed be delivered to an agent by the maker to be filled and delivered, both in the case of specialties and conveyances

of land, but also, in the former parol authority is sufficient to fill after delivery." 2 C. J. 1249.

Furthermore, the doctrine announced in *Ingram v. Little* is wholly inapplicable to the facts of this case. In that case the grantee's name was inserted in the blank by a third person in the absence of the grantor. In the instant case the grantee's names were inserted by the attorney of the heirs at law and the administrator, before delivery. It affirmatively appeared in the evidence that the estate had been distributed, and that the heirs had received their respective shares. By receiving the proceeds of the sale they impliedly ratified the conveyance by the administrator, and would be estopped from repudiating it.

[4] 4. The court submitted to the jury the issues relating to the identity of the grantee with the administrator's intestate, under whom the plaintiffs claimed, and whether the grantor had prior to his death conveyed the land to the person from whom the defendants traced their title. Some of the instructions of the court in the submission of these issues are criticized; but, after a careful examination, we do not think that the criticism is well founded.

[5] 5. Counsel for the defendants stated in his place that he was unable to fully discuss the issues within the time (one hour) prescribed by the rule of court, and asked for additional time. The refusal of this request is made the subject-matter of an exception. The issues in this case were narrowed to those referred to in the preceding note. The witnesses were few in number, and the documentary evidence was neither confusing nor complicated. It would seem that these issues could have been reasonably discussed within the time prescribed by the rule of court. The judge is not required to extend time in every instance when so requested. He has a discretion in the matter (rule 5 of superior courts, as amended by convention of judges December 19, 1911), and under the circumstances of the present case we do not think that discretion was abused.

[6] 6. The evidence was sufficient to authorize the verdict, and no errors of law were committed that require a new trial.

Judgment affirmed. All the Justices concur.

LUMPKIN and ATKINSON, JJ. We concur in the judgment, but we do not think it necessary to decide whether parol authority is sufficient to authorize the filling in of blanks in a deed under seal, or to discuss the decision in the case of *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549, or other cases in which it has been cited or bearing on the same subject. Objection was made to the admission of the deed in evidence, on the ground that various things appeared on the face of it. There is nothing to show that in fact

these things did appear on the face of it; but, on the contrary, a photograph of the deed contained in the brief of evidence fails to show that the names of the grantees were inserted after the deed was signed by the maker. Accordingly, the objection was properly overruled.

Again, an amendment had been made to the defendants' pleadings. After the evidence had closed, the defendants' counsel said to the court: "I would like to know at this time what the court holds regarding the amendment." The court answered that he struck all of the amendment except the attack on the deed of the administrator as being a forgery; but that he was going to hold, under the evidence, that it was not a forgery, and that he would instruct the jury that the deed was good, under the evidence, and not a forgery. Counsel stated that they desired to except to the statement of the court on the question of the deed not being a forgery, on the ground that it was an expression of opinion in the presence of the jury as to what had or had not been proved. The court immediately said: "I instruct the jury that it is not a forgery," etc. This colloquy formed the basis of one of the grounds of the motion for new trial. There was no evidence authorizing any submission to the jury of the question as to whether the deed of the administrator was a forgery. Whether or not the authority given by the administrator to the attorney, under which the latter inserted certain names in the deed as grantees, was sufficient in law to render the deed a perfect conveyance, there was no pretense that there was any forgery. There may have been a question of proper execution of the deed or proper authority to fill blanks, but this was a different question from whether the deed was a forgery.

Again, a bill of exceptions pendente lite was filed. One of the exceptions taken in it was that the court refused a certain written request to the jury. This requested charge began with these words: "If you find from the evidence that the deed from O. T. Montford, as administrator of Barnett Goslin, to the plaintiffs, was a forgery, or that material portions of the deed was a forgery," etc. A portion of this request referred to the filling in of names of grantees in a deed after it had been signed; but, under the repeated rulings of this court, unless a requested charge as a whole be correct, the refusal of it would constitute no ground for a reversal. From what has been said above it is patent that this request, in large part, was based on an erroneous theory, and that it contained matter which it would have been palpable error to have given in charge. It has not been the practice of this court to take such requests and seek for some part of them upon which to base a ruling, and we do not think that it should be done now.

Under the evidence, the verdict could be

supported regardless of the question of the sufficiency of the authority to fill up blanks in the deed.

(144 Ga. 14)

KEMERER v. FLYNT. (No. 496.)

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. CHARGES—ERROR—REVERSIBLE ERROR.

When the charges complained of, and the requests to charge which were refused, are considered in connection with the evidence and the entire charge, they do not show reversible error.

2. PROOF—SUFFICIENCY—NEW TRIAL.

There was evidence sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between Mrs. M. L. Kemerer and Mrs. A. L. Flynt. There was a judgment for the latter, and the former brings error. Affirmed.

Hitch & Denmark, of Savannah, for plaintiff in error. Oliver & Oliver, of Savannah, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 797)

CARLISLE v. OTTLEY et al.

(Supreme Court of Georgia. Aug. 11, 1915.)

(Syllabus by the Court.)

1. BANKRUPTCY—299 — STOCKHOLDERS OF CORPORATION—LIABILITY—SUITS.

Where an industrial corporation has been adjudged a bankrupt and trustees have been appointed, shareholders who received dividends from the corporation before the adjudication of bankruptcy, which were paid out of the capital assets of the corporation, may, under Civ. Code 1910, § 2251, be joined in one action instituted by the trustees to recover the amount of the dividends so paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 448; Dec. Dig. 299.]

2. VENUE—22—JOINT DEFENDANTS.

A suit in equity of the character just mentioned may be brought in the county of the residence of any one of the defendants. In such a case the jurisdiction will include also a defendant who resides in another county of this state.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. 22.]

3. BANKRUPTCY—164 — STOCKHOLDERS OF CORPORATION—LIABILITY.

Where a solvent industrial corporation, which is engaged in the conduct of its business as a going concern, annually declares dividends through a number of years, and these dividends are paid out of the capital assets of the corporation, and the shareholders receive them in good faith and without notice that they are not paid from the net profits of the corporation, and afterwards the corporation is adjudicated a bankrupt, an action by the trustees in bankruptcy will not lie against the shareholders to

recover the amount of the dividends so received by them.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 287; Dec. Dig. 164.]

4. DECISION—MATTERS DECIDED.

In view of the ruling announced in the third headnote, other questions raised by demurrer and specially mentioned in the fourth division of the opinion will not be decided.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. K. Ottley and others, as trustees in bankruptcy of the Spalding Cotton Mills, against E. F. Carlisle and others. There was a judgment overruling a demurrer to the petition, and defendant named brings error. Reversed.

J. K. Ottley, T. D. Meador, and R. H. Drake, as trustees in bankruptcy of the Spalding Cotton Mills, a corporation bankrupt, instituted suit in the superior court of Fulton county against J. A. McCrary, Mrs. C. B. Sasser, and J. A. Sasser, residents of Fulton county, and a large number of other persons residing beyond the limits of Fulton county, including E. F. Carlisle of Spalding county. Carlisle filed a separate demurrer, which was overruled as to each and every ground therein taken; and he excepted to this judgment. The defendants were alleged to have been stockholders in the Spalding Cotton Mills, and as such to have received separate dividends on their respective shares of stock for the years 1901 to 1909, inclusive. The suit was to recover the dividends thus paid, with interest. Carlisle was alleged to have had two shares of stock, and the total amount of dividends alleged to have been paid him was \$166. The petition further alleged the following, in substance: The defendants constitute all of the stockholders, except such as are deceased without administration on their estates, whose heirs at law are unknown to petitioner, and such as have left the jurisdiction, leaving no property, and such other stockholders as are so absolutely insolvent that a judgment against them would be of no value. At various times during the operation of the Spalding Cotton Mills as a going business concern, the corporation paid to its stockholders the dividends before mentioned, which "were entirely unearned." At the time each of the dividends were paid, the corporation had earned no profits or surplus out of which dividends could lawfully be paid; and payment of such dividends "impaired the capital assets of the corporation," and constituted an unlawful appropriation of the capital assets. Under the circumstances named, the stockholders were not authorized to retain the dividends so paid to them; and petitioners, as trustees in bankruptcy, are entitled, under the general principles of law, to recover the same. The question of the liability of each defendant rests upon the same state

of facts and the same questions of law, and therefore one suit can equitably and speedily adjust all questions arising relative to any of the defendants. Unless the court takes jurisdiction and in one suit adjusts all of the matters, petitioners will be forced to file separate suits against each defendant, which will needlessly involve a multiplicity of suits. The total amount of unearned dividends when recovered will be insufficient to pay the indebtedness of the bankrupt.

Cleveland & Goodrich, of Griffin, and Little, Powell, Hooper & Goldstein, of Atlanta, for plaintiff in error. Marion Smith, Ronald Ransom, Rosser, Brandon, Slaton & Phillips, and C. T. & L. C. Hopkins, all of Atlanta, for defendants in error.

ATKINSON, J. 1. As a ground of demurrer, it was urged that the petition did not purport to allege a joint liability against the defendants, but set forth distinct claims against the defendants separately; and consequently that there was a misjoinder of parties. It was also alleged in the demurrer that the petition sought to marshal the assets of several estates, thereby dealing with several things of distinct natures, and against several persons who have no joint interest in the subject-matter of the suit; and consequently that the petition was multifarious. The petition does not attempt to marshal the assets of any estate. Its object was merely to recover the amount of dividends alleged to have been unlawfully paid out by the corporation, some of which went into the hands of representatives of deceased stockholders. The plaintiffs are trustees in bankruptcy of the corporation which paid out the dividends, who, by virtue of their office, represent creditors of the bankrupt corporation, and as such they occupy the status of creditors relatively to the right to sue.

[1] It is declared in the Civil Code, § 2251:

"In all suits against the members of a private association, joint-stock company, or the members of existing or dissolved corporations, to recover a debt due by the association, company, or corporation, of which they are or have been members, or for the appropriation of money or funds in their hands to the payment of such debt, the plaintiff or complainant in such suit may institute the same, and proceed to judgment therein against all or any one or more of the members of such association, company, or corporation, or any other person liable, and recover of the member or members sued the amount of unpaid stock in his hands, or other indebtedness of each member or members: Provided, the same does not exceed the amount of the plaintiff's debt against such association, company, or corporation; and if it exceed such debt, then so much only as will be sufficient to satisfy such debt."

It was alleged in the petition that the total amount of unearned dividends, when recovered, will be insufficient to pay the indebtedness of the bankrupt. Under such allegations, the liability of the defendants, if any, under the statute quoted above, would be the full amount of their debt to the corporation.

The statute contemplates avoidance of multiplicity of actions, and is sufficient authority for joining all of the defendants in this action. See *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536; *Allen v. Grant*, 122 Ga. 552, 553, 50 S. E. 494; *Moore v. Ripley*, 108 Ga. 556, 561, 32 S. E. 647; *Boyd v. Robinson*, 104 Ga. 793, 803, 31 S. E. 29.

[2] 2. Another ground of demurrer urged that the petition should be dismissed, because it appears from the allegations thereof that the defendant resided in a different county from that in which the action was instituted, and therefore the court was without jurisdiction. As indicated above, the statute authorized the institution of one suit against all of the defendants. The suit was in equity, and the venue may be laid in the county of the residence of any defendant against whom substantial relief is prayed. Civil Code 1910, § 6540. As some of the defendants against whom substantial relief is prayed resided in Fulton county, jurisdiction as to them would also draw to it the defendant who resided in Spalding county.

[3] 3. It is alleged that the dividends were paid out of the capital stock of the corporation, there being no net profits from which to pay them. The plaintiffs contend that the capital assets of the corporation constituted a trust fund which the directors were prohibited, under penalty prescribed in the Penal Code, § 740, from applying to payment of dividends; and, being such, they could be followed for the benefit of creditors into the hands of the shareholders who received the dividends. It was not alleged that at the time the dividends were received the corporation was insolvent or was not a going concern, or that the shareholders received the dividends with notice that they were not being paid from net profits of the corporation. Nor was the good faith of the shareholders in receiving the certificates otherwise attacked. The demurrer complained of the absence of allegations of this character; and, as the demurrer was overruled, it must be assumed, in reviewing the judgment on demurrer, that the corporation was solvent and a going concern at the time of the payment of the dividends, and that the shareholders received the same in good faith and without notice that they were not being paid from net profits of the corporation. Viewing the petition in this light, we do not think it sets forth a cause of action. On its facts, as indicated above, the case is quite similar to that of *McDonald v. Williams*, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. Ed. 1022. It is unnecessary to repeat the discussion contained in the opinion in that case. It will suffice to say that the effort there was to recover dividends paid out by a corporation, not shown to be insolvent, to its shareholders who were not affected with notice that the dividends were being paid from the capital assets, and that there was a statute which prohibited the corporation from paying divi-

dends out of capital assets. The ruling in that case has been followed in *Great Western Mining Co. v. Harris*, 128 Fed. 321, 63 C. C. A. 51; *Lawrence v. Greenup*, 97 Fed. 906, 38 C. C. A. 546; and *New Hampshire Savings Bank v. Richey*, 121 Fed. 956, 58 C. C. A. 294. See, also, 5 *Thomp. Corp.* (2d Ed.) § 5363, p. 161; 2 *Cook on Corporations* (6th Ed.) § 548, p. 1497. The case differs from that of *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117, as will sufficiently appear from the remarks of Lumpkin, J., on page 519 of 130 Ga., 61 S. E. 117, in distinguishing the case from that of *McDonald v. Williams*, supra.

[4] 4. The demurrer also raised a question as to the right of the plaintiffs to recover dividends which were paid out prior to the time the corporation became indebted to the creditors for whom the trustees in bankruptcy were suing, and set up that the plaintiffs could not recover dividends which had been received four years before the institution of the suit. In view of the ruling in the preceding division, to the effect that the plaintiffs did not set forth a cause of action, it is unnecessary to deal with the questions thus raised, and they will not be decided.

Judgment reversed. All the Justices concur.

(144 Ga. 16)

PURVIS v. RASTE.

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. CONTINUANCE §22 — GROUND FOR CONTINUANCE.

There was no error in overruling the motion to continue or to postpone the case for the purpose of obtaining process in order to compel a female witness to appear and testify in person because, as it was contended, she had not answered one of certain interrogatories propounded to her.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 58-67; Dec. Dig. §22.]

2. TESTIMONY—CONCLUSION OF WITNESS.

Under the issues involved in this case, there was no error in refusing to allow a witness, who had stated that he was unable to tell whether a person to whom the plaintiff had executed a deed was insolvent at the time when such conveyance was executed, to answer the question, "Well, shortly after that."

3. WITNESSES §150—COMPETENCY—TRANSACTIONS WITH DECEDENT.

The provision of the Civil Code 1910, § 5853, par. 1, to the effect that the opposite party in a suit instituted or defended by an indorsee, assignee, or transferee of a deceased person shall not be admitted to testify in his own favor against the deceased person as to transactions or communications with such person, refers only to the immediate indorsee, assignee, or transferee of the deceased person. *Castleberry v. Parrish*, 135 Ga. 527, 69 S. E. 817.

(a) Where a plaintiff alleged that he had made a deed conveying land to another, who had conveyed it to a third person, who had in turn conveyed it to still another person, and the plaintiff attacked these deeds and sought to recover the land from the last grantee and to

have the deed made to her canceled, but did not make the first grantee, or any legal representative of him, a party, and did not make the second grantee a party, although he prayed the cancellation of the first deed, this did not render the plaintiff an incompetent witness to testify as to transactions between him and the first grantee.

(b) The prayer to have the first deed canceled, without making the grantee therein, or any legal representative of him, a party, did not change the ruling above made. There was no demurrer to the petition for want of proper parties.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 560, 653-657; Dec. Dig. §150.]

4. TESTIMONY—ADMISSIBILITY.

Under the issues and facts in this case, it was error to permit the defendant to testify as follows: "When Mr. Purvis brought the deed home, he told me he had bought Robert's place; and he says, 'If you outlive me, I want you to have this for a home.'"

5. VENDOR AND PURCHASER §239, 242 — BONA FIDE PURCHASER.

If a purchaser of real estate with notice of an existing equity sells to one who purchases bona fide, for value, and without notice, the latter will be protected; or if a purchaser bona fide, for value, and without notice of such equity, sells to one with notice, the latter will be protected, as otherwise a bona fide purchaser might be deprived of selling his property for full value. Civil Code 1910, § 4535. The charge of the court on this subject was inaccurate, especially in placing upon the plaintiff the burden of showing that the defendant and also her predecessor in title took with notice, without reference to whether they were purchasers for value.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 583-600, 603-605; Dec. Dig. §239, 242.]

6. APPEAL AND ERROR §216—TRIAL §256 —INSTRUCTIONS—REQUEST.

The charge complained of in the twelfth ground of the amended motion for a new trial was not subject to the criticisms made upon it. If a more complete statement of the rule that notice to an agent is notice to the principal was desired, a request for such a charge should have been made.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. §216; *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. §256.]

7. APPEAL AND ERROR §187—AFFIRMANCE—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

It cannot be held that the verdict was demanded by the evidence, and that an affirmance will result in spite of errors in the charge. The defendant in the court below not having raised the question of want of necessary parties in any proper manner, the judgment will not be affirmed because of the absence of such parties necessary at least for the obtaining of a part of the relief prayed by the plaintiff.

(a) In *Lane v. Newton*, 140 Ga. 415, 78 S. E. 1082, the question of the absence of necessary parties was raised in the trial court, and an effort to excuse the making of an administrator a party, by alleging that there was no such administrator, was met by a denial in the answer, and a naming of the administrator. There was no proof that there was no administration, but a decree of cancellation of a deed made by the intestate was obtained. The judgment was reversed. In *Palmer v. Inman*, 122 Ga. 226, 50 S. E. 86, and *Paulk v. Ensign Oskamp Co.*, 123 Ga. 467, 51 S. E. 344, an application to remove a cause from the state court to the federal court was involved, and the ques-

tion was entirely different from that in the present case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. ¶ 187.]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by R. H. Purvis against Lissie Raste. There was a judgment for defendant, and plaintiff brings error. Reversed.

Way & Burkhalter, of Reidsville, for plaintiff in error. Hines & Jordan, of Atlanta, and H. H. Elders, of Reidsville, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(144 Ga. 18)

GODDARD v. BOYD. (No. 435.)

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. WITNESSES ¶150—COMPETENCY—TRANSACTIONS WITH DECEASED PERSON.

Where suit to recover land was brought by one claiming to be an heir at law of a deceased person who held a conveyance from a former owner, and the defendant claimed by virtue of a chain of conveyances beginning with such former owner, such former owner was not an incompetent witness to testify on behalf of the defendant as to transactions between her and the deceased person under whom the plaintiff claimed as an heir. *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826; *Purvis v. Raste*, 85 S. E. 1012, this day decided.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 560, 653-657; Dec. Dig. ¶ 150.]

2. TRIAL ¶96—RECEPTION OF EVIDENCE—MOTION TO EXCLUDE—SUFFICIENCY.

Where motion was made to exclude evidence in bulk, the evidence consisting of a long extract from the testimony of a named witness, and a part of the evidence was competent and admissible, the exception going to the entire evidence, the judgment of the trial court will not be reversed for overruling the motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. ¶ 96.]

3. TRIAL ¶205—CHARGES—CONSTRUCTION TOGETHER.

While possibly certain portions of lengthy extracts from the charge to which exceptions were taken may have been subject to criticism, yet, when considered in connection with the entire charge, there is nothing in the charges complained of requiring a reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. ¶ 295.]

Error from Superior Court, Newton County; C. S. Reid, Judge.

Action between S. D. Goddard and Calvin Boyd. There was a judgment for the latter, and the former brings error. Affirmed.

R. B. Blackburn, of Atlanta, and R. W. Milner, of Covington, for plaintiff in error. Rogers & Knox, of Covington, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(144 Ga. 38)

ALLEN v. NAPIER, MAYNARD & PLUNKETT. (No. 524.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. JUDGMENT ¶874—SATISFACTION.

Where money recovered in a legal action for a particular person reaches that person, the law will not disturb his possession and take the money from him or his attorneys, who turned it over in full settlement of his claim, for the sole purpose of having it pass through the hands of another who has neither interest in nor charge upon the fund.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1643, 1644; Dec. Dig. ¶ 874.]

2. EXECUTORS AND ADMINISTRATORS ¶51, 495—ASSETS OF ESTATE—RIGHTS OF EXECUTOR.

Where a firm of attorneys was employed by the administrator of a deceased employé of a railway company, which, together with the employé, was engaged in interstate commerce at the time of the homicide, to recover damages for the negligent killing of such employé, and a recovery was had in favor of the administrator, who sued for the father of the deceased employé as the sole beneficiary entitled to recovery under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), and the money so recovered was paid by the attorneys of record to the father, the sole beneficiary, the administrator could not subsequently maintain a rule against the attorneys of record for the purpose of recovering the money in order that he might get commissions as administrator out of the fund so recovered, and turn the remainder of the money back to the beneficiary. In such a case, the administrator is not entitled to commissions out of the fund so collected.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2080-2106, 2108; Dec. Dig. ¶ 51, 495; Death, Cent. Dig. §§ 132-133.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by H. E. Allen, as administrator of George Roberts, deceased, against Napier, Maynard & Plunkett. There was a judgment for defendant, and plaintiff brings error. Affirmed.

H. E. Allen, as administrator of the estate of George Roberts, filed his petition alleging substantially as follows: Prior to his appointment as permanent administrator, William Roberts as temporary administrator of said estate had filed a suit in Stewart superior court against the Seaboard Air-Line Railway, for damages on account of the homicide of George Roberts, alleging that his death was due to the negligence of the defendant company. Subsequently the temporary letters were abated, and petitioner was appointed permanent administrator, and by proper amendment was substituted and made plaintiff in the cause in lieu of the temporary administrator. The temporary administrator had contracted with and employed the firm of Napier, Maynard & Plunkett, attorneys at law, of Macon, Ga., to prosecute the suit for him against the Seaboard Air-Line Railway,

contracting to give these attorneys, as compensation for their services, 25 per cent. of the amount recovered against the railway company. After petitioner was made permanent administrator, he contracted and agreed with these attorneys to continue the prosecution of the case, and to represent petitioner as the permanent administrator of the estate, on the same terms as existed between them and the temporary administrator. At the October term, 1913, the attorneys, acting under the agreement with petitioner, secured a verdict and judgment in favor of petitioner as administrator, against the Seaboard Air-Line Railway, for the sum of \$2,750; and on October 25, 1913, the same attorneys collected of the defendant railway the full amount of the verdict and judgment; notwithstanding which they have failed and refused to turn over to petitioner, as administrator of the estate, the sum so collected or any part thereof, less their fees as contracted for, except that they have conditionally offered to pay him his commissions as administrator if he would accept the same in full settlement, which he declined to do; and they wrongfully and erroneously, and contrary to law, claim the right to administer and distribute the fund themselves. A rule nisi was prayed against the attorneys, requiring them to show cause why they do not pay over to petitioner the money on written demand, and why the rule should not be made absolute, etc.

The defendants filed an answer in which, among other things, they averred that after Allen was appointed permanent administrator, and before he was made a party, he said he was willing for defendants' firm to continue the prosecution of the cause and to represent him as permanent administrator of the estate. After he was made a party plaintiff, there was never anything said about fees, and the only time he ever mentioned the subject of attorney's fees was a short while after he was made permanent administrator. Defendants denied that petitioner, as administrator, made any contract employing them to prosecute the case. They already had a contract with the temporary administrator, individually and as such temporary administrator, and on that contract suit had been filed and they had a lien on the suit for fees; and the contract made by the temporary administrator could not, as a matter of law, be disturbed by the permanent administrator. Plaintiff stated to defendants that he wanted them to continue the prosecution of the suit, but what transpired between plaintiff and defendant did not amount to a contract. At the October term, 1913, of Stewart superior court, a verdict and judgment were rendered in favor of H. E. Allen, administrator, for the use and benefit of William Roberts, against the defendant railway for the sum of \$2,750, and at the time of the rendition thereof defendants were acting under their original contract of employment,

which was made by the real plaintiff in the case, William Roberts, and Allen was only a nominal party to the case. Defendants collected the \$2,750, and they offered Allen his commissions as administrator, together with the costs and expenses of prosecution, as well as court costs; but they have refused to give him the net amount which belongs to William Roberts, and the same has been turned over to William Roberts, who is the sole beneficiary of the fund, and he has been fully and completely settled with. Defendants were employed to bring suit against the railway company for the tortious homicide of George Roberts, who died unmarried and childless, leaving no mother, and who was the son of William Roberts. The suit was brought in the name of William Roberts individually and as temporary administrator of the estate of George Roberts, and after the suit was brought H. E. Allen was made permanent administrator of the estate of George Roberts in the place of William Roberts, and was substituted as party plaintiff. The defendant railway answered the suit, setting up that it was an interstate carrier, and that at the time George Roberts was killed he was in the discharge of his duty as an employé of the railway and was engaged in interstate commerce, and that the federal Employers' Liability Act controlled the case. The railway made the voucher payable to Napier, Maynard & Plunkett, attorneys of record. It was sent directly to them. They cashed it, and have fully settled with William Roberts, for whose use and benefit the money was recovered.

J. A. Hixon, of Americus, for plaintiff in error. Harris & Harris, of Macon, for defendant in error.

HILL, J. (after stating the facts as above). This case was submitted to Judge Mathews for decision upon the petition and answer and an agreed statement of facts. It appears from the petition and the agreed statement of facts that the defendants, a firm of lawyers, brought suit for their client, who was the father of the deceased employé (conductor), against the railway in whose service the son was negligently killed while he and the carrier were both engaged in interstate commerce. They recovered a verdict and judgment against the railway, and settled in full with the sole beneficiary of the fund collected.

[1, 2] The question is whether the money could be paid directly by the attorneys to the father, who was the sole beneficiary and also temporary administrator of his son's estate, and who brought the suit, or whether it should have been paid to the plaintiff, who was the permanent administrator upon the son's estate, and who was made a party plaintiff in lieu of the temporary administrator, and in whose name the case proceeded to verdict and judgment. The court below

held, in effect, that the attorneys were with- in their rights when they paid the money re- covered to the sole beneficiary of the fund and refused on demand to pay it to the per- manent administrator of the son's estate. We think the court was right in so holding. The deceased employé and the defendant railway were both engaged in interstate com- merce at the time of the homicide. Suit was brought under the federal Employers' Li- ability Act, and under the facts that act was applicable. *St. Louis, etc., R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, 33 Ann. Cas. 1914C, 156. It is provided in that act that on the death of an injured em- ployé his personal representative may bring an action for his homicide for the benefit of those surviving him, who are entitled to the proceeds of any judgment that may be recov- ered. Those entitled to recover under the statute are the following: First, the surviv- ing widow or husband and children of such employé. Second, if there be no husband, widow, or children, then for the benefit of the employé's parents. Third, if there be no beneficiaries under the first and second class, then for the benefit of the next of kin de- pendent upon such employé. *Thornton on Federal Employer's Liability and Safety Ap- plication Acts* (2d Ed.) §§ 98, 105; *Act April 22, 1908, c. 149, 35 Stat. 65* (U. S. Comp. St. 1913, §§ 8657-8665). The beneficiary of the fund in the instant case comes within the second class, there being no widow or child, and the mother being dead. *St. Louis, etc., R. Co. v. Seale*, supra. A suit brought un- der the federal Employers' Liability Act is for the benefit of the next of kin of the de- ceased, as provided in the act. *St. Louis, etc., R. Co. v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031; *Roberts on In- juries to Interstate Employés* (1915) § 139. If the recovery is for the benefit of the next of kin under the statute, then it is not an asset of the decedent's estate for distribution, or for the paying of debts, but is to be paid di- rectly to such next of kin entitled thereto un- der the statute; and, if this be true, the per- manent administrator of the decedent's es- tate is not entitled to recover from those who have paid the fund to the one who is entitled to it. It is true he was a nominal party to

the suit, but it was for the purpose of recov- ering for the sole beneficiary, who has now received that to which the law says he is en- titled, and not for the estate he represents. If the personal representative brings the suit under the federal statute, it would not be on behalf of the estate he represents, but for the exclusive benefit of him who was the sole beneficiary, and who was entitled to re- cover for the tortious killing and for the loss which resulted to him thereby. *Gulf, etc., Ry. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785; *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 70, 33 Sup. Ct. 192, 57 L. Ed. 417, 33 Ann. Cas. 1914C, 176; *American R. R. of Porto Rico v. Diddrickson*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456. In the case of *White v. Ward*, 157 Ala. 345, 47 South. 166, 18 L. R. A. (N. S.) 568, it was held that:

"In defense of a claim by the administrator of a child for money recovered in a suit by the administrator for the negligent killing of the child, which, under the statute, is solely for the benefit of the child's parents, the attor- ney may show that he paid the money to as- signees of the parents and in satisfaction of attorneys' liens which might have been assert- ed against the money in his hands, notwith- standing the statute provides that every attor- ney receiving money for his client, and re- fusing to pay the same when demanded, shall be proceeded against in a summary way, and be subject to interest and penalties."

This case, though construing a state stat- ute, is in point. In the case at bar the real beneficiary has been paid the money to which he was entitled; and, even if the adminis- trator as the nominal party plaintiff was technically entitled to have the money pass through his hands and be by him paid to the beneficiary, yet the law will not require an unnecessary thing to be done; and, the bene- ficiary having received that which was due him from the proceeds of the suit, the attor- neys who collected the money and paid it over will not, at the instance of the nominal party who has no interest in the proceeds of the suit, be made to answer to him for it. That has been done which ought to have been done, and there the matter should rest. The court did not err in dismissing the rule.

Judgment affirmed. All the Justices con- cur.

(144 Ga. 47)

BARRETT v. WESTERN & A. R. CO.

(Supreme Court of Georgia. Aug. 14, 1915.)

*(Syllabus by the Court.)***1. DAMAGES ~~64~~—EVIDENCE—LOSS BY FIRE—INSURANCE.**

On the trial of a suit to recover damages alleged to have been caused by fire originating from sparks negligently emitted from the defendant's locomotive, the plaintiff as a witness was asked how much insurance he had collected from the burned property. Objection was made to his answering the question; and counsel for the defendant stated that he wished to make the point whether the plaintiff could recover of the railroad company all of his loss, in addition to the amount he had received from the insurance company, and wished to have a review of the decisions on that subject. The judge replied, "I will let him state the amount, and charge the jury that it has nothing to do with it." The witness answered that the property destroyed was worth \$6,855.73, upon which he had collected \$2,500 insurance. The judge did not instruct the jury as he stated he would do, but did instruct them that, if the plaintiff was entitled to recover, the measure of damages would be the full amount of his loss. *Held*, that it was erroneous to admit testimony that the plaintiff had received money from an insurance company on account of the destruction of the property by fire. *City of Rome v. Rhodes*, 134 Ga. 650, 68 S. E. 330. On the foregoing facts the error was prejudicial.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 113; Dec. Dig. ~~64~~.]

2. HARMLESS ERROR—INSTRUCTIONS.

Other charges complained of, though not strictly accurate, were not harmful to the plaintiff.

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by Dennis Barrett against the Western & Atlantic Railroad Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

W. C. Martin and William E. Mann, both of Dalton, for plaintiff in error. Tye, Peebles & Jordan, of Atlanta, and Maddox, McCamy & Shumate, of Dalton, for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur.

(144 Ga. 18)

MELTON v. HUBBARD. (No. 516.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. DIVORCE ~~236~~—ALIMONY—ELECTION.**

Where, in contemplation of a voluntary separation, a husband and wife entered into a written agreement, wherein it was stipulated that the husband was to pay to his wife a lump

sum of \$1,440 in full settlement of all claims of his wife for either temporary or permanent alimony, which was to be paid in installments of \$40 per month for the period of 36 months, the wife agreeing upon her part to accept this sum in lieu of alimony, and agreeing further to release the husband from any claim for attorney's fees to which she might be entitled in law in case she might in future bring suit for divorce; and where the wife subsequently, by way of a cross-petition in a suit for divorce brought by the husband, set up this contract and prayed that it be enforced and that the stipulated payments called for in the contract be allowed her "until the final hearing of the case, as temporary alimony, if the court should determine that said sum cannot at this time be allowed under said contract, or, in lieu thereof, such reasonable sum for temporary alimony as to the court may seem reasonable and just," and that she have certain other sums as damages, etc., and prayed further, if the court should for any reason "conclude that said contract cannot be enforced in manner and form as the same was made, that the court should allow to her such sums as temporary alimony" and other sums for attorney's fees as to the court might seem just and proper; and where the court upon the hearing of this petition entered a judgment in which, after stating in substance the provisions in the contract above referred to, it was adjudged that the plaintiff in the divorce suit (the husband) "do now pay to W. J. Grace, attorney for the respondent, the sum of \$120, and the further sum of \$40 per month on the first of July, 1907, and \$40 on the first day of each month thereafter, as temporary alimony, until the further order of the court"—*held*:

(a) The wife could not, after having accepted payment of alimony as ordered in the judgment quoted, maintain a suit for the enforcement of the contract. Having taken a judgment requiring the defendant to pay to her the amounts named in the judgment as alimony, and having received alimony under such order, she thereby elected to abandon the contract and treat it as nonenforceable.

(b) If the wife could not revert to the contract and enforce its terms under the circumstances stated, neither could her executrix, after her death, maintain a suit for the enforcement of the same.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 668, 667; Dec. Dig. ~~236~~.]

2. ASSIGNMENTS OF ERROR—CONSIDERATION.

The ruling made above is controlling in the case, and it is unnecessary to pass upon the special assignments of error.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by P. C. Hubbard, as executrix, against G. D. Melton. There was a judgment for plaintiff, and defendant brings error. Reversed.

A. L. Dasher, Jr., of Macon, for plaintiff in error. Ryals & Anderson, of Macon, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

~~64~~—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(144 Ga. 7)

KENT v. CENTRAL OF GEORGIA RY. CO.
(No. 480.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR ⇐926, 1058—REVIEW—HARMLESS ERROR.**

Where complaint is made in a motion for a new trial that a named witness for the plaintiff was not permitted to testify to certain facts, and in the brief of evidence it appears that the witness did testify to such facts, and both the motion for a new trial and the brief of evidence are duly approved by the presiding judge, this court cannot hold that the brief of evidence is incorrect, but must reconcile the two statements on the theory that, while at one time the court made the ruling stated in the motion for a new trial, at some stage of the examination the testimony was admitted. Under such facts, the ruling will not require a new trial, even if the evidence was admissible. *Roberts v. Tift*, 136 Ga. 901, 906, 72 S. E. 234; *Woods v. State*, 137 Ga. 85, 72 S. E. 908.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735-3747, 4195, 4200-4204, 4206; Dec. Dig. ⇐926, 1058.]

2. APPEAL AND ERROR ⇐1051—REVIEW—HARMLESS ERROR.

The general rule is that a witness cannot testify to matters derived from memoranda made by others, and of which he has no independent knowledge. Yet, inasmuch as the matters touching which the witness testified appear from other uncontradicted evidence, the error of allowing such testimony in this case is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. ⇐1051.]

3. EVIDENCE ⇐407—PAROL—CARRIAGE OF LIVE STOCK—VARYING CONTRACTS.

Where a shipper tenders to a carrier live stock for transportation, and voluntarily enters into a written contract with the carrier that in consideration of the reduced rate of freight he assents to certain stipulations therein contained, and where it is not contended that any fraud was perpetrated by the carrier's agent in procuring the contract, it is not error to repel testimony by the shipper that at the time of the shipment nothing was said about rates.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1826-1828, 1841; Dec. Dig. ⇐407.]

4. CARRIERS ⇐218—CARRIAGE OF LIVE STOCK—LIABILITY OF CARRIER.

A shipper of live stock entered into a special contract with the carrier, and, in consideration of a reduced freight rate, agreed that he had examined and found in good order and condition the car provided for the transportation of his live stock; that he accepted the same, and agreed that as thus provided it was suitable and sufficient for said purposes; that in case of delays of trains from any cause he was to feed, water, and take proper care of the stock at his own expense; and that the carrier was not

bound to carry the stock by any particular train or in time for any particular market, or otherwise than with as reasonable dispatch as its general business would permit. It was further agreed that, as a condition precedent to the shipper's right to recover any damages for loss or injury to the stock, the owner or person in charge of the stock should give notice in writing of his claim to the agent before the stock was removed from the place of delivery of the same, and before such stock was mingled with other stock. Upon the trial of an action brought by the shipper against the carrier, for damages in the value of one of the animals, alleged to have died, and on account of injuries to others, because they were without food, exercise, or water during the period of transportation, it appeared from the evidence that the plaintiff, before signing the contract, examined the car; that he failed to accompany the stock or make provision for their being fed, watered, and cared for; that the stock were loaded at noon, leaving about three hours after being put upon the car, arriving at a junction point at 7:30 p. m., where they remained in the car until the next afternoon, when they were transported, by the first scheduled train, to their destination, reaching there at 5:30 p. m.; that the stock were transported on the first trains of the carrier scheduled between the initial point and their destination; that the trains were run on schedule time; and that no written claim, as provided in the contract, was presented to the carrier. *Held*, that it was not error to direct a verdict for the defendant. *Williams v. Central of Georgia Ry. Co.*, 117 Ga. 830, 43 S. E. 980; *Central of Georgia Ry. Co. v. James*, 117 Ga. 832, 45 S. E. 223; *Ragsdale v. Southern Ry. Co.*, 119 Ga. 627, 46 S. E. 832; *Gilleland v. L. & N. R. Co.*, 119 Ga. 739, 47 S. E. 336; *Southern Ry. Co. v. Tollerson*, 135 Ga. 74, 68 S. E. 798.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. ⇐218.]

5. APPEAL AND ERROR ⇐843—DETERMINATION—MOOT CASE.

Inasmuch as the plaintiff is not entitled to recover, it is immaterial to inquire whether, under the testimony, the value of the horses as contained in the contract of shipment was arbitrary, or was fixed in a bona fide attempt to agree on a specific valuation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. ⇐843.]

Error from Superior Court, Macon County; *Z. A. Littlejohn*, Judge.

Action by F. H. Kent against the Central of Georgia Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Lawton Nalley and Thomas E. Scott, both of Atlanta, for plaintiff in error. Jule Felton, of Montezuma, and E. A. Hawkins, of Americus, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(148 Ga. 840)

**GEORGE W. MULLER BANK FIXTURE
CO. v. GEORGIA STATE SAVINGS
ASS'N et al. (No. 538.)**

(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

**1. MECHANICS' LIENS — 276 — FORECLOSURE —
COMPLAINT — AMENDMENT.**

A foreclosure of a mechanic's lien, alleging that the work done and material furnished were pursuant to a contract with the contractor, and praying a general judgment against the contractor and the foreclosure of the lien against the improved property, is not amendable by adding a second count alleging that the materials furnished and work done were at the instance and with the consent of both contractor and owner, and praying judgment in personam against both for the reasonable value of the material and services, and for a foreclosure of the lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 539-545; Dec. Dig. — 276.]

**2. MECHANICS' LIENS — 108, 281 — RIGHT TO
LIEN — FORECLOSURE — EVIDENCE.**

A mechanic furnishing material and doing work on the employment of a subcontractor does not acquire a lien against the property improved. Applying this principle to the evidence, a nonsuit was proper.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 140, 141, 565-572; Dec. Dig. — 108, 281.]

**3. APPEAL AND ERROR — 1056 — REVIEW —
HARMLESS ERROR.**

The excluded evidence, even if allowed, would not have materially changed the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. — 1056.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the George W. Muller Bank Fixture Company against the Georgia State Savings Association and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Anderson, Cann & Cann, of Savannah, for plaintiff in error. Osborne & Lawrence and Hitch & Denmark, all of Savannah, for defendants in error.

EVANS, P. J. The George W. Muller Bank Fixture Company brought suit against the Georgia State Savings Association, the owner of the property, and E. Morgan, its contractor, to foreclose its lien as a materialman. The petition alleged that the savings association was the owner of a certain described lot of land, and as such employed E. Morgan as contractor to make certain improvements upon the building located on the land; that the contractor in turn contracted with the Southern Seating & Cabinet Company for installing certain cabinet, marble, and metal work; that the Southern Seating & Cabinet Company in turn duly transferred its contract for the material and work to the plaintiff, which at once notified the savings association and its contractor, who accepted petitioner in the place of the

Southern Seating & Cabinet Company; that the contract was completed, and within three months the plaintiff's claim of lien was duly recorded; and that under the terms of its employment the plaintiff was to receive from the contractor \$6,512.50, of which sum \$4,596.56 had been paid, leaving a balance due of \$1,916. The prayer was for a general judgment against the contractor, and for a foreclosure of the plaintiff's lien upon the real estate of the owner. The plaintiff proposed to amend its petition by adding a new count, in which it was alleged, that the Georgia State Savings Association had employed Morgan as the contractor to improve certain property described in the amendment, and that the plaintiff, "at the instance of and with the consent and recognition of the said E. Morgan and said Georgia State Savings Association, did the following work and supplied material in accordance with said employment as a contractor and materialman on the building owned by said Georgia State Savings Association heretofore referred to, and in the banking house thereof, as follows:"—describing the work and material. The prayer was that plaintiff have judgment for the reasonable value of the work done and material furnished, amounting to \$1,916, against the contractor and the association; and that the petitioner's lien be set up and established and foreclosed against the real estate. The court declined to allow the proffered amendment.

[1] 1. The cause of action set out in the second count is essentially different from that declared on in the original petition. The plaintiff proceeded originally on the ground that it was a subcontractor, and had furnished the material and performed the work by virtue of an express contract with the contractor. It was not sought to charge the owner with personal liability, but it was sought to impress the land with a lien by virtue of the statute. The cause of action set up in the proposed amendment is an implied assumpsit against the contractor and the owner for materials furnished and work done at their special instance and request. The contract it is thereby sought to imply is essentially different from that alleged in the original petition. It is alleged in the petition that the contract was made with the contractor. In the amendment it is sought to set up an implied contract with the contractor and the property owner. The amendment was properly disallowed. *Lamar v. Lamar, etc., Drug Co.*, 118 Ga. 850, 45 S. E. 671.

[2] 2. The plaintiff complains of a nonsuit. It appears from the evidence that the Georgia State Savings Association employed E. Morgan to do certain described work on a building located upon the premises of the former. The contractor in turn sublet this work to the Southern Seating & Cabinet

Company, which assigned to the plaintiff its contract. On February 12, 1912, Morgan, the contractor, acknowledged the receipt of a letter from the plaintiff, containing copies of an agreement between itself and the Southern Seating & Cabinet Company, a bond, an assignment, and an affidavit of Tigner. The letter from Morgan continued:

"I do not intend to agree to anything whatever that will release the Southern Seating & Cabinet Company from any of its obligations under its contract. The agreement, copy of which you send me, is a matter entirely between yourselves and the Southern Seating & Cabinet Company. The bond is of course absolutely inadequate; the affidavit is worthless for the purpose for which it is made, because it is made by a corporation and not by an individual. It is apparent that a corporation cannot swear. I am willing to facilitate the Southern Seating & Cabinet Company in their effort to complete their contract in every reasonable way, as I have done ever since the commencement of this work. But under no circumstances will I do anything to release them from their obligation to carry out their contract. I have no objection to the Southern Seating & Cabinet Company employing you to complete their contract for them for their account, provided, of course, this is satisfactory to the architect, Mr. Whitcover, and the Georgia State Savings Association. It must be understood, however, throughout, and until the completion and final settlement, that you are acting for the account of the Southern Seating & Cabinet Company and not in any sense as an independent contractor with me. With this understanding you may complete the contract for the account of the Southern Seating & Cabinet Company."

On February 28, 1912, the plaintiff addressed to Morgan a letter in which it stated that its superintendent had informed it that Morgan would not recognize it on the job of the Georgia State Savings Association, and wishing to know whether Morgan accepted the assignment "in a business way." Morgan replied to this letter on March 1, 1912, as follows:

"Your superintendent is in error in stating that I take the position that I do not recognize you on the job of the Georgia State Savings Association. I have recognized the difficulties in which all parties have found themselves in the matter of this contract, and I have endeavored to be fair to all parties. In each instance in all I have done I have acted under legal advice, with the idea of being fair to everybody and at the same time protecting myself. I received a copy of your contract with the Southern Seating & Cabinet Company, and permitted you to go ahead with the work. I have not the slightest objection to your furnishing [finishing] the work. I have, however, taken the position that my original contract was with the Southern Seating & Cabinet Company, that your execution of the work did not relieve them from their liability to me under their contract, nor have regarded you in any sense as an independent contractor. You have no right to ask more of me than could the Southern Seating & Cabinet Company, for whose account you are completing the work. For my part I want the work completed; and if you do the work, I desire to see you get your money, and I will do everything I can to help you get all that is due you. All I want is to be assured of the completion of the contract to the acceptance of the owner of the building. I am perfectly willing to make any payments from time to time which can fairly be collected under my original contract with the Southern Seating & Cabinet Company,

and which can be made in justice to myself, having due regard to the fact that the way to assure the completion of the contract is to always keep enough back to pay for its completion. In conclusion permit me to say that I am just as anxious to have this work done and paid for as you are, and I am equally anxious to pay the man that does it to the satisfaction of the owner. While your letter makes it appear so, I really do not think there is any difference of opinion between you and me."

On March 7, 1912, the plaintiff acknowledged receipt of this letter, and thereupon wrote to Morgan, among other things, as follows:

"Summing up your entire letter, you have set forth certain conditions as they exist; and we agree with you on everything in your letter, with the exception that you have failed to acknowledge the receipt of our former letter and assignment. What we want you to do is to say that you will pay us \$6,512.50 in lawful money on the completion of part No. 3 of the general specifications and contract. If there is any difference outside of this, it is up to you and the Southern Seating & Cabinet Company and their bondsmen. What we are after is getting ourselves accepted by you to this amount, and when you do this we will proceed."

The contractor responded, on March, 9, 1912:

"Replying to your favor of the 7th, as I have previously written, I have received all your correspondence and a copy of the assignment referred to by you, whereby the Southern Seating & Cabinet Company gives you the authority to complete the work and receive payment therefor. As previously stated, I do not recognize you as an independent contractor, because such recognition would release the Southern Seating & Cabinet Company and their bond from the obligation to me. I am perfectly willing for you to complete the contract for the account of the Southern Seating & Cabinet Company and pay you, under authority of the assignment, the money which may be lawfully due to the Southern Seating & Cabinet Company, under their contract with me, whatever the amount may be under the terms of said contract. I owe the Southern Seating & Cabinet Company approximately \$6,512.50. This may not be absolutely correct, but is approximately so. It is understood I am not obligating myself to pay this full amount unless the amount stated is ascertained to be actually due to the Southern Seating & Cabinet Company. It is understood that I will pay you, under authority of this assignment, only the total amount finally due the Southern Seating & Cabinet Company under their contract. If, however, there is any difference between the amount due you for work and the amount I am due to the Southern Seating & Cabinet Company which may be recovered by me from the Southern Seating & Cabinet Company or their bondsmen, I will endeavor to collect the difference, in which event I will pay the same to you."

The foregoing correspondence contains the contract by virtue of which the plaintiff undertook the work upon the building of the Georgia State Savings Association. It is clear from this correspondence that the contractor did not employ the plaintiff to furnish the materials and do the work. The contractor was insistent that the original subcontractor, the Southern Seating & Cabinet Company, should do this work, and that he would not release it from the contract; and that, if the plaintiff undertook to do the work by virtue of the assignment of the

Southern Seating & Cabinet Company to it, it would not do it as a contractor under him, but as an employé of the assignor. The contractor never consented that the plaintiff should be substituted for the Southern Seating & Cabinet Company. The plaintiff's assignor had no right to assign its executory contract without the consent of the contractor. *T. T. & G. R. Co. v. Bedgood*, 116 Ga. 945, 43 S. E. 257. There is nothing in the correspondence between the parties to indicate that the contractor recognized the plaintiff otherwise than as an employé of the Southern Seating & Cabinet Company, doing the work on its behalf by virtue of the assignment of the contract. Such being the case, the plaintiff was not entitled to a lien for the materials furnished, or for work done. *General Supply Company v. Hunn*, 128 Ga. 615, 55 S. E. 957; *Cambridge Tile Co. v. Bank*, 128 Ga. 178, 57 S. E. 311.

[3] 3. The president of the plaintiff company offered to testify that after the work had been under way about two months he went to Savannah and ordered his workman to suspend work, that the contractor fretted about it, and the vice president of the Georgia State Savings Association asked what was the matter, to which he replied that the contractor did not satisfy him that he was going to acknowledge his company on the job, that he remained there two or three days and saw the contractor, and said to him:

"Mr. Morgan, I want to know whether you are going to accept me on the job. I want to know whether I will get my money. He said: 'Sure I accept you. Go on with the work and you will get your money.' I took his word that he had accepted me."

The plaintiff contends that this amounted to a novation of the contract, by the terms of which the contractor accepted the plaintiff as an independent contractor employed by him in the prosecution of the work which he had contracted to perform. On the other hand, it is insisted, in the first place, that, if it amounted to a novation, there was absolutely no consideration for the novated contract; and, secondly, that the statement of the contractor in no wise indicated any departure from his position as contained in his written correspondence. We have carefully compared the testimony excluded by the court with the correspondence evidencing the contract between the contractor and the plaintiff, and we cannot find any substantial variance. In the correspondence the contractor stated that he was willing to recognize the plaintiff on the job as an employé of the subcontractor, but not as an independent contractor; and this testimony is in substantial accord with the contract between the parties, as contained in their original letters. Its exclusion will not require a reversal of the judgment.

Judgment affirmed. All the Justices concur.

(144 Ga. 13)

WASHINGTON v. TURNER. (No. 495.)
(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

VERDICT—DIRECTED VERDICT.

Under the decision in *Smith v. Du Bose*, 73 Ga. 413, 432, 3 S. E. 309, 6 Am. St. Rep. 200, there was no error in directing a verdict in this case. No other question was argued in the brief of counsel for the plaintiff in error.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between Anna Washington and W. A. Turner, executor. There was a judgment for Turner, and Anna Washington brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error. F. P. McIntire, of Savannah, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(144 Ga. 36)

STURKEY v. M. O'DOWD SONS & CO.
(No. 520.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. PRELIMINARY RULINGS—ERRORS.

No material error is shown in the rulings of the court pending the trial.

2. CHARGE—ERRORS—EVIDENCE.

While the charge in reference to the burden of proof was not entirely accurate, in view of the evidence in the case and the issues made, the inaccuracy was not of such character as to require the grant of a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by W. O. Sturkey against M. O'Dowd Sons & Company. There was a judgment for the latter, and the former brings error. Affirmed.

Pierce Bros., of Augusta, for plaintiff in error. D. G. Fogarty, of Augusta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(144 Ga. 21)

J. I. CASE THRESHING MACH. CO. v. THURMOND.

(Supreme Court of Georgia. Aug. 11, 1915.)

(Syllabus by the Court.)

1. SET-OFF AND COUNTERCLAIM—22—SUBJECT-MATTER OF COUNTERCLAIM.

If the counterclaim set up against the plaintiff by the defendant in his plea be treated as one arising ex contractu, it was the subject-matter of set-off. If it be treated as one arising ex delicto, it was alleged that the plaintiff was a nonresident corporation, and that he should be allowed to plead an equitable set-off. In either event, there was no error in refusing to strike the plea on the ground that it sought to set off damages for a tort against a suit on a contract. See, in this connection, *Bibb Land-Lumber Co. v. Lima Machine Works*, 104 Ga.

116, 30 S. E. 676, 31 S. E. 401; Hecht v. Snook, 114 Ga. 921, 924, 925, 41 S. E. 74; Arnold v. Carter, 125 Ga. 319, 325, 54 S. E. 177.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 26-37; Dec. Dig. § 22.]

2. PROOF—SUFFICIENCY.

There was sufficient evidence to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by the J. I. Case Threshing Machine Company against J. P. Thurmond who counterclaimed. There was a judgment for defendant, and plaintiff brings error. Affirmed.

C. E. Sutton, of Washington, Ga., for plaintiff in error. Colley & Colley, of Washington, Ga., for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(144 Ga. 35)

SEABOARD AIR LINE RY. v. MOSELEY. (No. 519.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. TRIAL § 261—CHARGES—REFUSAL.

The exceptions to the refusal of certain requests to charge the jury are not well taken, because the requests in themselves are not such complete and accurate statements of the law in all respects as to render it error for the judge to decline to give them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.]

2. RULINGS—EXCEPTIONS—ERRORS.

The exceptions to the charge as given and to rulings of the court made pending the trial are without merit.

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Action between the Seaboard Air Line Railway and Howell Moseley, by his next friend. There was a judgment for Moseley, and the railroad company brings error. Affirmed.

J. B. Geiger, of Mt. Vernon, for plaintiff in error. G. W. Lankford, of Lyons, and Hines & Jordan, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(143 Ga. 810)

SOUTHERN ICE & COAL CO. v. ATLANTIC ICE & COAL CORPORATION. (No. 526.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. MONOPOLIES § 24—REGULATION OF PRICES—JURISDICTION OF COURT.

The superior court has no jurisdiction to make or regulate the price of a commodity made and sold in this state by a manufacturing corporation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

2. INJUNCTION § 120—RELIEF—PRAYER.

There being no prayer for specific relief other than the fixing of minimum prices below which the defendant could not sell, the court did not err in sustaining the demurrer and dismissing the petition.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 251, 252; Dec. Dig. § 120.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Southern Ice & Coal Company against the Atlantic Ice & Coal Corporation. A demurrer was sustained to the petition, and plaintiff brings error. Affirmed.

The Southern Ice & Coal Company brought a petition against the Atlantic Coal & Ice Corporation, alleging in substance as follows: The plaintiff is a Georgia corporation, with a capital stock of \$150,000. The defendant corporation was created and organized under the laws of Virginia, with a capital stock of \$7,000,000. The defendant owns and operates factories for manufacturing and selling ice in Macon, Bibb county, and in many other cities in Georgia, Florida, and Tennessee, and the plaintiff is the only competitor of the defendant in Macon, Ga. The defendant corporation was organized and chartered for the purpose of controlling as a monopoly the manufacture and sale of ice in cities and states where it should thereafter own and operate or control factories, or carry on business, and to prevent and impede free and fair competition in trade between itself and owners of ice factories in all the cities and states where it owns and creates or controls ice factories or does business, and with this purpose has taken over and obtained control of many ice factories in the states where it operates. The defendant now consists of a combination and union of the ice factories originally built, owned, and operated by it, and of former independent ice factories, all of which are now operated under the charter of the defendant, which combination is illegal and contrary to the laws of Georgia and paragraph 4 of section 2 of article 4 of the Constitution of this state. The defendant has never built an ice factory except for the purpose of carrying out the scheme of creating a monopoly to prevent free and fair competition in trade between itself and owners of independent ice factories, except in Ft. Valley, Ga., where it build a small plant for the purpose of assisting in carrying out its contract with the Armour car lines in the refrigeration of cars for the shipment of fruit. For the purpose of creating a monopoly and for the purpose of defeating fair and honest competition and increasing the price of ice, the defendant forced all of the former independent ice factories either to sell to it, or to combine with it and operate under its charter, thus forming the combination, union, and monopoly, all of which tends to defeat and does defeat free and fair competition and results in the

monopoly planned by the defendant. For the purpose of further defeating free and fair competition and of controlling the sale and price of ice, the defendant entered into an illegal contract and combination with the Southern Ice Company, a corporation of Nashville, Tenn.; the stockholders of the defendant being also large stockholders of the Southern Ice Company.

The general scheme of carrying out its purpose was that the defendant would take over and combine with more than one independent factory, with the understanding and agreement between itself and the Southern Ice Company that they would nominally appear as competitors, but in fact would and did agree among themselves to maintain a fixed scale of prices for the sale of ice, and in this way defeat free and fair competition. This scheme was carried out in a number of cities of Georgia and Florida. From the organization of the plaintiff company, the defendant set out to drive it out of business and carry on the monopoly for the sale of ice in Macon and in other territory in which the plaintiff now does business, and by threats, intimidations, and other unlawful means, and by reason of the formation of a monopoly, has a scheme to prevent plaintiff from engaging in or remaining in or carrying on business. Immediately upon the commencement of the sale of ice by the plaintiff, the defendant reduced the price of ice to the principal users in Macon from \$5 to \$4.50 per ton, and from time to time thereafter the defendant has reduced the price of ice on wholesale and retail quantities, and is now threatening to reduce the price lower, for the purpose of driving plaintiff out of business, and for the purpose of then increasing to an unreasonable rate the price of ice in Macon and the territory in which the plaintiff and defendant compete. The difference in the price of ice at the scale of prices for which ice was sold by the defendant company immediately and for many years before the plaintiff entered business and the prices of ice at the scale of prices now in effect amounts to \$150 to \$187.50 per day to plaintiff; although the cost of the manufacture of ice, by reason of the increase in the price of labor and increase in the price of water rates and for other causes, is considerably greater than was the cost of its manufacture for many years before the plaintiff entered into business; and the selling price has been from time to time reduced since the defendant entered business, for the purpose of driving defendant out of business and creating a monopoly. In other cities where defendant owns and operates the only ice factory, and where there is no competition, the defendant charges and receives a much higher price for ice, both wholesale and retail, although in such cities freight rates on coal is comparatively much lower than it is in Macon in proportion to the price of ice; the item of coal being the largest expense in the

manufacture of ice. All the unlawful means practiced by the defendant to prevent the plaintiff from enjoying, remaining in, or carrying on business at a fair and legitimate profit are in restraint of trade, prevent fair competition, and create a monopoly, and are illegal and contrary to the principles of equity and good conscience. Ice is one of the necessities of life, the injury that has been inflicted by defendant's means and methods is irreparable in damages, and the plaintiff has no adequate remedy at law for the correction of the injury inflicted. It prays for temporary and permanent injunction to restrain the defendant from further reducing or cutting the price of ice, either in wholesale or retail quantities, or from selling or offering for sale ice in such quantities at a rate less than that at which it is now offering ice for sale in the city of Macon and Bibb county, and in any territory in which the plaintiff and the defendant are competitors, and to compel defendant to offer ice for sale in the city of Macon, Bibb county, and territory, at such prices as will allow both plaintiff and defendant a fair and legitimate profit; and that the defendant be enjoined from selling ice in Macon and the territory supplied from Macon at a schedule of prices below the cost of manufacturing and delivering it.

The defendant filed a general demurrer to the petition, which was sustained, and the plaintiff excepted.

J. E. Hall and Guyton Parks, both of Macon, for plaintiff in error. Payne & Jones, of Atlanta, and Miller & Jones, of Macon, for defendant in error.

HILL, J. (after stating the facts as above). By the allegations of the petition a strong case is made out prima facie tending to show an illegal combination and conspiracy between the defendant company and a similar one outside the state, the purpose of which, by reducing the selling price of ice in the territory covered by the plaintiff below the cost of manufacture and delivery, was to drive the plaintiff from the territory now occupied by it and the defendant, and then to raise the price of ice unreasonably high and have a monopoly of the business of manufacturing and selling it in that territory. It is alleged that the defendant company is a corporation with \$7,000,000 capital, and that the plaintiff is capitalized at only \$150,000. The acts complained of are, briefly stated, that the defendant corporation has: (1) Bought and obtained control of various independent ice factories previously owned by individuals and independent corporations in Georgia, Florida, and Tennessee, for the purpose of defeating and lessening competition. (2) Entered into an illegal combination and contract with the Southern Ice Company of Nashville, Tenn., for the same purpose. (3) Intimidated the customers of the plaintiff by refusing to sell them ice when

the plaintiff was out of business, if they bought ice from the plaintiff. (4) Reduced the price of ice in the city of Macon, where the plaintiff's factory is located, below the cost of production. It is alleged that these acts on the part of the defendant company will cause irreparable damage to the plaintiff which is incapable of estimation. The plaintiff's prayer is for injunction to prevent the defendant from further reducing the price of ice below the cost of manufacturing and delivering it, but there is no prayer for injunction against the illegal combination or conspiracy alleged to exist and to be in restraint of trade.

[1] The demurrer raises the question of the jurisdiction of the court to determine a question like the one at bar. It will be observed that the relief sought is not to break up or set aside the alleged illegal combination and conspiracy; and hence we will not discuss that phase of the case, but we address ourselves to the question directly made by the petition and demurrer. Can the superior court, on a hearing of this kind, fix the prices at which ice may be sold, and put a limitation on the price below which the defendant cannot sell? Would it be within the power of the superior court, assuming all of the allegations of the petition to be true, to grant a perpetual injunction forbidding the defendant from ever selling ice below a schedule of prices now fixed by it? We know of no such power vested in the superior court. If such a judgment as prayed (permanent injunction) should be rendered, it would be a final judgment, and there could be no modification of that judgment, without trouble and delay at least, to meet the changing conditions surrounding the manufacture and sale of ice, and to meet the market conditions which affect the price of commodities in order to produce the article manufactured and sold. The price below which the defendant could not sell would become fixed by judgment of the court, and it could not easily be changed, if at all, to meet the varying conditions of trade. It is insisted by the plaintiff that there is no allegation or prayer for the fixing of rates, but that the prayer is for an injunction to prevent the defendant from cutting the price of ice to a rate less than the cost of production, etc. But we think that the grant of the prayer of the plaintiff would in effect be the fixing of a minimum rate or price below which the defendant could not

sell; and, if the court could name the minimum, it could as well name the maximum—a power which we think the superior court does not possess. It is true that in cases where rate-making bodies, or the Legislature, have fixed rates for certain public service corporations, the courts may say whether a given rate is just and reasonable, or confiscatory, or remunerative, and the like, within the meaning of the law; but that class of cases, where the court has jurisdiction, is very different from one where it is sought, in effect, to confer on the superior court a right primarily to fix and regulate prices of commodities of private corporations, without express constitutional authority to do so. There is no authority of which we are aware which confers such power or jurisdiction upon the superior court, either as a court of law or in the exercise of its equity jurisdiction. The Legislature of this state, by virtue of the authority vested in it expressly by the Constitution, has created a commission in the nature of a public service commission, and has conferred on it the right to make just and reasonable railroad and certain other rates, which may be revised from time to time as conditions necessitate (Civil Code, § 2615 et seq.); but those powers have not as yet been extended by the Legislature to any tribunal so as to include a corporation like the present, or on the superior courts to fix and regulate the price at which such corporations may sell the products of their factories.

The case of *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126, cited by the plaintiff, is different in its facts from the present. In that case this court held that a combination of merchants to compel another dealing in similar kinds of merchandise to sell at prices fixed by them, or, upon his refusal to do so, to prevent those of whom its members were purchasing customers from selling to him, was contrary to public policy and void. But the allegations and prayers in that case are different from those in the present.

[2] Basing our decision upon the lack of authority on the part of the superior court to make rates or prices below which a manufacturer of ice cannot sell, we think the court below properly sustained the demurrer and dismissed the petition.

Judgment affirmed. All the Justices concur.

(144 Ga. 14)

MCDONALD v. WARD.**WARD v. McDONALD.**

(No. 497.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. TRIAL** \Rightarrow 295—**INSTRUCTIONS—CHARGES.**

While the charges of the court complained of were not in all respects accurate, and were to some extent subject to criticism, when viewed in connection with the entire charge, and with the evidence, they are not such as to require a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. \Rightarrow 295.]

2. ERRORS—REVERSIBLE ERRORS.

The other rulings complained of do not contain reversible error.

3. PROOF—SUFFICIENCY.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

4. APPEAL AND ERROR \Rightarrow 1103—**AFFIRMANCE—CROSS-BILL OF EXCEPTIONS—DISMISSAL.**

The judgment having been affirmed on the main bill of exceptions, the cross-bill of exceptions is dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4383; Dec. Dig. \Rightarrow 1103.]

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action between C. J. McDonald and S. K. Ward, as administrator. The former brings error, and the latter assigns cross-errors. Affirmed on main bill and cross-bill of exceptions dismissed.

A. S. Way, of Reidsville, and Thomas & Gibbs, of Jesup, for plaintiff in error. P. W. Meldrim and Edwin A. Cohen, both of Savannah, for defendant in error.

LUMPKIN, J. Affirmed. All the Justices concur.

(144 Ga. 12)

JONES v. BLACKMAN.

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***PROOF—SUFFICIENCY—NEW TRIAL.**

There was sufficient evidence to support the verdict, and there was no error in overruling the motion for a new trial based on the ground that the verdict was contrary to law and the evidence.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action between John Jones and Mrs. W. S.

Blackman. There was a judgment for the latter, and Jones brings error. Affirmed.

W. A. Slaton, of Washington, Ga., for plaintiff in error. O. E. Sutton, of Washington, Ga., for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(144 Ga. 13)

SAVANNAH ELECTRIC CO. v. HOWARD.

(No. 493.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. CHARGE—ERRORS—NEW TRIAL.**

Considered in the light of the evidence and the entire charge, no such errors are shown in the portions of the charge excepted to or in the alleged omissions to charge as require the grant of a new trial.

2. PROOF—SUFFICIENCY.

The evidence authorized the verdict.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between the Savannah Electric Company and B. S. Howard. There was a judgment for Howard, and the company brings error. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error. Twiggs & Gazan, of Savannah, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(144 Ga. 12)

CULLEN v. TYLER. (No. 490.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***AFFIRMANCE—GROUND FOR AFFIRMANCE.**

No specific error of law is complained of in the motion for a new trial, and the verdict is supported by the evidence.

Error from Superior Court, Burke County; H. O. Hammond, Judge.

Action between W. B. Cullen and O. M. Tyler. There was a judgment for Tyler, and Cullen brings error. Affirmed.

Wm. H. Davis, and C. B. Garlick, both of Waynesboro, for plaintiff in error. Wm. H. Fleming, of Augusta, and Brinson & Hatcher, and H. J. Fullbright, all of Waynesboro, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

\Rightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(133 Ga. 322)

LAW et ux. v. McCORD. (No. 534.)

(Supreme Court of Georgia. Aug. 14, 1915.)

*(Syllabus by the Court.)***STATUTES §98—SPECIAL LAWS—COURTS—UNIFORMITY OF JURISDICTION.**

The act approved September 4, 1908 (Laws 1908, p. 1107), entitled "an act to provide for the establishment of children's courts as branches of the superior courts," etc., held unconstitutional, because violative of article 6, § 9, par. 1, of the Constitution of 1877, which provides for uniformity of the "jurisdiction, powers, proceedings, and practice of all courts * * * of the same grade or class," etc.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 110, 111; Dec. Dig. §98.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Petition by R. E. Law and wife for writ of habeas corpus against Robert McCord. From a judgment denying the writ, petitioners bring error. Reversed.

Walter A. Sims, of Atlanta, for plaintiffs in error. Dorsey, Brewster, Howell & Heyman and Hugh Howell, all of Atlanta, for defendant in error.

BECK, J. R. E. Law and Mrs. R. E. Law brought their petition for a writ of habeas corpus, wherein they sought to release from custody Thomas and Marion Law, their children, alleged to be illegally detained in an institution known as the Home of the Friendless, in the city of Atlanta; it being alleged that they were so detained under an alleged commitment by the judge of the superior court of Chatham county. This commitment was issued under the provisions of an act approved September 4, 1908, entitled "An act to provide for the establishment of children's courts as branches of the superior courts," etc. Acts 1908, p. 1107. This act was attacked as unconstitutional, upon several grounds. At the conclusion of the hearing the judge denied the writ, and the petitioners excepted.

It is declared by article 6, § 9, par. 1, of the Constitution of this state (Civil Code of 1910, § 6527):

"The jurisdiction, powers, proceedings, and practice of all courts or officers invested with judicial powers (except city courts), of the same grade or class, so far as regulated by law, and the force and effect of the process, judgment, and decree by such courts, severally, shall be uniform. This uniformity must be established by the General Assembly."

The caption of the act of 1908, which is challenged by the petition in this case as being unconstitutional, is as follows:

"An act to provide for the establishment of children's courts as branches of the superior courts; to define their jurisdiction and powers; the officers thereof; the compensation; duties and powers of such officers, and for other purposes."

It is declared in express terms that the purpose of the act is to provide for the es-

tablishment of children's courts as branches of the superior courts. By section 2 of the act (Penal Code of 1910, § 886) it is provided that children's courts may be established in any county of the state, by the concurrent recommendation of two grand juries at different terms of court. By section 4 (P. C. § 887), it is provided that the judge of any superior court may preside over such court. Whenever he is absent from the county, or the business of the superior court shall, in the opinion of the judge, need his attention in preference to the children's court, the judge of any city court of the county may preside in the children's court, with all the powers and rights of the judge of the superior court under this act. In no other county than one in which there has been a recommendation of two successive grand juries can a judge of the superior court call in a judge of a city court to preside in his stead because he wishes to be absent or is busy with other work of the superior court.

By section 9 of the act (Penal Code 1910, § 895), it is provided:

"If, on the hearing, the court finds that a child is a delinquent or wayward child, it may: (a) Release the child on probation upon such terms and conditions, and for such period of time as the court may think fit; or (b) commit the child for such period of time as the court may think fit, either to an institution or to the care of some person who is willing to undertake such care; or (c) if such child is over ten years of age, commit the child to take his trial according to law. In the event such child is convicted of an offense not punishable by death or imprisonment for life, the court may: (1) Release the child on probation upon such terms and conditions and for such period of time as the court may think fit; or (2) commit the child for such period of time as the court may think fit either to an institution or to the care of some person who is willing to undertake such care; or (3) sentence the child according to law. In addition to such sentence for the offense the court may commit the child at the expiration of such sentence to the Georgia state reformatory; or may instead of any other sentence, commit the child forthwith to the reformatory."

What court is referred to in this section of the act? Evidently the superior court. That court has exclusive jurisdiction in cases of felony. Constitution of 1877, art. 6, § 4, par. 1 (Civil Code of 1910, § 6510). If therefore the act sought to confer upon any other court than the superior court the power to try felony cases, it would be unconstitutional. When it says that, "in the event such child is convicted of an offense not punishable by death or imprisonment for life, the court may" do one of several things, this is broad enough to include felonies as well as misdemeanors; so it evidently must refer to a court which has the power to try felonies. That is, the superior court, not some special court in which the judge of the superior court might preside. Indeed, the whole act shows that it is dealing with the children's court as a branch of the superior court. So construing the section last quoted, it will be

seen that the act undertakes to confer upon the superior court in a particular county, upon the recommendation of two successive grand juries, the power to sentence a child over 10 years of age (and apparently under 16, by reference to section 7 of the act—Penal Code of 1910, § 891), who has been convicted of a misdemeanor or a felony not punishable by death or imprisonment for life, either to the punishment provided by the Penal Code for the offense which he has committed, or to release him on probation on such terms and conditions and for such time as the court may think fit, or to commit him to an institution or to the care of some person who is willing to undertake such care; and also authorizes the judge, in addition to the sentence prescribed by law, to commit the child, at the expiration of the sentence, to the Georgia state reformatory, or, instead of any other sentence, to commit the child to the reformatory. In all other counties of the state, where two grand juries have not recommended the establishment of a children's court as a branch of the superior court, if a child is of sufficient age to be convicted and is convicted of a felony or a misdemeanor, he must receive the punishment prescribed for the offense of which he has been convicted.

By section 10 of the act (Penal Code of 1910, § 896), it is provided that if a child who has been released on probation breaks the terms or conditions of the release, or if it appears to the court that it is to the best interest of such child to take the same away from any person or institution to whose care such child has been committed, the child may again be brought before the court and dealt with under the provisions of this act, as if it had not been released or committed. By section 12 (P. C. § 898), it is provided that the judge of the superior court of the county may make regulations for the visitation and inspection of institutions and places where children are placed under the act; may provide for the employment, education, discipline, and punishment of children dealt with under the act; may provide for the appointment of a deputy solicitor general, when in his discretion it may be necessary in order to secure the best results; may appoint a probation officer and such other officers as the court may think necessary in order to carry out the provisions of the act; may prescribe the duties of the officers employed, and may impose a penalty of not exceeding \$100 for the breach of any regulation under the act. By section 13 (P. C. § 900), it is provided that the judge of the superior court of the county shall fix the compensation of the "deputy solicitor general," the probation officers, and any other officers employed in carrying out the act; and that all salaries and other expenses provided for in the act shall be paid out of the county treasury, upon the certificate of the judge of the superior court, as other court expenses are now

paid. No limit is placed upon the power of the judge in fixing the amount of these salaries. He is authorized to require payment of the salaries and expenses which he may allow from the county treasury. The Constitution provides for a solicitor general. This act authorizes the judge of the superior court to appoint a hitherto unknown officer called a "deputy solicitor general." It does not prescribe his duties nor limit his salary, leaving the latter to be fixed by the judge of the superior court.

We have thus taken a limited survey of the entire act, in order that it might appear what was meant by the establishment of a children's court upon recommendation of the grand jury, which was provided for in the second section of the act. This was attacked on the ground that it violated the constitutional provision requiring uniformity of the jurisdiction, powers, proceedings, and practice in courts of the same grade or class. Civil Code 1910, § 6527. Perhaps we might take a narrow and technical view, and say that section 2 of the act (Penal Code of 1910, § 886) provides for the establishment of a children's court, but does not contain provisions in regard to its powers, proceedings, or practice; and that the fourth section of the act (Penal Code 1910, § 887) makes provision only in regard to the presiding officer. But we are not inclined to thus avoid deciding the real point made by the plaintiffs. Substantially they attack, not the creation of children's courts generally, or theoretically, or abstractly, but the children's courts for the establishment of which provision was made by that act, namely, the children's courts as branches of the superior courts, with the jurisdiction and powers in that act prescribed. Thus the plaintiffs attack this act and point out the section of the Constitution which the establishment of such courts, in the manner stated and with the powers and jurisdiction prescribed, as branches of the superior courts, would violate. It is evident that the jurisdiction, powers, proceedings, and practice in superior courts with branches called children's courts, as provided for in this act, are not uniform with superior courts in other counties where such courts have not been established; and this radical difference in the superior courts of different counties is made to depend upon the recommendation of two grand juries. Whatever may be said of the merits of children's courts to look after wayward or delinquent children, we cannot uphold an act which practically destroys the uniformity in powers and practice in the superior courts of the different counties of the state, which is required by the Constitution, by the mere recommendation of two grand juries. If the jurisdiction of those courts and their powers, proceedings, and practice can be varied in matters involving conviction of felonies and misdemeanors, or persons guilty of such offenses, because two grand juries recommend

such variance in different counties, it would seem that a similar variation might be made in regard to old men or old women, or foreigners who cannot speak the English language, or sick persons, so that upon the recommendation of the grand jury they might be sentenced in one way if convicted of crime in one county, and sentenced in a different way if convicted of crime in another county.

The attack upon the act on the ground that it is not a general law, and is therefore violative of article 1, § 4, par. 1, of the Constitution (Civil Code of 1910, § 6391), is without merit. Relatively to that section, there may be legitimate classification; but this does not authorize a violation of the other section of the Constitution providing for uniformity in the courts of the same grade.

What has been said above renders it unnecessary to discuss the other criticisms made upon the act.

Judgment reversed. All the Justices concur.

(143 Ga. 337)

BAUGH v. LOVVORN. (No. 533.)

(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

STATUTES ~~§~~98—UNIFORMITY—CHILDREN'S COURT.

Under the ruling made this day in the case of *Law v. McCord*, 85 S. E. 1025, in which it is held that the act approved September 4, 1908 (Laws 1908, p. 1107), entitled an act to provide for the establishment of children's courts as branches of the superior courts, etc., is unconstitutional, the denial of the writ of habeas corpus in the present case was error.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 110, 111; Dec. Dig. ~~§~~98.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Petition by Kate Baugh for writ of habeas corpus directed against J. P. Lovvorn. The writ was denied, and petitioner brings error. Reversed.

R. O. Lovett, of Atlanta, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(144 Ga. 23)

RICHARDSON v. STATE.

(Supreme Court of Georgia. Aug. 11, 1915.)

(Syllabus by the Court.)

AFFIRMANCE REQUIRED ON APPEAL.

There was no complaint that any error was committed on the trial. The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Howard Richardson was convicted of crime, and he brings error. Affirmed.

F. W. Copeland, of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., of Rome, Walter B. Shaw, of La Fayette, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(144 Ga. 33)

TOLBERT v. WIMPY. (No. 513.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. DEMURRER—DISMISSAL—GROUND.

In view of the state of the pleadings, the first and second demurrers filed by the defendant, the rulings induced thereby (to which no exception was taken), and the amendment made by the plaintiff in accordance with such rulings, there was no error in refusing to dismiss the case on demurrer.

2. REVERSAL—REVERSIBLE ERROR.

Under the circumstances of the case, there was no error requiring a reversal.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between H. W. Tolbert and W. E. Wimpy. There was a judgment for Wimpy, and Tolbert brings error. Affirmed.

Mayson & Johnson, of Atlanta, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(144 Ga. 52)

CARRINGTON v. CITIZENS' BANK OF WAYNESBORO. (No. 537.)

(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

1. MORTGAGES ~~§~~370—FORECLOSURE—SALES—EFFECT.

Where land was sold at public sale to be paid for in cash, under a power of attorney in a security deed, and the highest bidder failed to comply with his bid, and the donee of the power gave him written notice of his intention to resell the property on the same day unless he complied with his bid, such bidder was liable for the difference between his bid and the amount the property brought at the second sale, although the notice of resale did not expressly state that the second sale would be at his risk. *Gay v. Parrish*, 138 Ga. 399, 75 S. E. 323.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1101, 1101½; Dec. Dig. ~~§~~370.]

2. MORTGAGES ~~§~~370—FORECLOSURE—SALES—RESALE.

After the property had been sold at the second sale and purchased by the grantee in the security deed, under permission contained in the deed to become a purchaser at the sale, the bidder at the first sale had no right, on tender of his bid several days thereafter, to demand its acceptance and a conveyance of the land to him by the purchaser at the second sale, who was the grantee in the security deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1101, 1101½; Dec. Dig. ~~§~~370.]

3. MORTGAGES **⚡372—FORECLOSURE—EFFECT.**

A sale under power in a security deed divests the title of the grantor, and he has no legal right several days thereafter, on tender of the amount of the debt secured by the deed to the grantee, who is purchaser at the sale, to demand a conveyance of the land or a cancellation of the security deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1102, 1103, 1105-1117; Dec. Dig. **⚡372.**]

4. MORTGAGES **⚡599—FORECLOSURE—RIGHTS OF GRANTOR.**

Where a sale of land is made under a power contained in a security deed, and by permission of the grantor contained in the deed the grantee purchases the land at such sale, the grantor cannot defeat the purchaser's right to have the sale fully consummated, by tender of the amount of his indebtedness to the grantee before the actual execution of the deed pursuant to the terms of the sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1733-1741; Dec. Dig. **⚡599.**]

5. MORTGAGES **⚡116—RECITALS—EFFECT.**

A deed, reciting that it is given to secure an existing indebtedness represented by notes for stated amounts, and also for subsequent advances or loans to be made to the grantor by the grantee, will include, inter partes, as a part of the consideration, such subsequent advances. *Hester v. Gairdner*, 128 Ga. 531, 58 S. E. 165.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 230-232; Dec. Dig. **⚡116.**]

6. ISSUES—SUBMISSION—SUFFICIENCY.

The only issue presented by the evidence was whether the second sale occurred within the legal hours of sale, and that issue was fairly presented by the court to the jury.

7. AFFIRMANCE—GROUNDS.

The various complaints of error are involved in and controlled by the foregoing rulings. The trial was without substantial error, and the evidence supports the verdict.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action between F. P. Carrington and the Citizens' Bank of Waynesboro. There was a judgment for the Bank, and Carrington brings error. Affirmed.

See, also, 140 Ga. 798, 80 S. E. 12.

Wm. H. Fleming, of Augusta, for plaintiff in error. H. J. Fulbright, of Waynesboro, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(144 Ga. 26)

FROST v. ARNAUD et al. (No. 511.)
(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS **⚡32—FRAUD.**

An action to recover damages sustained by a plaintiff in consequence of fraudulent representations and concealment made by the defendant, whereby the former is induced to purchase worthless shares of stock in a corporation never legally organized, is governed by the statute of limitations appertaining to injuries to property, which is four years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 142-145; Dec. Dig. **⚡32.**]

2. LIMITATION OF ACTIONS **⚡100, 179—FRAUD—DISCOVERY—LACHES.**

A plaintiff whose action is founded on actual fraud must exercise reasonable diligence to detect and discover the fraud. The allegations are insufficient to excuse the plaintiff's laches of nearly six years in bringing his suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493, 663, 669; Dec. Dig. **⚡100, 179.**]

3. LIMITATION OF ACTIONS **⚡102—PROMOTERS—FIDUCIARY RELATION.**

Promoters of a corporation, fraudulently inducing subscribers to take stock in the corporation, do not stand in such fiduciary relation to such subscribers as to exclude the operation of the statute of limitations from a suit by a stockholder against them on account of the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494-505; Dec. Dig. **⚡102.**]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by W. E. Arnaud and others against Johnathan B. Frost and others. There was a judgment overruling his demurrer, and defendant named brings error. Reversed.

W. E. Arnaud and others brought suit against Johnathan B. Frost and J. M. Bishop of Fulton county, and Thomas J. Shanley of the state of Montana, to recover money alleged to have been paid to them by the plaintiff in connection with the promotion of a corporation. The petition (filed on September 30, 1912) alleged as follows: On September 30, 1905, Shanley entered into a contract with J. P. Brooke, whereby Brooke agreed to sell to Shanley certain described mining property located in Gwinnett county, Ga.; in which contract it was stipulated that, if the mine should be operated during a stated period, 25 per cent. of the ore mined should be paid on the purchase price. Thereafter Shanley associated with himself Bishop and Frost for the purpose of promoting a corporation to take over the mining property under Shanley's contract, and, with certain other persons, applied for and obtained, on September 20, 1906, from Fulton superior court, a charter for a corporation to be known as the Suwanee Gold Mines Company. In the application for charter it was recited that the minimum capital stock was fixed at \$1,000,000, divided into 1,000,000 shares of the par value of \$1 each, and that 10 per cent. of the capital stock, \$100,000, had been actually paid in. Immediately after the procurement of the charter, Frost appropriated to himself 50,000 shares of the capital stock of the company, and afterwards received 50,000 additional shares of stock, and Bishop appropriated to himself 50,000 shares of the stock, which stock was issued to Frost and Bishop in consideration of services to be performed by them in procuring sufficient capital to pay for the mining property and to begin the mining operations. Shanley appropriated to himself 225,000 shares of the stock in consideration of transferring to the corporation his rights under his contract with Brooke. In

reality there was no consideration flowing to the corporation for the stock, because Frost and Bishop did not procure the capital, but only \$8,152.50 thereof, including the amount received from petitioners, and because the contract itself was without market value.

"The defendants entered into a conspiracy to sell to the public, including petitioners, so much additional stock as should be necessary to pay the purchase price of said mining property under the terms of said contract between the said Brooke and said Shanley, to wit, \$40,000, and so much more of such additional or treasury stock as should be necessary to put in operation the mines on said property, to wit, \$10,000 or less, reserving to themselves enormous blocks of stock appropriated to themselves as aforesaid."

For the purpose of inducing petitioners to buy stock in the corporation, the defendants resorted to false and fraudulent artifices, by verbally stating to petitioners that the Suwanee Gold Mines Company owned in fee simple all of the mining property contracted to be purchased from Brooke, and that every dollar they invested would purchase its equivalent in an undivided interest in land owned by the company, exclusive of valuable gold mines thereon; by representing in the application for charter that \$100,000 had been actually paid into the company's treasury; by concealing from petitioners the fact that defendants had issued to themselves 375,000 shares of stock; by dumping thousands of tons of auriferous dirt into a gulch and washing therefrom most of the sand, so that upon inspection of the property it would appear that the placer deposits of gold were much richer than in truth they were.

By means of such false and fraudulent artifices, your petitioners, relying thereon, on January 12, 1907, purchased from defendants 1,000 shares, and paid therefor the sum of \$900. Petitioners did not know of the fraud so perpetrated on them by the defendants until August 1, 1912, when Arnaud was informed by Brooke that on September 30, 1910, Frost took to himself a deed to all of the mining property which Brooke contracted to sell to Shanley. Petitioners by the exercise of ordinary care could not have discovered the imposition so practiced upon them, and they were lulled into a sense of security by reason of the relation of trust and confidence between them and the defendants which rendered it their duty to disclose the truth. Petitioners were deterred from discovering the fraud or suspecting that any fraud had been perpetrated upon them.

"Petitioner [Arnaud], often within four years next after the purchase of said stock, approached said defendants for information as to the progress said company was making in the development of its mines and business, and was at all times assured that said company would soon be paying dividends, and that the stock, including petitioner's, was constantly enhancing in value; and at all such times defendants fraudulently concealed from petitioner the truth of the matters set forth in paragraph 6 of this petition, notwithstanding they well knew that

petitioner relied on said representations in purchasing his said stock. Petitioner intrusted defendants with his money to be used in connection with that of other subscribers whose aggregate subscriptions should amount to the capitalization required by the charter of said company in developing and putting into complete operation said mining properties; and there was no specified time in which this should be done, four years being a reasonable time therefor."

The defendants were thus in possession of petitioner's money, using it, as he supposed, for his benefit in perfecting the operation of the mining property. In appropriating this money or the property improved thereby to themselves or to the defendant Frost, the defendants abused the fiduciary relation existing between petitioner and themselves; and petitioner did not know, nor by the exercise of ordinary care could he have known, that they or either of them held his money or the property improved adversely to him and the other stockholders until the year 1912, when he discovered the facts hereinbefore set forth. The stock so purchased was and is worthless, as the corporation never had any assets; nevertheless he tenders back the stock certificates issued to him. The prayer is for judgment for the money so paid, with interest thereon at the rate of 7 per cent. Frost filed a demurrer on the ground that no cause of action was set out, and that the cause of action, if any, was barred by the statute of limitations. The demurrer was overruled, and Frost excepted.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error. Hines & Jordan and J. L. Anderson, all of Atlanta, for defendants in error.

EVANS, P. J. (after stating the facts as above.) According to the allegations of his petition, the plaintiffs parted with their money through being fraudulently led into the purchase of stock in a corporation which was never legally organized, and was but an instrumentality devised as a part of the defendants' fraudulent scheme. The action is founded in the fraud of the defendants. Although the demurrer challenged the sufficiency of the petition as stating a cause of action, this ground of the demurrer was not argued in the brief, and will be treated as abandoned.

[1] 1. All actions for injuries to property, real or personal, shall be brought within four years after the right of action accrues. Civil Code 1910, §§ 4495, 4496. We think that an action brought to recover damages sustained by the plaintiff in consequence of fraudulent representations and concealment by the defendant, whereby the former is induced to purchase worthless shares of stock in a corporation which was never legally organized, is governed by the statute of limitation appertaining to injuries to property. *Crawford v. Crawford*, 134 Ga. 114, 67 S. E. 673, 28 L. R. A. (N. S.) 353, 19 Ann. Cas. 932; *Miller v. Wood*, 41 Hun (N. Y.) 600. The action was

commenced more than four years after the plaintiff had parted with his money, and is barred, unless the case as alleged falls within an exception to the general rule.

[2] 2. One of the statutory exceptions to the general rule is expressed in the Civil Code 1910, § 4380:

"If the defendant, or those under whom he claims, has been guilty of a fraud by which the plaintiff has been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud."

The fraud referred to in this section as relieving the bar of the statute must be such as involves moral turpitude. *Austin v. Raiford*, 68 Ga. 201. The plaintiff's allegations make a case of actual or moral fraud. Even in cases of moral fraud, there must be reasonable diligence on the part of the plaintiff to detect or discover the fraud.

"Ignorance of fraud which, by the use of ordinary diligence, might have been discovered in due time, will not hinder the statute from running." *Freeman v. Craver*, 56 Ga. 161; *Marler v. Simmons*, 81 Ga. 611, 8 S. E. 190.

The defendants' statements made to induce the purchase of stock in the corporation were so alluring that the natural cupidity of the most careless speculator would have raised an expectation of early and large returns from the investment, and would have prompted investigation as to the cause of the disappointment. The plaintiff anticipated that he reasonably might be called on to explain why he was in such laches in discovering the defendants' fraud, and assigned, as a reason why he had not called upon the officers of the company for a statement of the corporation's business, that the defendants had "often within four years next after the purchase of the stock" assured him that the company would soon be paying dividends, and that the stock was constantly enhancing in value. The time elapsing between the purchase and the filing of the suit was nearly six years. The pleader does not state that continuously during the four years after he bought his stock he applied to the defendant for information. If he had done so, he might have excused his negligence during this period. The allegation that often within four years next after the purchase of his stock he had approached the defendants for information about the corporation could be satisfied by proof that he had often made inquiries within twelve or eighteen months after his purchase, and still more than four years would have intervened before the bringing of the suit. As was well said by Judge Bleckley, in *Sutton v. Dye*, 60 Ga. 449:

"Diligence to detect fraud is as much incumbent upon a party who labors under no disability, as to do any other act in which his interest is involved. He must look about him, and see what villainies environ him. If he has been caught in a net, he must feel for the meshes."

This plaintiff does not allege that he resided remotely from the county of the principal office of the corporation. Reasonable diligence would have required him to inquire of the officers of the corporation the condition of its affairs. This would have been the natural thing for him to have done; and, if he had done so with reasonable diligence, he would have sooner ascertained whether he was the victim of a financial swindle.

[3] 3. Another reason advanced by the plaintiff as an excuse for his laches is that a confidential relation existed between him and the defendant, inasmuch as he intrusted the defendant with his money to be used in connection with that of other subscribers, whose aggregate subscriptions should amount to the capitalization required by the charter of the corporation, in developing and putting into complete operation the mining properties, and that four years was a reasonable time for this purpose. Promoters of a corporation have been held liable to account to the corporation for secret profits, on the theory of a trust relationship. While promoters may stand in a fiduciary position to the corporation, they do not, as a rule, occupy that position toward the subscribers for shares. *Alger on Promotion of Corporations*, § 127. But, even if it be conceded that a sort of trust relationship is alleged, it is not an express trust, but only such as may equitably result from the facts. Resulting or implied trusts are within the statute of limitations. 25 Cyc. 1155. The relation of an officer to a corporation has been held not to be such a technical trust relationship as came within section 3782 of the Civil Code, declaring that subsisting trusts, cognizable only in a court of equity, are not within the ordinary statutes of limitation. *Knowles v. Rome Tribune Co.*, 127 Ga. 90, 56 S. E. 109. We think that the plaintiff and the defendant sustained the relation of vendor and vendee; and although the former was promoting a corporation in the sale of its stock, and made the representations alleged by the plaintiff, nevertheless the cause of action arising out of the transaction was barred after four years from the time it accrued.

Judgment reversed. All the Justices concur.

(143 Ga. 791)

SHIVER v. TIFT.

TIFT v. SHIVER.

(Supreme Court of Georgia. Aug. 11, 1915.)

(Syllabus by the Court.)

1. PLEADING \Leftrightarrow 248—RAILROADS \Leftrightarrow 305, 344
—CROSSING ACCIDENTS—RIGHT OF COMPANY
—PETITION—AMENDMENT.

A railroad company engaged as a common carrier of freight and goods for hire under the laws of this state, whether incorporated or unincorporated, has the right, in the operation of trains, to make all the noises usual and necessary to the movement and working of locomotives, and will not be liable for injuries occasioned by horses driven on the highway taking fright at such noises, if it exercise the right in a lawful and reasonable manner. In crossing a much frequented street in a city, it is the duty of the company to so operate its locomotive as not unnecessarily to interfere with the rights of individuals traveling on the street by other means of travel, or to endanger such travel by unnecessary noises, frightening horses. For a breach of this duty, resulting in injury, an action will lie. The petition as amended stated a cause of action, and the amendment did not add a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. \Leftrightarrow 248; Railroads, Cent. Dig. §§ 968-971, 1107-1112; Dec. Dig. \Leftrightarrow 305, 344.]

2. RAILROADS \Leftrightarrow 347—CROSSING ACCIDENTS—EVIDENCE.

It was pertinent to the issue to show that the railroad track crossed the street on a grade level.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. \Leftrightarrow 347.]

3. EVIDENCE \Leftrightarrow 474½—OPINIONS—DISPOSITION OF HORSES.

Testimony of a witness that a horse was nervous and high-strung is allowable, as being within the rule which admits opinions from necessity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. \Leftrightarrow 474½.]

4. RAILROADS \Leftrightarrow 93—CONSTRUCTION—STREET CROSSINGS.

The charter of Tifton (Acts 1890-91, vol. 2, p. 676) authorizes that municipality to permit an unincorporated railroad company, operating as a common carrier and engaged in a public use, to lay its track across one of the streets under such conditions and restrictions as the mayor and council may impose.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 260-266; Dec. Dig. \Leftrightarrow 93.]

5. RAILROADS \Leftrightarrow 350—CROSSING ACCIDENTS—QUESTIONS FOR JURY.

The evidence examined, and held, that the court erred in directing a verdict.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. \Leftrightarrow 350.]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by Mrs. D. D. Shiver against H. H. Tift. Defendant's demurrer was overruled, and verdict directed for defendant, whereupon plaintiff brought error, and defendant assigned cross-errors. Reversed on plaintiff's bill of exceptions, and affirmed on the cross-bill.

The suit was by a widow to recover damages caused by the alleged wrongful death

of her husband, due to the defendant's negligence. It was alleged that the defendant, doing business as the Tifton Terminal Company, is a common carrier under the laws of Georgia, and owns and operates a number of railroad tracks in the city of Tifton. One of these tracks is located on an alley between the First National Bank building and the Tifton Grocery Company's warehouse, and crosses Love avenue, a public and much traveled street in the city. About 5 o'clock on the afternoon of August 12, 1912, the plaintiff's husband, by invitation of the driver, was riding north on Love avenue in a buggy drawn by two horses driven and controlled by Green Nelson. They approached the track of the Tifton Terminal Company, located just north of the First National Bank and the Tifton Grocery Company's warehouse, with the intent of crossing the same. Unknown to petitioner's husband and the driver, the defendant, through his employes and agents, had one of his locomotives under steam on the track in the alley, which is seldom used. The presence of the locomotive was entirely concealed from the occupants of the buggy by the building of the Tifton Grocery Company, and its presence was not known and could not have been known by them. When the buggy was driven to a point about 30 yards from the track, the locomotive was suddenly, without warning, and with loud jarring noises and loud exhaust of steam and at a rapid rate of speed, run out of the alley and across Love avenue, where it was well known to the defendant and his servants that people with teams were likely to be, and where they knew that, on account of the surrounding buildings, the presence of the locomotive could not be known to travelers on the street until the locomotive would be within the street. No warning was given of the approach of the locomotive by ringing the bell or blowing the whistle, or by sending some one ahead to give warning and notice to approaching travelers. On account of the noise of the locomotive and the escape of steam, and of its sudden approach and speed, the horses driven by Nelson became frightened, and before he could control them they suddenly turned and ran away, throwing petitioner's husband out of the buggy, by and on account of which, without fault on his part, he was killed. He was 52 years of age, in good health, and was earning on an average \$1,800 per year. The petitioner specifically charged the defendant with the following acts of negligence: In operating the locomotive through the alley and across a much traveled street with knowledge that many people were constantly passing with teams, without having some one in advance of the locomotive to give warning of its approach; in operating an old, noisy, rattle-trap engine, calculated to frighten horses, which did frighten the horses driven to the buggy in which petitioner's husband was rid-

ing; in running the locomotive out of the alley into a much traveled public street without ringing the bell and without giving other warning of its approach; in allowing a heavy exhaust and escape of steam from the locomotive, which the defendant's servants knew was likely to frighten horses, and which was unusual and unnecessary and not to be expected at the time when and place where the injury occurred, and which frightened the horses. A demurrer to the petition was filed, and the plaintiff proffered an amendment which was allowed. The amendment elaborated the alleged acts of negligence, and further alleged that the maintenance and operation of a private railroad through the public alley and across the public street was without authority of law, and did not and was not intended to serve any public purpose, but, on the contrary, served only the individual purpose of the defendant, and that the operation of a railroad by steam under the circumstances was an unlawful encroachment and obstruction of the street and constituted a public nuisance. The defendant objected to the allowance of the amendment, on the ground that it set forth a new cause of action; and further demurred because the petition as amended set forth no cause of action, and because there was no allegation that the husband of petitioner, at the time of the alleged injury, was in the exercise of ordinary care and diligence and could not have avoided the consequences of the alleged negligence of the defendant. The court overruled the demurrer. At the conclusion of the evidence, the court directed a verdict for the defendant. The plaintiff excepted to this direction, and the defendant excepted to the overruling of the demurrer.

F. G. Boatright, of Cordele, R. E. Dinsmore, of Tifton, and Perry, Foy & Monk, of Sylvester, for plaintiff in error. Fulwood & Skeen, of Tifton, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The case made by the petition was that plaintiff's husband, while riding in a buggy behind two horses driven by another man, was killed on account of the negligent operation of the locomotive by the defendant's servants and employes. The occupants of the buggy were driving along a much frequented public thoroughfare, where they had a right to be; and the allegation is distinct that the horses were frightened by the sudden emergence of the locomotive from the alley, running across Love avenue, without warning, and that the horses were frightened both by the sudden appearance of the locomotive within 30 yards in front of them, and by the negligent operation of the locomotive, whereby unnecessary noises were made and unnecessary exhausts of steam were emitted. According to these allegations, the proximate cause of the death of petitioner's husband was the negligence of the defendant. *Georgia Railroad v. Carr*, 73

Ga. 557; *Hill v. Rome Street R. Co.*, 101 Ga. 66, 28 S. E. 631. The main allegations of the amendment were an amplification of the allegations in the petition, with the allegation of an additional act of negligence. This does not add a new cause of action. *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

[2] 2. During the progress of the trial, the following question was propounded to a witness:

"State whether or not there is anything about that track that would have attracted any one's attention to the existence of an engine some distance off."

The court was informed that the witness' answer would be that said track was on a level with the streets and could not be seen by a person approaching it. The court declined to allow this answer. It was pertinent to the inquiry to determine the character of the place where the horses became frightened, as bearing upon the diligence of the respective parties at the time. If the track in the alley was obscured by houses, and was level with the street at the crossing, so as to prevent travelers approaching the track from seeing it, this information should not have been withheld from the jury.

[3] 3. A witness was asked whether the horse which was frightened and ran away was a gentle, roadworthy horse, or a nervous, high-strung horse, and he replied that it was a nervous, high-strung horse. The objection was on the ground that this was opinion evidence. Opinions of witnesses not experts are sometimes admissible from necessity, and to prevent a failure of justice, as in questions of identity of persons, handwriting, distances, size, sounds, and the like. If the facts upon which the opinion is formed can be as well stated and described, they must be, and the jury left to form their own opinion; but, where the subject-matter of the inquiry is such as cannot be adequately described so as to enable the jury to form an opinion of their own, opinion testimony is permissible. *Taylor v. State*, 135 Ga. 622, 70 S. E. 237. Testimony of a witness that the horse at the time of the accident did not appear to be frightened, but sulky, was held admissible, within the rule which admits opinions from necessity. *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185. We think it competent to show, by a witness who had observed the horse, whether he was nervous, high-strung, docile, or ordinarily roadworthy.

[4] 4. The court allowed in evidence the application of the defendant to the city council of Tifton for permission to construct railroad tracks across Love avenue, under such regulations as council might prescribe, and the certified copy of the action of council granting the privilege. The objection urged to this evidence was that the city of Tifton had no power to grant to an individual authority to operate engines by steam across Love avenue. It is provided in the nine-

teenth section of the charter of the city of Tifton that:

The mayor and council shall have authority "to grant rights of way to railroads, street railroads, water and gas works, and electric lights, telegraph and telephone lines throughout the streets and alleys of said city upon such terms and conditions and restrictions as said mayor and council may by ordinance prescribe." Acts 1890-91, vol. 2, p. 676.

This charter power expressly authorizes the city to allow railroads to be constructed across its streets under such conditions and restrictions as the municipality may require. It is applicable to all railroads, whether incorporated or privately owned, so long as such railroads are devoted to a public use. It is charged in the petition that the defendant, in the operation of the railroad, was a "common carrier of freight and goods for hire, under the laws of the state of Georgia"; and the testimony of the defendant was that the Tifton Terminal Company was engaged in the business of a common carrier, and was regulated under the rules of the state and Interstate Commerce Commission; its services consisting largely as a switching company in handling and transferring cars from one railroad company to another. A highway cannot be devoted to a private use, but it may be burdened with an additional public use, so long as the second use does not materially interfere with the first use. The contention of the plaintiff is that the Tifton Terminal Company was privately owned, that it was devoted to a private use, and that it was beyond the power of the Legislature to authorize the appropriation of the streets to a purely private use, and therefore that the operation of the railroad was a nuisance per se. But the plaintiff's own allegation, as well as the undisputed evidence, was that the terminal company, though privately owned, was engaged in a public use; and we think it was within the power of the municipality of Tifton to grant a right of way to construct a railroad track across Love avenue, so long as it did not materially interfere with the use of that street as a public highway; and there is no contention of inconsistent use.

[5] 5. Complaint is made that the court erred in directing a verdict for the defendant. It appeared that the husband of the plaintiff, by invitation of the driver, was riding with the owner of the horses, as the latter's invited guest; that the owner of the horses had had much experience driving horses, and was a skilled driver; that at the time of the in-

jury they were driving towards their home, along Love avenue, a much traveled public street in the city of Tifton. As they approached the railroad track, and were in about 30 yards of it, an engine of the defendant, suddenly and without warning, was run out from the alley into the street. They had not seen the engine, on account of buildings which obstructed the view. The engine was making loud, unusual, and unnecessary noises, steam was escaping, and no flagman or other person preceded it so as to give warning of its approach; and the horses became suddenly frightened and turned around, throwing the plaintiff's husband out of the buggy and killing him. The evidence was conflicting as to the character of one of the horses. Some of the witnesses described this horse as nervous, wild, dangerous, and unsafe. Others described it as being safe. And the driver testified that he owned the horse, and had never had any previous trouble, except one time when the horse was frightened at the depot; that on one occasion he had left the horse unhitched in the street while he went into a store; and that it had not tried to run away. Even if the horse was a high-strung and nervous horse, the driver had the right to drive that horse on the public highway. A person has a right to travel on a highway, and there is no rule of law which prevents him from driving a nervous, high-strung horse. *City of Rome v. Sud-deth*, 116 Ga. 649, 42 S. E. 1032.

"At grade crossings the traveler on the highway and the railroad company enjoy a common privilege on the highway itself, and each must use such privilege with due regard to the safety and rights of the other. This obligation requires the railroad company, in approaching a grade crossing, even in the absence of a positive statute to that effect, to exercise proper precautions to prevent injury to a traveler on the crossing, or who is about to cross, or who has just crossed." *Barton v. Southern Ry. Co.*, 132 Ga. 841, 843, 64 S. E. 1079, 22 L. R. A. (N. S.) 915, 16 Ann. Cas. 1232.

It was a question for the jury to determine whether the plaintiff's husband lost his life on account of the horse's becoming frightened by the negligent operation of the defendant's locomotive, and whether he was guilty of any contributory negligence which debarred him from a recovery. As to these matters, the evidence was conflicting, and the court should have left their solution to the jury.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur.

(143 Ga. 837)

SMITH v. SMITH et al. (No. 539.)

(Supreme Court of Georgia. Aug. 14, 1915.)

*(Syllabus by the Court.)***1. EVIDENCE — 155—COMPETENCY—SIMILAR EVIDENCE OF ADVERSE PARTY.**

Where an action was brought by a wife against her grantees, to recover a certain house and lot which had been conveyed to her by her husband a very short time previously, on the ground that the deed was executed by the wife under duress and while charges of criminal prosecution against the husband were being discussed, but were not pending, and the defendants' answer was based on the ground that the husband was insolvent at the time of the conveyance to the wife, and that the deed from the husband to the wife was executed in order to defraud the creditors of the insolvent husband, among whom were the defendants, and that the deed from the wife to the defendants was freely and voluntarily made in settlement of the husband's indebtedness to the defendants as creditors of the husband; and where the plaintiff as a witness detailed a conversation between herself, her husband, and the defendants, leading up to the making of the deed by her to the defendants, giving her version of the conversation—it was competent for one of the defendants to testify, giving his version of the conversation between the witness and the plaintiff and her husband in reference to the making of the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458, 2148; Dec. Dig. — 155.]

2. TRIAL — 252—INSTRUCTIONS—REFUSAL.

The charge requested, as outlined in the second division of the opinion, was properly refused, as there was no evidence on which to base it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. — 252.]

3. PROOF—SUFFICIENCY.

The verdict was supported by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by A. G. Smith against C. C. Smith and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

H. H. Elders and Way & Burkhalter, all of Reidsville, for plaintiff in error. J. P. Moore and P. M. Anderson, both of Claxton, and Hines & Jordan, of Atlanta, for defendants in error.

HILL, J. [1] 1. The first headnote requires no elaboration.

[2] 2. Complaint is made because the court failed and refused to charge the jury, as requested by the plaintiff's counsel, that, if the deed from the plaintiff to the defendants, conveying the property in question, was made by the plaintiff for the purpose of settling or suppressing a prosecution, or procuring a settlement or suppression of a prosecution or threatened prosecution against her husband for an alleged criminal offense, then the consideration of the deed would be

an illegal and immoral one, and her deed made to the defendants would be void. The court did not err in refusing this instruction to the jury. Under a proper construction of the evidence in this case, there was nothing on which to base the charge. It is true that the plaintiff testified in general terms that the deed "was made about the criminal prosecution, to stop the prosecution." But there was no prosecution of her husband on the part of the defendants, so far as the evidence discloses, and no threatened prosecution on their part. On the contrary, the plaintiff testified that one of the defendants, who was a brother of plaintiff's husband, told her:

"No matter what it costs us, we are going to see Jim [plaintiff's husband] out of trouble if it takes every dollar we have;" and "he went on to say that Mr. Faircloth [one of the creditors of plaintiff's husband] is in Claxton, and he says he is going to take your home anyway; and I asked him how could he take it, and he said he didn't know how; and he said, 'You make a deed over to me and the boys,' and says, 'We intend to see Jim out of this trouble, no matter what happens,' and he says, 'If you make a deed over to us to your place, at the proper time we will dispose of it and it will be applied in this direction.' They have never done that. He said the banks were threatening to prosecute Jim for alleged violation of the state banking laws. He said they would help Jim out in that, said that was what he wanted the home for. Claude didn't want me to make him a deed, because of the fact that they were indorsers on some notes for Jim; he wanted it to stop this threatened prosecution, was what he told me. None of the defendants paid me anything as a consideration for the deed. Claude also told me that, if this threatened prosecution couldn't be stopped, they would return my home back to me. That was before I signed the deed. The prosecution was not stopped; it went on; and they haven't returned the property or its proceeds to me. I never did receive any consideration for it. My husband was present during that conversation. As to the notes they were indorsers on, I didn't owe any of that debt, didn't have anything to do with it."

The defendants' testimony tended to show that they had indorsed and had to pay notes of Jim B. Smith, plaintiff's husband, in the sum of \$2,000, and that the deed was executed by plaintiff to defendants to secure them against liability as indorsers on those notes; that Jim B. Smith was insolvent at the time he executed the deed to his wife, at which time the defendants were creditors of Jim B. Smith; and that the wife paid nothing to the husband for the property in controversy.

This case differs from the case of Southern Express Co. v. Duffey, 48 Ga. 358. There a mother made a deed to procure the release of her son from arrest on a charge of felony. The son was under arrest and in chains, and the grantee in the deed agreed to release the son and stop the proceedings, but he refused to settle the prosecution because he said he could not control the public authorities. The son was released and the proceedings were stopped. It was held that the

deed was void in that case. The court, speaking through Judge McCay, said:

"If this arrest was illegal, if the agents of the express company had this boy in their own custody, and could let him go or not at their pleasure, then this deed was the clear result of duress, since it was made to release the child of the grantor from illegal imprisonment. A man's child stands, under the law, in the same situation as himself in such cases."

Jordan v. Beecher, 143 Ga. 143, 84 S. E. 549, was a case where a criminal warrant was issued, the principal object of which was to collect a debt due to a corporation, and the magistrate issuing the warrant was president of the corporation, and the defendant was arrested and imprisoned under the warrant. It was held that a conveyance of property by the person imprisoned, who had procured a deed from his wife, in order to secure his release, was void. In the instant case, the brothers of the plaintiff's husband, who were the defendants, did not take out a warrant for plaintiff's husband or threaten to do so, but, on the contrary, showed their purpose of helping him by settling with his creditors and thus preventing his prosecution. Both were creditors, and a debtor has a right to prefer one creditor to another. The plaintiff and her husband preferred the defendants. There is evidence tending to show that the debtor, Jim B. Smith, was insolvent at the time he executed the deed to his wife, and that the deed was made to defeat his creditors. This being so, the deed to the wife was void, and in a case like the present the law will not require a separate suit to cancel and set aside that deed and then subject the property, where the parties themselves have put the title where it properly belongs, in order to satisfy creditors with the proceeds of the property, which is subject to the creditors' claims.

[3] 3. The verdict was supported by the evidence, and the court did not err in refusing a new trial.

Judgment affirmed. All the Justices concur.

(143 Ga. 785)

NEWSOME v. TRAVELERS' INS. CO. OF HARTFORD, CONN.

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. INSURANCE §449—ACCIDENT INSURANCE—"ACCIDENT."

Where one person injures another, and the injury is not the result of misconduct or provocation by the injured person, but is unforeseen by him, it is as to him an "accident" within the

meaning of an accident policy insuring him against bodily injuries effected through external, violent, and accidental means. *Travelers' Ins. Co. v. Wyness*, 107 Ga. 584 (3), 589, 34 S. E. 118; *American Accident Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 801, 59 Am. St. Rep. 473.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1182; Dec. Dig. § 449.

For other definitions, see Words and Phrases, First and Second Series, Accident.]

2. INSURANCE §464—ACCIDENT INSURANCE—EXCEPTIONS.

A provision contained in an accident insurance policy of the character just described, which excepts from operation of the policy injuries "intentionally inflicted upon the insured by any other person, sane or insane," contemplates injuries intended against the insured, and not injuries intended against another. Accordingly, such exception will not relieve the insurer from liability for an injury to the insured inflicted by another person, where the other person, intending to injure some one other than the insured, mistook the insured for the person intended to be injured and intentionally inflicted upon him a bodily injury, while he was unaware of the intent to injure him, and had done nothing to bring about the injury. *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 434; *Fuller on Accident Insurance*, 277; 1 Am. & Eng. Enc. Law (2d Ed.) 322; 1 C. J. 442, § 102; *Travelers' Pro. Ass'n v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991, and cases cited.

(a) In the case of *Utter v. Travelers' Ins. Co.*, supra, the policy sued on contained the following exception: "This insurance shall not be held to extend to disappearances, nor to any case of death or personal injury, unless the claimant under this policy shall establish, by direct or positive proof, that the said death or personal injury was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or of any other person." The use of the word "design," as thus employed, does not render the exception contained in that policy substantially different from that involved in the present case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1184; Dec. Dig. § 464.]

3. PETITION—DISMISSAL—GENERAL DEMURRER.

Applying the law as indicated in the preceding notes, it was error to dismiss the petition on general demurrer.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mrs. J. D. Newsome against the Travelers' Insurance Company of Hartford, Conn. There was a judgment for defendant, and plaintiff brings error. Reversed.

J. F. Gollightly and Gus Russell, both of Atlanta, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(144 Ga. 37)

COMMANDER MILLS CO. v. SCHAFER
et al. (No. 523.)

(Supreme Court of Georgia. Aug. 13, 1915.)

*(Syllabus by the Court.)***SALES** \S 467—**BREACH BY PURCHASER—REMEDY OF SELLER.**

This case is controlled in principle by the decision in *Mountain City Mill Co. v. Butler*, 109 Ga. 469, 34 S. E. 565.

(a) It was there ruled that "the breach, by a purchaser, of a contract to pay a draft for the price of goods and remove the same from a railroad depot, the title to the goods remaining in the seller until such draft should be paid, did not involve the purchaser in liability to the seller for loss occasioned by the destruction by fire of the goods in the depot." This ruling was not changed by the addition of the words, "and more especially is this so when the seller's agent for the collection of the draft extended the time of the payment thereof until the day upon which the fire occurred." An examination of the entire opinion in the case will show that the ruling was not made to depend upon the words last quoted, but that they furnished an additional reason to support the judgment.

(b) The decision above cited was concurred in by the entire bench of six justices, and the request to review and overrule it is denied.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 1354, 1358-1364; Dec. Dig. \S 467.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Commander Mills Company against P. G. Schafer and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Hitch & Denmark and Jno. G. Kennedy, all of Savannah, for plaintiff in error. *Paul E. Seabrook*, of Savannah, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 848)

SMALL v. STATE. (No. 543.)

(Supreme Court of Georgia. Aug. 14, 1915.)

*(Syllabus by the Court.)***1. INSTRUCTIONS—SUFFICIENCY.**

The instructions to the jury, to which exceptions were taken, were in accordance with decisions of this court.

2. CRIMINAL LAW \S 823—**INSTRUCTIONS—CURE OF ERRORS.**

An erroneous statement in the charge as to one of the contentions of the accused was so specifically and clearly corrected by the judge in his further instructions that the jury could not have been misled by such misstatement.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1992-1995, 3158; Dec. Dig. \S 823.]

3. PROOF—SUFFICIENCY.

There was evidence tending to corroborate the testimony of the female alleged to have been raped, the verdict was authorized by the evidence, and the refusal of a new trial was not error.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

David Small was convicted of crime, and he brings error. Affirmed.

W. Spencer Connerat, of Savannah, for plaintiff in error. W. C. Hartridge, Sol. Gen., of Savannah, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(143 Ga. 798)

GEORGIA LIFE INS. CO. v. HANVEY.
(No. 489.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. NEW TRIAL** \S 18—**MOTION—GROUND.**

An exception to the allowance of an amendment to a petition is not ground for a motion for a new trial. *Bullock v. Cordele Sash, etc., Co.*, 114 Ga. 627, 40 S. E. 734; *Hammond v. George*, 116 Ga. 792, 793, 43 S. E. 53.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 24-29; Dec. Dig. \S 18.]

2. CONTINUANCE \S 14—**AMENDMENT OF PLEADINGS—SURPRISE.**

The defendant was not entitled to a continuance of the case on the ground of surprise caused by the amendment, where he failed to comply with the requirements of Civ. Code 1910, \S 5714, by stating that he was not only surprised by such amendment, but that he was less prepared for trial, and how, than he would have been if such amendment had not been made, etc.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. \S 25, 99-112; Dec. Dig. \S 14.]

3. TRIAL \S 133—**ARGUMENT OF COUNSEL—IMPROPER REMARKS.**

The improper remarks of counsel in addressing the jury in this case will not require a new trial, where the court promptly rebuked counsel for making them, and in such manner that the jury must have understood that they were to disregard such remarks.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 316; Dec. Dig. \S 133.]

4. NEW TRIAL \S 99—**NEWLY DISCOVERED EVIDENCE—GROUND.**

A new trial will not be granted on the ground of newly discovered evidence, where it appears that proper diligence has not been shown, or that the evidence would probably not change the result on another hearing.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 201, 207; Dec. Dig. \S 99.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Geo. Hanvey against the Georgia Life Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Archibald Blackshear, of Augusta, for plaintiff in error. C. E. Dunbar, of Augusta, for defendant in error.

HILL, J. This was a suit by Hanvey to recover, on a policy of insurance, damages alleged to have been sustained by his automobile, on account of its coming into contact with a bank or ditch on the side of the road on which he was traveling. The special

items of damage to the automobile, amounting to \$318, are admitted between counsel, and that the only issue is whether the defendant is liable under "the terms of the collision clause of the policy," which reads:

"Against loss or damage to any automobile herein described, including its operating equipment while attached thereto, if sustained within the period covered by this policy, and if caused solely by collision with another object, either moving or stationary; excluding, however, * * * all loss or damage caused by striking any portion of the roadbed or any impediment consequent upon the condition thereof," etc.

The jury found for the plaintiff, and the case is here on exceptions to the refusal of the court to grant a new trial. The case was here once before, and we then decided that as against a demurrer the petition set forth a cause of action.

[1, 2] 1, 2. The first and second headnotes require no elaboration.

[3] 3. Error is assigned because the court refused to declare a mistrial on account of certain language employed by counsel in concluding his argument to the jury; it being alleged that there was no evidence in the record upon which to base the statements, and that it prejudiced the minds of the jury against the defendant. Counsel said to them, in effect:

"Gentlemen of the jury, Mr. Hanvey did not have anything to do with making this contract. This contract is not signed by him. It was drawn up by shrewd lawyers employed by the insurance company, who didn't have Mr. Hanvey's interest at heart when they were drawing the contract. It wasn't drawn up in Augusta. It was drawn up in Macon or some other place by shrewd lawyers."

The motion to declare a mistrial was overruled by the court, who directed the attorney for the plaintiff to proceed with his argument, stating to him in the presence of

the jury that his remarks were improper and had nothing to do with the case. Such language, without evidence to authorize it, would undoubtedly be improper and calculated to prejudice the minds of the jury against the defendant, and should not have been indulged in by counsel; but it has been repeatedly ruled by this court that such language is not generally cause for a new trial where the trial judge promptly rebukes the attorney using such language and cautions the jury not to consider it. This was substantially done in this case. See *McLendon v. Frost*, 57 Ga. 449 (10); *Dickerson v. State*, 121 Ga. 136, 48 S. E. 942; 1 Mich. Dig. 516. See, also, Civ. Code, § 4957.

[4] 4. The court did not err in refusing a new trial on the ground of newly discovered evidence. Sufficient diligence was not shown in not discovering the witness before the trial. It appears that he lived right across the road from where the accident occurred, and by the slightest diligence counsel could have discovered whether this witness knew the facts sought to be proven by him. Besides, his evidence, if secured, would probably not produce a different result on another trial. Several of the witnesses for the plaintiff testified that the wheel of the plaintiff's automobile struck the bank on the side of the road and "turned turtle." The affidavit of the newly discovered witness is to the effect that he examined the ground at the point where the automobile lay, and that the ground showed that the automobile skidded and turned over as the result of being pulled too sharply to the left.

5. The evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur.

(143 Ga. 789)

FREEMAN et al. v. FREEMAN.

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. NE EXEAT §14—BOND—FORFEITURE.**

Where a judgment has been entered against the principal and surety on a ne exeat bond signed by them, they cannot have the judgment set aside on motion because of the insufficiency of the affidavit upon which the writ was sanctioned. *Blue v. Sheppard*, 28 Ga. 566.

[Ed. Note.—For other cases, see *Ne Exeat*, Cent. Dig. § 16; Dec. Dig. §14.]

2. NE EXEAT §8, 14—BONDS—OBSTRUCTION—FORFEITURE.

Construing the ne exeat bond in connection with the order of the court requiring bond given, it is held to be an appearance bond. But the court erred in entering up judgment against the principal and surety on the bond for the sum named therein, it appearing that neither of them had been served with a rule nisi, or otherwise given an opportunity to show cause why the bond should not be forfeited, before the judgment was rendered.

[Ed. Note.—For other cases, see *Ne Exeat*, Cent. Dig. §§ 10, 16; Dec. Dig. §8, 14.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by R. G. Freeman against Charles E. Freeman, in which defendant's ne exeat bond was forfeited. A motion by defendant and surety to set aside the judgment of forfeiture was denied, and they bring error. Reversed.

Gober & Jackson and Hugh Howell, all of Atlanta, for plaintiffs in error. Lowndes Calhoun, of Atlanta, for defendant in error.

HILL, J. [1] 1. The first headnote needs no elaboration.

[2] 2. This is a motion by Charles E. Freeman and P. P. Jackson to set aside a judgment rendered in the superior court against them as principal and surety, respectively, on a ne exeat regno bond. It appears from the record that when the petition for a writ of ne exeat, to restrain the defendant from departing the jurisdiction of the court, was presented to Judge Pendleton of the superior court, he ordered that the writ issue, and the defendant was required to give bond and security in the sum of \$250 in accordance with the statute, and that in default of doing so he be kept in the custody of the sheriff until such bond was given. Whereupon the clerk of the superior court issued the writ. The bond given by Freeman as principal and Jackson as surety was conditioned, "if the said Charles E. Freeman, defendant, shall be forthcoming to answer the com-

plainant's claim, or shall abide by the order and decree of the court, then this bond to be void; else of full force and virtue." This bond was dated May 14, 1913. On December 15, 1913, the defendant was ordered by the judge of the superior court to pay the plaintiff certain alimony and counsel fees on December 20, 1913, or five days thereafter. So far as the record shows, the defendant was not present when the question of alimony was heard and the order was made. On the same date the court made an order reciting that, the defendant Freeman having violated the conditions, and having failed to comply with the conditions of the ne exeat bond and the same having been forfeited, it was adjudged that the bond had been forfeited, and judgment was rendered in favor of the plaintiff Mrs. Freeman against the principal and surety on the ne exeat bond, the plaintiffs in error here, for the amount therein stated. It is insisted that this judgment is void and should be set aside, because, in addition to the reason set out in the first headnote, the bond is not an indemnity bond, or one for the payment of the eventual condemnation money; and, if it were such, the movants have not had their day in court by notice, etc., and therefore the judgment is void. Construing the bond in connection with the order of court requiring that it be given, we think that it is an appearance bond; and, this being so, the defendant was bound to be in court when required by the order of court to answer the judgment. The court could not summarily enter up judgment upon his appearance bond on the same day that the judgment was rendered in the alimony proceeding. Both the defendant and his surety had the right to show that the bond had not been breached. It may have been that the principal was absent for providential cause or had other good and sufficient reason for not appearing; and the court could not properly penalize the surety for not producing the principal on the hearing of the alimony case, when he had no notice that the bond was going to be finally forfeited, and his liability adjudicated at that time. We therefore think it was error to summarily enter up judgment on the bond, without giving the principal and surety an opportunity to show cause why the bond had not been breached. See *Stapler v. Hurt's Ex'rs*, 16 Ala. 799; *Harris v. Hardy*, 3 Hill (N. Y.) 393; *Dunsmoor v. Bankers' Surety Co.*, 206 Mass. 23, 91 N. E. 807.

Judgment reversed. All the Justices concur.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(144 Ga. 9)

MANNING v. MALLARD.

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. EXECUTION \S 312—SHERIFF'S DEED—DESCRIPTION—SUFFICIENCY.**

Land conveyed by a sheriff was thus described in the entry of levy and in the deed: "A certain lot in the city of Atlanta, in ward 4, land lot 19 of the Fourteenth district of Fulton county, Georgia, fronting fifty feet on the east side of Randolph street, between Edgewood and Auburn streets and running back one hundred feet, more or less, in an easterly direction. The house on said lot known as No. 21 on said street according to street number. The same being improved property of the city of Atlanta, Ga., adjoining O. Callahan; and levied on as the property of Tansey Cook." *Held*, that the deed was not void because of insufficient description of the property purported to be conveyed. *Singleton v. Close*, 130 Ga. 716, 61 S. E. 722.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 921-924; Dec. Dig. \S 312.]

2. PROOF—SUFFICIENCY.

The case was tried by the judge without a jury, upon consent of parties. The evidence supports his judgment.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between A. A. Manning and S. M. Mallard. There was a judgment for the latter, and Manning brings error. Affirmed.

Mark Bolding, of Atlanta, for plaintiff in error. C. T. & L. C. Hopkins, of Atlanta, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(144 Ga. 36)

SALAS v. POWERS et al. (No. 522.)

(Supreme Court of Georgia. Aug. 13, 1915.)

*(Syllabus by the Court.)***1. WORK AND LABOR \S 14 — CONTRACTS — PARTIAL PERFORMANCE.**

When, considered in the light of the evidence and the entire charge, none of the grounds of the motion for a new trial show reversible error:

(a) The contract which formed the basis of the suit was an entire contract. The reference to certain coal made in the exhibit attached to the petition had reference to the claim for materials furnished for the performance of the contract. The suit did not involve a claim against the defendants for a small quantity of coal belonging to the plaintiff and improperly taken and sold by the defendants, as contended in the briefs of the plaintiff in error, and as to which there was some evidence.

(b) Nor does this case fall within the principle involved in certain decisions to the effect that where a builder or workman partially completes a job, and abandons it, but the owner utilizes the work and material which has been done and furnished, and himself completes the work, under some circumstances an action may be based on a quantum meruit or quantum valebat.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. \S 29-33; Dec. Dig. \S 14.]

2. PROOF—SUFFICIENCY—NEW TRIAL.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between R. S. Salas and T. A. Powers and others. There was a judgment for the latter, and Salas brings error. Affirmed.

Lawton & Cunningham, of Savannah, for plaintiff in error. F. P. McIntire, of Savannah, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(144 Ga. 43)

NORTH HIGHLANDS LAND CO. v. HOLT et al. (No. 525.)

(Supreme Court of Georgia. Aug. 13, 1915.)

*(Syllabus by the Court.)***1. VENDOR AND PURCHASER \S 314—ACTIONS FOR PURCHASE PRICE—ISSUE.**

The answer of the defendant to a suit for the purchase price of land alleged that there had been an agreement between an individual and a corporation, touching a division of a tract of land, which contained the following clause: "Together with the right, title, and interest to the said A. O. Bacon, trustee, his heirs and successors, and all other persons hereafter acquiring under him any portion of the lands above mentioned or other lands now owned by said A. O. Bacon, individually or as trustee, to the use and enjoyment of the park, as it is now located or may hereafter be located and defined upon the lands of the North Highlands Land Company, or any other land conveyed to them or used by them for park purposes." It further alleged that, at certain sales made by the company, land of which the two lots now involved formed a part was designated and declared by the auctioneer, representing the plaintiff, as a perpetual and permanent park; and that the defendant was unable to furnish the names of purchasers at such sales, except one. The defendant also alleged that the plaintiff did not have a "merchantable" title, and that the sale to the defendant was made subject to an examination of the titles, and with the statement that if the plaintiff did not have a good and legal title to the lots the purchaser would not be compelled to take them; and that she discovered the state of the title upon an examination of it. *Held*, that the marketability of the plaintiff's title was involved.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. \S 920-927; Dec. Dig. \S 314.]

2. MARKETABLE TITLE.

As to marketable title, see *Cowdery v. Greenlee*, 126 Ga. 786, 55 S. E. 918, 8 L. R. A. (N. S.) 137; *Bouvier's Law Dictionary*, Words and Phrases, words "marketable title."

3. VENDOR AND PURCHASER \S 308—ACTIONS FOR PURCHASE PRICE—DEFENSE.

Although the person who had the division of land with the plaintiff was made a party at the instance of the defendant, there were purchasers from the plaintiff who were not made parties, and who would not be bound by the decree and judgment rendered in the case. Accordingly, the making of such party who would be bound did not destroy the defense that

the title which the plaintiff could convey to the defendant was not marketable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 862, 877-899; Dec. Dig. ¶ 308.]

4. REQUEST TO CHARGE—REFUSAL.

The request to charge which was refused was not in all respects accurate, and, under the pleadings and evidence, restricted the defense somewhat too closely.

5. CHARGES—SUFFICIENCY.

The charges of the court complained of may have contained some inaccuracy, but it was not of sufficient materiality to constitute reversible error.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the North Highlands Land Company against I. L. Holt and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Guerry & Son, of Macon, for plaintiff in error. R. K. Hines and L. D. Moore, both of Macon, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(143 Ga. 790)

MAYOR AND ALDERMAN OF CITY OF SAVANNAH v. HARMS.

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS ¶ 835—ACTIONS AGAINST—CHANGE IN GRADE OF STREETS.

It is alleged in the petition in this suit, which was brought against a municipal corporation to recover damages, that the petitioner was the owner of a certain lot of land and the buildings thereon, said property being situated adjacent to the right of way of a certain railroad at the intersection of that road with Bolton street in the corporate limits of the defendant municipality, which through its public works department furnished the grade and plans for the elevation of the track and roadbed of the railroad named, "incident to the building of the Gwinnett Street Subway, and, in

order to accomplish the elevation of said tracks at Gwinnett street, said tracks for a distance of a block and a half north and south of said Gwinnett Street Subway were raised on a gradual incline from the former level to the height required at Gwinnett street, and, in thus grading and elevating the roadbed and tracks, the portion of the track immediately east of your petitioner's property was elevated about one foot, and a slope or incline was made from said tracks, as elevated, to the premises of petitioner"; the result of this being that when it rains the water which flows upon the tracks and right of way at the Bolton street crossing runs down the incline upon the property of petitioner, where it accumulates under the house; and that this has resulted in certain injuries to petitioner's property. The negligence charged against the defendant corporation is: (A) The failure to place a sewer or ditch between the right of way of the railroad and petitioner's property, for the purpose of carrying off the water which would otherwise run from the right of way upon the adjacent property; and (B) the failure to grade the incline from the right of way into Bolton street, so that the water would flow into Bolton street and thence to the nearest sewer. *Held*, that no cause of action is stated in this petition against the city, it not appearing that the plan furnished by the city through its engineering department was defective in itself, or that it involved the changing of the grade of the street, or that any of the work necessarily involved in the execution of the plan furnished by the city was in the street itself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1785; Dec. Dig. ¶ 835.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by J. D. Harms against the Mayor and Aldermen of the City of Savannah. There was a judgment for plaintiff, and defendant brings error. Reversed.

John Rourke, Jr., and David S. Atkinson, both of Savannah, for plaintiff in error. Twiggs & Gazan, of Savannah, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(144 Ga. 20)

HIGGS v. HIGGS. (No. 504.)

(Supreme Court of Georgia. Aug. 11, 1915.)

(Syllabus by the Court.)

1. PLEADING ⚡377—ANSWER—NECESSITY OF ANSWER.

A wife instituted suit against her husband "for permanent and temporary alimony for herself and minor children," there being no suit for divorce pending. Upon the hearing in 1905, both parties consenting, the judge ordered that "temporary alimony" be "granted to the plaintiff, as follows: Defendant, John F. Higgs, shall immediately remove from and vacate the premises described in the petition, and turn over the same and every part thereof to petitioner, Cornelia Higgs, who shall have the exclusive use, and shall collect, for the exclusive use and benefit of herself and her minor children, the rents, issues, and profits until the final disposition of the case, or until the further order of the court; and that the earnings of the minor, John F. Higgs, Jr., be turned over to petitioner; and that the defendant pay the insurance and the taxes on said place. Ordered further, that the defendant pay to petitioner the sum of \$15 as temporary fees, paying one dollar each Saturday, beginning on the 22d day of July, 1905, until the full sum of \$15 is paid." The petition for permanent alimony was never pressed for trial or determination by the court, but there was entered upon the minutes of the court a pencil memorandum, "Dismissed." After the filing of the petition for "permanent and temporary alimony," the husband filed a suit for total divorce, and a total divorce was granted him in 1913. Shortly thereafter one of the children attained his majority and the other was 17 years old and at work. Allegations to the above effect were made in a petition in a separate action instituted by the husband against the wife alone, in November, 1913. In the action so instituted by the husband, it was prayed: (a) That the order granting alimony be revised and revoked. (b) That the deed to the property described in the order for alimony be construed, and that the wife be decreed to have no interest therein, and the property be restored to plaintiff, to the end that he might carry out trusts mentioned therein. The wife was duly served, and filed no answer; but the case was submitted to the judge by consent to be decided upon the allegations of the petition. Judgment was rendered refusing the prayers of the petition; and the plaintiff excepted. *Held*: The allegations of the petition, not having been denied by any answer, are to be taken as true, without the introduction of evidence. Civ. Code 1910, §§ 5539, 5662.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1228-1231; Dec. Dig. ⚡377.]

2. HUSBAND AND WIFE ⚡299 — SEPARATE MAINTENANCE—CONSENT—ALIMONY.

The consent order allowing temporary alimony, construed in the light of Civ. Code 1910, § 2976, under which the action for alimony was

instituted, contemplates alimony "pending the cause."

(a) There are provisions in Civ. Code 1910, § 2986, to the effect that a wife may institute proceedings in equity against her husband for support, and obtain a decree in a specified manner; "but such proceeding shall be in abeyance when a libel for divorce shall be filed, bona fide, by either party, and the judge presiding shall have made his order on the motion for alimony, and when so made, such order shall be a substitute for the aforesaid decree in equity, as long as said libel shall be pending and not finally disposed of on the merits." If this section of the Code is applicable in cases where there is a consent order for temporary alimony under Civ. Code 1910, § 2976, it would not require a ruling in this case that the consent order was supplanted; it not appearing that in the divorce suit any application was made for alimony.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. ⚡290.]

3. DISMISSAL AND NONSUIT ⚡79—EVIDENCE OF DISMISSAL.

The pencil memorandum on the minutes of the court, "Dismissed," without anything to show that it applied to the suit for alimony, or that it was made by one authorized to dismiss the action, was insufficient to show that the action was dismissed. *Dixon v. Minnesota Lumber Co.*, 132 Ga. 347, 64 S. E. 71.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 174, 175; Dec. Dig. ⚡79.]

4. HUSBAND AND WIFE ⚡299 — SEPARATE MAINTENANCE—TEMPORARY ALIMONY—CONSENT ORDER.

It appearing that the proceeding brought by the wife for alimony had never been finally disposed of, and the consent order not having been modified or terminated by proper proceeding in the case in which it was granted, the allegations in this independent petition to revise and revoke the order granting temporary alimony, though taken as true, did not require the grant of any of the relief prayed for.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. ⚡299.]

Evans, P. J., and Beck, J., dissenting.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. F. Higgs against Cornelia Higgs. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry C. Roney, of Augusta, for plaintiff in error. W. Inman Curry, of Augusta, for defendant in error.

ATKINSON, J. Judgment affirmed.

EVANS, P. J., and BECK, J., dissent. The other Justices concur.

(144 Ga. 44)

JENKINS v. BOONE. (No. 528.)

(Supreme Court of Georgia. Aug. 13, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR — 664 — EVIDENCE — 873 — CONVEYANCES — AUTHENTICATION — BRIEF OF EVIDENCE.**

It was error to admit in evidence a deed purporting to be executed by a corporation signed with the name of the corporation, "per R. C. Morgan, Secretary and Treasurer," where no seal was attached, and no evidence that authority had been conferred upon the officer executing the deed to perform such an act, and where there was no evidence to bring the case within the ruling made in the case of *Garmany v. Lawton*, 124 Ga. 876, 53 S. E. 669, 110 Am. St. Rep. 207. As set out in the brief of evidence, the deed claimed to have been executed in the name of the common grantor to the defendant was signed in the name of the grantor company by its secretary and treasurer "without the corporate seal"; nor does it appear that there was a seal of any sort. While another portion of the record indicates that some character of seal was attached, the brief of evidence will control as to what was introduced.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2856-2859; Dec. Dig. — 664; *Evidence*, Cent. Dig. §§ 1531-1536, 1590, 1592, 1593, 1610, 1611; Dec. Dig. — 373.]

2. TRIAL — 252 — INSTRUCTIONS — ERROR.

Under the ruling above made, if the deed under which the defendant claimed was excluded from evidence, there would be nothing to show that he had any conveyance from the alleged common grantor. Accordingly, charges dealing with the question of competition between this deed and that under which the plaintiff claimed, and with the question of actual and constructive notice to the defendant, were affected by the error above pointed out.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. — 252.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action between L. W. Jenkins and W. B. Boone. There was a judgment for the latter, and the former brings error. Reversed.

Mallory & Wimberly, of Macon, for plaintiff in error.

BECK, J. Judgment reversed. All the Justices concur.

(144 Ga. 46)

ROSENBERG v. WEINSTEIN. (No. 530.)

(Supreme Court of Georgia. Aug. 13, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR — 1066 — REVIEW — HARMLESS ERROR.**

Complaint is made that, in connection with an instruction on impeachment of witnesses by previous contradictory statements, the court charged: "When thus impeached, he may be sustained by proof of general good character, the effect of the evidence to be determined by the jury." The criticism is that the instruction was applicable to a named witness, as to whose good character no evidence had been submitted. An examination of the brief of evidence fails to disclose that any contradictory statements of this witness were proved. The charge was in-

applicable, but was not prejudicial to the losing party under the facts of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. — 1066.]

2. APPEAL AND ERROR — 1066 — REVIEW — HARMLESS ERROR.

The action was to recover damages because of an assault by the defendant on the plaintiff. Vindictive damages were claimed. In his instruction the court read the whole of Civ. Code 1910, § 4504, on the subject of the allowance of damages; the last sentence of which is: "The verdict of a jury in such a case should not be disturbed, unless the court should suspect bias or prejudice from its excess or its inadequacy." The quotation from the section is criticized as being inapplicable, and as tending to suggest the idea that any verdict for vindictive damages could not be set aside. The court should have refrained from reading this part of the Code section, as it only concerns the disposition by the court of a verdict including vindictive damages, and has no reference to the jury's allowance of such damages. But, in the light of the evidence and the whole charge, the reading the whole Code section will not require a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. — 1066.]

3. APPEAL AND ERROR — 1033 — INSTRUCTIONS.

The plaintiff claimed special and general damages, and the defendant pleaded justification for the assault. It was not erroneous, as against the defendant, to charge: "The burden of showing the amount of the actual damage, if any, is on the plaintiff in this case."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. — 1033.]

4. TRIAL — 313 — CONDUCT OF COUNSEL — IMPROPRIETY.

After the jury had the case under consideration for some length of time, the court had them brought into the courtroom and inquired if a recharge would be of any assistance to them. The spokesman of the jury replied that they were "troubled by matters of fact, and not matters of law." Counsel for plaintiff, in the hearing of the jury, requested the court to "ask them how they stand." One of the jurors replied, "Eight to four." Counsel for defendant immediately objected to the language of counsel for plaintiff as being improper, but invoked no ruling from the court. The court caused the jury to return to their room without instructing them to disregard counsel's remark, and without reproving counsel for making it. Held, that the verdict will not be vacated because of this occurrence. *Southern Railway Co. v. Brown*, 126 Ga. 1, 64 S. E. 911.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 730, 746; Dec. Dig. — 313.]

5. ASSIGNMENTS OF ERROR — NEW TRIAL.

Other assignments of error do not require a new trial, and the evidence supports the verdict.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action between Phil Rosenberg and Morris Weinstein. There was a judgment for the latter, and the former brings error. Affirmed.

Colley & Colley and W. A. Slaton, both of Washington, Ga., for plaintiff in error. J. M. Pitner and I. T. Irvin, Jr., both of Washington, Ga., for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(148 Ga. 780)

ROBERTS v. NORTHWESTERN NAT.
LIFE INS. CO.
NORTHWESTERN NAT. LIFE INS. CO. v.
ROBERTS.
(No. 479.)

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. INSURANCE §239—LIFE POLICIES—SURRENDER OF POLICY—RIGHT OF INSURED.

The right reserved by an insured in a policy of life insurance to change the beneficiary does not include the power to surrender and cancel the policy without the consent of the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 518; Dec. Dig. §239.]

2. INSURANCE §239—LIFE POLICIES—RIGHT TO SURRENDER.

Nor is any power by the insured to surrender the policy to the insurer during the first year of its existence, without the beneficiary's consent, to be derived from the policy options with reference to loans and acceptance of surrender values after three full years' premiums have been paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 518; Dec. Dig. §239.]

3. EXCEPTIONS, BILL OF §39—CROSS-BILL—TIME OF TENDER.

A cross-bill of exceptions must be tendered to the trial judge within 30 days from the date of the service of the principal bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54-56, 60; Dec. Dig. §39.]

Error from Superior Court, Early County; W. C. Worrell, Judge.

Action by W. J. Roberts, as administrator of James B. Roberts, deceased, against the Northwestern National Life Insurance Company. There was a judgment for defendant, and plaintiff brings error, and defendant assigned cross-errors. Reversed on the main bill of exceptions; cross-bill dismissed.

James B. Roberts applied for a policy of insurance upon his life in the Northwestern National Life Insurance Company. In his application he directed that the policy be made payable to his wife, Laura Roberts, reserving the right to change the beneficiary. On November 9, 1909, the insurance company issued and delivered the insurance policy to the insured, who, upon its receipt, executed and delivered to the insurance company his promissory note which was accepted for the first year's premium. The policy contained the following provisions:

"(5) The insured, subject to any existing assignment of the policy, may designate a new beneficiary, with or without reserving right of revocation, by filing written notice thereof at the home office of the company accompanied by the policy for suitable endorsement thereon, provided in making application for this policy the right of revocation has been reserved. If any beneficiary, under either a revocable or irrevocable designation, shall die before the insured, and the insured shall not have designated a new beneficiary, the interest of such beneficiary shall revert to the insured, the insured's legal representatives or assigns. * * * (11) No assignment of this policy shall be binding upon the company unless filed at the home office of the

company. The company assumes no responsibility for the validity of any assignment. * * *

(12) After three full years' premiums have been paid, and while this policy is in force, the company will advance, on proper assignment of this policy, a sum not greater than the loan value stated in the table of loans on the third page hereof," etc. "(13) If after three full years' premiums have been paid, any subsequent premium be not paid, the insured may, within one month after the unpaid premium shall have become due, select one of the methods of surrender settlement shown in the table of loan and surrender values, on the third page hereof, namely: (A) To accept the value of this policy in cash; or (B) to have the insurance continued in force from the date of default, without the right to loans, for its face amount, less any indebtedness to the company hereon; or (C) to purchase paid up insurance, payable at the same time and on the same conditions as this policy."

On July 29, 1910, the insured, in Early county, surrendered the policy of insurance to an agent of the insurance company for cancellation, and the agent of the company contemporaneously surrendered his note for the premium, and the policy was marked canceled by the company. The insured died on September 3, 1910. The company waived the furnishing of proofs of death of the insured, and made an absolute refusal to pay anything on the policy to the beneficiary named therein. Thereupon the wife of the insured brought an action on the policy. She died pending the suit, and her administrator was made a party in her stead. The company denied liability, and the foregoing facts were submitted to the judge under a stipulation that he should pass upon the case without the intervention of a jury. A judgment was rendered in favor of the defendant, and the plaintiff brings error.

R. H. Sheffield, of Blakely, and Pope & Bennet, of Albany, for plaintiff in error. Pottle & Hofmayer, of Albany, and C. L. Glessner and Rambo & Wright, all of Blakely, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] 1, 2. It appears from the stipulation of the parties that the liability of the insurance company depends upon the right of the insured to surrender the policy and agree upon its cancellation, without the consent of the beneficiary named in the policy. The subject-matter of the action is an ordinary policy of life insurance. It is well established in this state, and in other jurisdictions, that:

"In ordinary life insurance, where no power of divestiture or to change the beneficiary is reserved in the policy, the issuance of the policy confers a vested right upon the person so named as beneficiary, and the insured cannot transfer such interest to any other person without the consent of such beneficiary." Perry v. Tweedy, 128 Ga. 402, 57 S. E. 782, 119 Am. St. Rep. 393, 11 Ann. Cas. 46; Arnold v. Empire, etc., Life Ins. Co., 3 Ga. App. 685, 60 S. E. 470; Central Nat. Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; Ferguson v. Phoenix Mutual Life Ins. Co., 84 Vt. 350, 79 Atl. 997, 35 L. R. A. (N. S.) 844; Wash-

ington Life Ins. Co. v. Berwald, 97 Tex. 111, 76 S. W. 442, 1 Ann. Cas. 682; 3 Cooley's Briefs on Insurance, 2863.

The principle upon which this doctrine rests is that the person procuring the insurance divests himself of all interest in the policy, and the policy vests exclusively in the beneficiary, so as to make an irrevocable settlement upon the beneficiary for the amount for which the policy is issued. Any right to change the beneficiary is one of contract, and it can be accomplished only in the manner pointed out in the policy. There was no attempt by the insurer and insured, in the instant case, to change or substitute a different beneficiary. The insured reserved that right in his policy, but did not act upon it. The insured and insurer attempted to surrender and cancel the policy, contending that, as the insured reserved the right to change the beneficiary, he had the right to agree with the insurer upon the cancellation and surrender of the policy. The right to change the beneficiary in an ordinary life insurance policy does not include the power to surrender and cancel without the consent of the beneficiary. The right to change the beneficiary is quite different from the right to surrender the policy for the purpose of cancellation; as the former contemplates modification and continued existence of the policy, while the latter contemplates its complete destruction. *Holder v. Prudential Ins. Co.*, 77 S. C. 299, 57 S. E. 853.

[2] Neither will the right to surrender the policy be inferred from the provision allowing assignments of the policy to secure loans on its security, for the reason that such right did not arise until after three full years' premiums had been paid. For the same reason, the power of cancellation does not result from the stipulation providing for a settlement of the value of the policy in cash after three full years' premiums have been paid. In the fifth paragraph of the policy, providing for a change of beneficiaries, it is expressly recognized that the beneficiary has a vested interest in the policy, subject to divestiture by change of beneficiary, from the provision that if the beneficiary should die before the insured, and the insured should not have designated a new beneficiary, the interest of the original beneficiary shall revert to the insured, his legal representatives or assigns. If the beneficiary had no vested interest, then there was nothing to revert, under the contingency named in this paragraph. We are therefore of the opinion that the interest of one named as beneficiary in an ordinary life insurance policy is a vested interest, and the contract of insurance cannot be terminated by the insured and insurer without the consent of the beneficiary, except in the manner provided by the policy. The policy did not provide for its surrender and cancellation by agreement between the insured and insurer, and the plaintiff is entitled to recover thereon under the stipulated facts.

[3] 3. A motion was made to dismiss the cross-bill of exceptions, because it was certified more than 30 days after the main bill of exceptions was signed and served. The statute is silent as to the time when cross-bills of exceptions shall be tendered to the trial judge for certificate; and the point presented must be decided from a consideration of the various statutory provisions relating to the practice prescribed for reviewing judgments of the trial court by the Supreme Court. Civil Code 1910, § 6139, provides that the main bill of exceptions shall specify plainly the decision complained of and the alleged error, and shall be signed by the party or his attorney:

"And when the successful party to any cause tried in any of the superior or city courts of this state, which is carried to the Supreme Court by the unsuccessful litigant, files a cross-bill of exceptions, complaining of errors in rulings made upon the trial, adverse to him, it shall be the duty of the Supreme Court to hear argument upon such cross-bill of exceptions, and to decide the questions therein made, if a reversal of the judgment of the court below is ordered, or if the effect of the affirmance is to leave the case to be again tried in the court below."

The act of 1889 (Civil Code 1910, § 6140 et seq.) provides for the manner of taking cases to the Supreme Court, and declares (section 6148):

"If a defendant in error excepts in any case by bill of exceptions, he shall prepare his bill of exceptions and proceed in the same manner as above provided, but shall not take up any portion of the evidence or record that is taken up by the main bill of exceptions."

The practice with reference to the particularity of assignments of error, as well as to the subject-matter of exceptions in main and cross-bills of exceptions, has always been considered substantially the same. The essential difference between a main, and a cross, bill of exceptions is that the latter does not lie until a main bill has been certified, and it is sued out by the defendant in error. The practice act does not indicate that the plaintiff in error in a cross-bill of exceptions is to be accorded any privilege superior to the plaintiff in a main bill. The Civil Code, § 6152, requires that a main bill of exceptions in ordinary cases shall be tendered to the trial judge within 30 days from the adjournment of the court or the date of the decision in chambers; and, in the event that the court shall not adjourn within 30 days from the date of the opening of the court, then such bill of exceptions shall be tendered to the trial judge within 60 days from the date of the decision, judgment, verdict, or decree rendered. By the Civil Code, § 6153, "fast bills of exceptions" must be tendered within 20 days of the judgment complained of. It would seem, as a limit of time for tendering a main bill of exceptions is fixed by statute, that the statute implied a like limitation upon cross-bills. The statute (Civil Code, § 6153) provides that, if the judge shall determine that a bill of exceptions is not true, he shall return the same

within 10 days to the party or his attorney, with his objections to the same in writing. If these objections are met and removed, the judge may then certify the bill of exceptions. It has been held that the silence of the Code with respect to the time when the corrected bill of exceptions shall be tendered to the judge cannot be construed as giving the party an indefinite time, but that the statute should be construed to mean that the plaintiff is to have such length of time as is allowed for the original bill of exceptions. *Atkins v. Winter*, 121 Ga. 75, 48 S. E. 717; *Meador v. Callicott*, 129 Ga. 631, 60 S. E. 863. A similar point was before the court in *Harris v. Central R.*, 78 Ga. 525, 3 S. E. 355. In that case a motion to dismiss the cross-bill, on the ground that it was sued out too late, was denied. In the opinion Bleckley, C. J., said that:

"There was no right to a cross-bill until the principal bill had been signed, and that, as the cross-bill was of the same date, or near the same date, as the principal bill, it was in time."

The implication is clear that the decision was rested on the ground that there was no laches, because the cross-bill was certified substantially about the time that principal bill was signed; and the implication is further that the court recognized that the plaintiff in the cross-bill was not entitled to an indefinite time within which to tender his cross-bill. Therefore, taking into consideration the entire statutory procedure relating to bringing cases to this court for review, we hold that a cross-bill of exceptions must be tendered to the trial judge within 30 days from the date of the service of the principal or main bill of exceptions. More than 30 days having intervened between the service of the main bill and the tender and certificate of the cross-bill, the motion must prevail.

Judgment reversed on the main bill of exceptions. Cross-bill of exceptions dismissed. All the Justices concur.

(143 Ga. 816)

MILNER v. GATLIN.

GATLIN v. MILNER.

(No. 532.)

(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

1. DIVORCE \S 332 — CUSTODY OF CHILD — JUDGMENT—COLLATERAL ATTACK—GROUNDS.

As a general rule, it is not permissible for a party to attack a judgment for fraud in a collateral proceeding. But where the parties to a divorce decree, rendered by a court of the state of Texas, at the time both were residents of that state, subsequently remove to Georgia, and one of them brings habeas corpus for a minor child of the marriage, in the possession of the other party, and the respondent sets up the Texas divorce decree as establishing his right to the custody of the child, the applicant may show that the provision in the decree disposing of the child was obtained by fraud. Likewise

the respondent may repel the charge of fraud by competent evidence.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 843; Dec. Dig. \S 332.]

2. EVIDENCE \S 472 — OPINION EVIDENCE — PURPOSE.

In a contest between parents over the possession of a child of the marriage, witnesses should not be permitted to give their opinion that one or the other of the parties is an unfit and improper person, or that the interest of the child will be best subserved by awarding its custody to one of the contending parties.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 2186-2195, 2248; Dec. Dig. \S 472.]

3. EVIDENCE \S 317 — HEARSAY.

Testimony of a witness that people in the neighborhood of one of the parties had denounced his character as bad, but refused to give an affidavit to that effect because of fear of injury to person or property, is hearsay and inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 1174-1192; Dec. Dig. \S 317.]

4. DIVORCE \S 302 — CUSTODY OF CHILD — JUDGMENT—CONCLUSIVENESS.

A decree in a divorce suit awarding a child of the marriage to one of the parties is prima facie evidence of the legal right to its custody, but is not conclusive in habeas corpus proceedings, where the circumstances and conditions pertaining to the fitness of the parent, arising since the date of the decree, are involved. If, since the decree, the circumstances have changed, a habeas corpus court may award the custody to the other parent, or to a stranger, if the welfare of the child demands it.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 791, 792; Dec. Dig. \S 302.]

Fish, C. J., and Atkinson, J., dissenting in part.

Error from Superior Court, Pike County; Robt. T. Daniel, Judge.

Petition by Mary F. Gatlin for writ of habeas corpus against C. W. Milner. There was a judgment for petitioner, and respondent brings error, while petitioner assigned cross-errors. Reversed on the main bill of exceptions, and affirmed on the cross-bill.

See, also, 139 Ga. 109, 76 S. E. 860.

C. W. Milner and Mary F. Erwin were married in 1908. At the time of their marriage they were both residents of the state of Texas, and the marriage occurred in that state. There was born unto them a girl child, Lucile Milner. About three years after their marriage the husband instituted a suit for divorce. Pending the action the husband and wife entered into an agreement, reciting that the husband had applied for a divorce, and that it was desired to settle the custody of their minor child and their property rights, and it was agreed, among other things:

"That the court may in its discretion direct the care and custody of said child be awarded to C. W. Milner."

A decree of absolute divorce was rendered, in which it was adjudged that the father have the exclusive care and custody of the minor child, and that the wife "shall have

the privilege of visiting said child at the home of the plaintiff at any and all reasonable times." About 60 days after the decree of divorce had been entered, Mary F. Milner intermarried with John Gatlin. About that time C. W. Milner removed to Pike county, Ga., bringing his daughter with him, and in February of 1912 he married again. In July, 1912, Mrs. Mary F. Gatlin filed with the court which rendered the divorce decree her application to reform so much of it as awarded the custody of the child to C. W. Milner, stating in her application that C. W. Milner had taken the child to Georgia, and was without the jurisdiction of the court. Citation issued from the Texas court, and was served on Milner, who was domiciled in Georgia, by the sheriff of Pike county, Ga. Milner made no appearance, and the decree of divorce was amended by revoking so much thereof as awarded the custody of the child to the father; and it was adjudged in the amended decree that the mother should have the exclusive possession of the child, with the privilege to the father of visiting it at reasonable times. Thereafter Mrs. Gatlin sued out a writ of habeas corpus, asking that the possession of the child be awarded to her. On the hearing of this writ the custody of the child was awarded to the mother, and the father excepted. That judgment was reversed by the Supreme Court, 139 Ga. 109, 76 S. E. 860. A few days before the remittitur of the Supreme Court was made the judgment of the superior court, Mrs. Gatlin, who had removed to Georgia, filed a second application for habeas corpus against C. W. Milner, on the hearing of which the court again awarded the custody of the child to the mother, providing in the order that the father have the right to visit the child from time to time in suitable hours; that the child may visit the father at his home for one week every two months until the child shall enter school; and that while the child is in school these weekly visits shall cease, and in their stead the child shall spend with the father two weeks during the summer vacation and two days during the winter vacation, if he desires such visits. The father sued out a bill of exceptions to review this judgment. The mother, by cross-bill of exceptions, assigned error upon the exclusion of certain testimony offered by her.

Earl P. Patterson and Cleveland & Goodrich, all of Griffin, for plaintiff in error. William H. Beck and W. E. H. Searcy, Jr., both of Griffin, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The court allowed Mrs. Gatlin to testify concerning the procurement of her signature to the written contract between herself and husband, wherein she consented that the court might award, in the pending divorce proceeding, the child of the marriage to the husband, and she agreed upon a divi-

sion of their property in the event a divorce decree was entered. Her testimony was to the effect that, while confined in bed by illness, her husband brought into her room a stranger whom he introduced as his attorney, and who notified her that a suit for divorce had been filed, on which they desired her to acknowledge service; that both represented that they did not wish to take the child from her, and that the court would allow the child to stay with her; that she signed the paper without reading it and without knowing its contents, and in the belief that it was but an acknowledgment of service of the divorce suit, as it was represented; that afterwards her husband and his lawyer came to her while she was still confined to her room by illness, and gave her \$250 as being her part of the property, and she signed a receipt for the money; and that she retained the custody of the child until her husband abducted it and carried it off to Georgia, when for the first time she found out that the child had been awarded to the husband in the divorce decree. Objection was made to this testimony, on the ground that it was an attempt to collaterally impeach the decree of divorce. The record is not clear that Mrs. Gatlin knew, when she contracted her second marriage, that the divorce decree gave the custody of the child to the husband, so as to apply any estoppel on that point. The purport of her testimony is that so much of the divorce decree as relates to the custody of the child was procured by fraud; and the question is: Can this attack on the judgment be made in this case? Ordinarily it is not permissible for a party to attack a judgment for fraud in a collateral proceeding. *Alabama Great Southern Ry. Co. v. Hill*, 139 Ga. 224, 76 S. E. 1001, 43 L. R. A. (N. S.) 236, Ann. Cas. 1914D, 996. The policy of the law which forbids the indirect impeachment of the judgment is that it is the business of a litigant to be on his guard against fraud and trickery; but, if his rights are nevertheless infringed, he has his proper remedy by action or motion to annul the judgment, or by application to equity for relief. It appears that both Mrs. Gatlin and Milner, at the time of the filing of the present application, were residents of this state. Marriage being a status, and both parties being residents of this state, the courts of Texas have no jurisdiction to fix the status of the child of the marriage, by amendment of the divorce decree. If that portion of the divorce decree was obtained by the fraud of the husband in representing to the court that the wife assented to an award of the child to his custody, she has the right to attack the judgment on that ground in some forum. If, by reason of the parties being residents of the state of Georgia, the Texas court is without jurisdiction to determine this question, when the Texas decree is offered in evidence in a proceeding pending in this state, for the purpose of establishing a

right, the opposite party will not be shut off from showing that the decree was fraudulently obtained. The court was not consistent in applying this principle, and rejected the evidence offered by the defendant tending to disprove the plaintiff's charges of fraud. Complaint is made of such refusal, and the court erred in rejecting this testimony.

If the court should deem the evidence sufficient to establish that the provision in the decree disposing of the child was fraudulently procured, then the whole matter as to the fitness of either parent to have the custody of the child would be open, and unhampered by the former decree. On the other hand, if the court is not satisfied that the decretal disposition of the child was obtained by fraud, matters tending to show the unfitness of the father, existent at the time of the decree, should not be considered. *Milner v. Gatlin*, 139 Ga. 109, 76 S. E. 860. The allegations of the sixteenth paragraph of the petition, considered in connection with other paragraphs, are applicable to the case in the event the decree respecting the custody of the child is successfully impeached for fraud in its procurement; and it was not error to overrule a demurrer to that paragraph.

[2] 2. In a contest between parents for the possession of a child, witnesses should not be permitted to testify that one or the other of the parties is an unfit and improper person, or that the interest of the child will be best subserved by giving it to one of the contending parties. This is opinion evidence; and the rule with respect thereto is that, if the data can be placed before the judge in such a way that he may draw the inference as well as the witnesses, then it will be superfluous to add by way of testimony the inference which the judge may well draw for himself. Evidence touching the character, conduct, and reputation of either of the parties, or any other evidence tending to throw light on their fitness to be the custodian of the child, is admissible; but conclusions deducible from this testimony are not the subject-matter of opinion by the witnesses. *Moore v. Dozler*, 128 Ga. 90, 57 S. E. 110; *Churchill v. Jackson*, 132 Ga. 666, 64 S. E. 691, 49 L. R. A. (N. S.) 875, Ann. Cas. 1913E, 1203; *Milner v. Gatlin*, supra.

[3] 3. The court received in evidence the affidavit of the applicant that she and her husband had canvassed the neighborhood where the defendant Milner resided, for the purpose of obtaining affidavits to be used as evidence on the trial of the case, and that, almost without exception, the neighbors, relatives, and parties declared that Milner was not a fit person, at that time, to have the care, custody, and control of the child, on account of his habits and character, and on account of the feeling of his present wife towards the child; but they were afraid to make affidavit of the fact, as Milner was a desperate character, and if they testified to the facts as known to exist they were afraid

that Milner would burn them out. This was hearsay testimony, and was clearly illegal and highly prejudicial. The defendant offered affidavits of numerous citizens in his neighborhood that he was a man of good character. If the people in the neighborhood of the defendant refused to give an affidavit to the applicant, the statute provided a means by which she could compel their attendance before the court.

[4] 4. It is the settled law in this state that a decree in a divorce suit awarding the child to one of the parents is prima facie evidence of the legal right to its custody, but is not conclusive in habeas corpus proceedings where the circumstances and conditions or unfitness of the parent, arising since the date of the decree, are involved. *Barlow v. Barlow*, 141 Ga. 535, 81 S. E. 433, 52 L. R. A. (N. S.) 683. If since that decree the circumstances have so changed, a habeas corpus court may award the custody to the other parent or to a stranger, if the welfare of the child demands it. Civil Code 1910, § 2971; *Williams v. Crosby*, 118 Ga. 296, 45 S. E. 282. It is insisted that the rule in this respect has been altered by a recent act of the Legislature (Acts 1913, p. 110). Prior to that act the courts had decided that in a contest between a father and another, for the custody of the former's child, prima facie the right of custody of the infant is in the father. *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48. The act of 1913 provides that in all cases of contest between the parents of children, for their custody, "there shall be no prima facie right to the custody of such child or children in the father, but the court hearing such issue of custody may exercise its sound discretion, taking into consideration all the circumstances of the case, as to whose custody such child or children shall be awarded, the duty of the court being in all such cases in exercising such discretion to look to and determine solely what is for the best interest of the child or children, and what will best promote their welfare and happiness, and make award accordingly." This enactment applies to situations growing out of the domestic relation of husband and wife, as unaffected by any final divorce proceedings. Where there has been a divorce decree, in which disposition of the child has been made, that decree (where it is not successfully attacked for fraud in its procurement, under circumstances above pointed out) is binding on the parties, so as to conclude their respective rights to the custody of the children at the time of its rendition. As to conditions subsequently occurring, the judge of a habeas corpus court has full discretion in awarding the custody of the child, and in exercise of such discretion he may look to the circumstances relating to the child's ordinary comfort and contentment, its intellectual and moral development, and award the custody to either of the parents, according as it may be to the best interest of the child.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur.

ATKINSON, J. I concur in the result and in the rulings other than that stated in the first division of the opinion. Under the clause of the Constitution of the United States requiring full faith and credit to be given the proceedings of each state, I think that a judgment of a court having jurisdiction of the parties and the subject-matter, rendered in another state and valid on its face, cannot be collaterally attacked for fraud. I am authorized by Chief Justice FISH to say that he concurs with me.

(144 Ga. 8)

WEAVER v. TUTEN.

(Supreme Court of Georgia. Aug. 10, 1915.)

(Syllabus by the Court.)

1. EXECUTION \S 166 — JUDGMENT \S 305 — AMENDMENTS — AFFIDAVIT OF ILLEGALITY — GROUNDS.

Pending an issue formed on an affidavit of illegality to the levy of an execution, the judgment was amended, by order of court to conform to the verdict on which it was predicated, and the execution was amended to conform to the amended judgment. The amendment of the judgment and execution did not cause the levy to fail (Civ. Code 1910, \S 5697); and those grounds of illegality based on the variance between the verdict and judgment before amendment were properly stricken.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 485, 486; Dec. Dig. \S 166; Judgment, Cent. Dig. \S 596, 597; Dec. Dig. \S 305.]

2. EXECUTION \S 166 — VERDICT — OBJECTIONS.

If a verdict upon which a judgment is rendered, by a court having jurisdiction of the subject-matter and parties, be erroneous, the error must be corrected by timely and proper exception to the verdict, and cannot be taken advantage of by affidavit of illegality; and grounds of illegality setting up such alleged error were properly stricken.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 485, 486; Dec. Dig. \S 166.]

3. SET-OFF AND COUNTERCLAIM \S 46 — MATTERS WHICH CAN BE SET OFF.

A judgment was rendered in favor of an administrator de bonis non against the sureties on the bond of the former administrator, and an execution based on the judgment was levied on the property of one of the sureties. The surety filed an affidavit of illegality on the ground, amongst others, that the administrator had no interest in the recovery of the fund but to distribute it among the heirs of his intestate, some

of whom were indebted to the surety in stated amounts, which indebtedness it was prayed be set off on the ground of the insolvency of the surety's debtors. Held, that this ground was properly stricken. The judgment is in favor of the administrator in solido, and indebtedness of the heirs cannot be set off against it.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. \S 100, 103-106; Dec. Dig. \S 46.]

4. EXECUTORS AND ADMINISTRATORS \S 453 — RECOVERY OF JUDGMENT — SATISFACTION.

The individual indebtedness of an administrator to a defendant, though agreed to by him to be a payment on a judgment in favor of himself as administrator of an intestate, is not a payment to him as administrator, and should not be credited on the judgment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 1884-1908; Dec. Dig. \S 453.]

5. EXECUTION \S 137, 166 — LEVY — CORPORATE STOCK.

The statute provides a method by which shares in a bank or other corporation may be seized and sold under levy of an execution. Civ. Code 1910, \S 6035, 6036. Such levy is accomplished by giving notice thereof to the defendant in execution, if his residence be known, and also the officers or agent of the corporation in the county where the levy is made. A purchaser at the sale under such levy is entitled to a certificate of his purchase, which, on presentation to the officers of the corporation, shall authorize a transfer of the stock to him. A levy on stock of the corporation without the statutory notice is insufficient, and may be arrested on illegality. Where the evidence shows that the levy was made without compliance with the statute, it was erroneous to direct a verdict for the plaintiff and against the illegality. Princeton Bank v. Crozer, 22 N. J. Law (2 Zab.) 333, 53 Am. Dec. 254; Blair v. Compton, 33 Mich. 414; Wagner v. Marple, 10 Tex. Civ. App. 505, 31 S. W. 691; People ex rel. Adams v. Goss & Phillips Mfg. Co., 99 Ill. 355.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 325-329, 485, 486; Dec. Dig. \S 137, 166.]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

Action by J. L. Tuten, administrator, against J. L. Weaver and others. After judgment for plaintiff and the issuance of execution, defendant filed an affidavit of illegality. There was judgment on the affidavit for plaintiff, and defendant brings error. Reversed.

W. W. Bennett, of Baxley, for plaintiff in error.

PER CURIAM. Judgment reversed. All the Justices concur.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(144 Ga. 14)

GLENNVILLE INV. CO. v. JORDAN & ROGERS. (No. 498.)

(Supreme Court of Georgia. Aug. 10, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR \S 272 — EXCEPTIONS, BILL OF \S 39 — TIME FOR TENDER — NECESSITY OF EXCEPTIONS.**

This court is without jurisdiction to consider exceptions to the overruling of a motion to dismiss a case, where such ruling occurred more than one year prior to the tender of the bill of exceptions, and where no exceptions pendente lite were filed. In this case it was more than a year from the date of the ruling complained of to the date of the tender of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. \S 272; Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54-56, 60; Dec. Dig. \S 39.]

2. ATTORNEY AND CLIENT \S 190 — JUDGMENT \S 126 — ATTORNEY'S FEES — DEFAULT — FAILURE TO ANSWER.

Where suit is brought by an attorney at law for his clients as payees, against the maker of a promissory note, for principal, interest, attorney's fees, and certain equitable relief, and before the trial of the case the parties settle it among themselves, without the knowledge or consent of the plaintiff's attorney, who is not paid his fees, he may prosecute the original suit for the purpose of recovering his fees. Civil Code 1910, § 3364.

(a) In such a case, where no defense is filed by the defendant in the original suit, who has been legally served with process, etc., the defendant shall be considered in default, and the plaintiffs shall be permitted to take a verdict as if every item and paragraph were proved by the testimony. Civ. Code 1910, § 5662; Mitchell v. Allen, 110 Ga. 282, 34 S. E. 851; Boaz v. Jackson, 105 Ga. 228, 31 S. E. 163; Watson v. Parian Paint Co., 138 Ga. 621, 75 S. E. 608.

(b) The plaintiff's attorney having in such way made out the case of the plaintiffs against the defendants in the original suit, and having proved his employment, the value of his services as attorney at law in such case, the fact that he had never been paid, and the settlement of the case, a finding by the jury in his favor was authorized. The court did not err in overruling the motion for a new trial. Civ. Code 1910, § 2364.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. \S 190; Judgment, Cent. Dig. §§ 223, 224, 228-230; Dec. Dig. \S 126.]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by Jordan & Rogers against the Glennville Investment Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

L. L. Thomas, an attorney at law, brought suit in the superior court for his clients, Jordan & Rogers, against the Glennville Investment Company upon a promissory note for \$3,000 principal, with interest and 10 per cent. attorney's fees, and for certain equitable relief. Before trial the suit was settled between the parties, without the knowledge of the plaintiffs' attorney, the plaintiffs receiving the full amount of the note, except attorney's fees; and the case was marked across the face of the docket "X. R.," which the clerk of the court testified was in the handwriting of the presiding judge. There was a pencil memorandum on the docket, made by some one other than the judge, as follows:

"Upon motion of plaintiff's counsel this case is dismissed as to W. U. Rogers, the case of Rogers & Jordan retained on docket to settle question of lawyer's fees."

Thomas was not paid any fee, and the present proceeding is the prosecution of the suit by him for his fees. Upon call for trial, the defendant moved the court to strike the case from the docket, on the ground that at the April term, 1908, which was the appearance term, the case was dismissed and stricken from the docket by the presiding judge. In support of the motion the clerk of the court testified: He was clerk of that court during the years 1908-1910, inclusive. The entry "X. R." was made on the docket by Judge Rawlings, who was judge of the court at the time the entry was made. About a year afterwards, Mr. Thomas, the attorney, asked the clerk to redocket the case, claiming that he wanted to proceed for his fees. It was redocketed by the clerk, but there was no order of the court to do so. The court also overruled the motion to strike the case from the docket. A verdict in favor of the plaintiffs was rendered. A motion for a new trial was overruled, and the defendant excepted to each of the rulings just stated.

E. C. Collins, of Reidsville, and Hines & Jordan, of Atlanta, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(148 Ga. 827)

MITCHELL v. LANGLEY. (No. 535.)
(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

1. INSURANCE — §782 — FRATERNAL INSURANCE — BENEFICIARY — RIGHTS OF.

Although a beneficiary named by a member in a certificate issued by a benefit society may not have such a vested interest as to prevent the member from changing the beneficiary, where permitted so to do by the statute law, the charter, by-laws, or certificate, yet a beneficiary who has been so named is not an entire stranger to the contract, but has such an interest that if a third person, by false and malicious defamation of the beneficiary, fraudulently induces the member to change the certificate and appoint such person as the new beneficiary, who receives the amount specified, upon the death of the member, when otherwise the fund payable at the death of the member would have been received by such original beneficiary, this will furnish a basis for an action on the case for damages by the injured person against the person so acting.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.]

2. TRIAL — §339 — VERDICT — AMENDMENT — AMOUNT.

After the jury had been discharged in the afternoon with the consent of counsel, the court instructed them that, if they should agree upon a verdict after the court took a recess for the day, it could be written and signed by the foreman, and kept by him, and the jury could return it into court the next morning. When the court assembled the next morning, all of the jury being present, a verdict was returned in the following form: "We, the jury, find in favor of the plaintiff, with seven per cent. interest, less expense"—signed by the foreman. The court directed them to return to their room and correct their verdict by inserting therein the amount which they intended to find for the plaintiff. They retired, and later returned with a verdict expressing the amount found in the plaintiff's favor. *Held*, that this was not error, and furnished no ground to arrest the judgment, or for granting a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 791-794; Dec. Dig. § 339.]

3. MOTION FOR NEW TRIAL — ERROR — REVERSIBLE ERROR.

While some of the grounds of the motion for a new trial may have presented inaccuracies in the charge or rulings, none of them show error requiring a reversal.

Error from Superior Court, Rockdale County; C. S. Reid, Judge.

Action by Georgia Langley against C. G. Mitchell. Judgment for plaintiff, and defendant brings error. Affirmed.

Georgia Langley brought suit against Cora G. Mitchell, alleging in substance as follows: The plaintiff and the defendant were sisters, and they had another sister. They had a half-brother who had resided for some time in the state of Colorado, and who had been in feeble health, weak in body and mind, and liable to be influenced. In 1904, he took out a benefit certificate in the Royal Arcanum for \$3,000, payable at his death to his three half-sisters, one-third each. In 1911, in order to induce the member to surrender the certificate and obtain a new one

excluding the plaintiff as a beneficiary and in which the defendant would be the sole beneficiary, the defendant falsely and fraudulently, and with intent to deceive him, wrote to the member a letter in which she represented that all her two-half sisters cared for was to get all they could from the member; and in another letter defendant made certain representations tending to show that her two half-sisters did not agree to pay their part of what was necessary to keep the certificate in force, and that "it seems like they didn't care or want to help brother." These representations were knowingly false and fraudulent, and the defendant maliciously intended to injure the plaintiff in the good opinion and affection of her half-brother, and to bring about an estrangement between them and cause it to be believed by him that the plaintiff had been guilty of misconduct and of entertaining feelings imputed to her, and thus to cause him to surrender and cancel the benefit certificate in which she was a beneficiary. By these means the defendant induced her half-brother to surrender and cancel the benefit certificate, which would have remained in force at his death, and from which the plaintiff would have received \$1,000 principal, and to cause a new certificate to be issued, making the defendant the sole beneficiary. In doing this he believed the false representations and statements of the defendant, and was influenced by them. The member died after the change had been made, and the defendant collected the amount due under the second certificate. The plaintiff laid her damages at \$1,000. She also alleged that the written statement constituted a libel. By amendment it was alleged that the change in the beneficiary was procured by fraud and was void, and that the defendant was liable to the plaintiff for money had and received. No objection appears to have been made to adding these allegations to an action based on tort.

The plaintiff recovered; the jury making, in the verdict, a deduction on account of certain expenses which had been incurred by the defendant. A motion for a new trial was denied, and the defendant excepted.

A. C. & J. H. McCalla, of Conyers, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error. J. R. Irwin, of Conyers, and Rogers & Knox, of Covington, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. It is well settled that, in the absence of a clause of defeasance, or one providing for a change of beneficiaries, the beneficiary in an ordinary policy of life insurance has a vested interest which the insured cannot divest at his mere volition. In benefit societies, it is generally held, the beneficiary named in the certificate does not

stand in the same position as the beneficiary named in an ordinary life insurance policy. It has frequently been said that a beneficiary in such a certificate has only an expectancy, and not a vested interest, so as to prevent the member from making a change and substituting another beneficiary. Some of the courts announce this as if it were the result of something inherent in the nature of benefit societies. Others treat it as the result of some provision in the statute under which the society operates, or in its charter or by-laws, or in the certificate itself. In other words, the latter class of courts hold that the beneficiary takes what the contract (including in that term the statute law, the charter and by-laws, and the certificate) gives him; and that, by virtue of the authority derived from such sources to make a change, the member has that right. Sometimes the member has been referred to as having a power of appointment, with a power of revocation or substitution, and the beneficiary has been referred to as the appointee. *Nib. Acc. Ins. & Ben. Soc. (2d Ed.)* § 212; *1 Bac. Ben. Soc. (3d Ed.)* § 289 et seq.; note to *Union Central Life Ins. Co. v. Buxer*, 49 L. R. A. 737, 749, et seq. (62 Ohio St. 385, 57 N. E. 66); *Smith v. Locomotive Engineers*, etc., Ass'n, 138 Ga. 717, 76 S. E. 44; 29 Cyc. 125 (c), and citations; *Locomotive Engineers*, etc., Ass'n, v. *Winterstein*, 58 N. J. Eq. 189, 44 Atl. 199.

In *Hoelt v. Supreme Lodge Knights of Honor*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174, it was held that fraud inducing the insured to change the beneficiaries in his certificate of life insurance in a benefit society, when he has a right to make the change, does not give the former beneficiaries any right to claim the proceeds as against the new beneficiary, where the insurer does not contest the validity of the insurance. This was based on the argument that the beneficiary in such a certificate has no vested right, but only a mere expectancy, or an incomplete gift, which is revocable at the will of the insured, and which does not become vested until the death of the latter; that a right of action for fraud is personal and not transferable; that one cannot be defrauded of that in which he has no vested right; and that such a beneficiary has no right of property to be protected. In that case the benefit society paid the money into court, and the controversy was between the widow of the member and his children; the latter claiming that the widow, their stepmother, had fraudulently procured the member to surrender the certificate, in which they were named as beneficiaries, and to have issued another, in which she was named as the beneficiary. The statement that the views expressed are sustained by a multitude of authorities may be true to the extent that a beneficiary has no such vested interest as to prevent the member from substituting another beneficiary. But the cases cited in

support of the proposition do not establish the contention that a beneficiary named in a certificate has no such interest as to authorize him to attack a fraudulent procurement of a change by a third party who receives the amount specified, upon the death of the member. In *Alfson v. Crouch*, 115 Tenn. 352, 89 S. W. 329, a similar ruling was made.

Hahn v. Supreme Lodge of the Pathfinder, 136 Ky. 823, 125 S. W. 259, was cited by counsel for the plaintiff in error, as making a like ruling. But, when carefully examined, that decision will be found not to sustain the two decisions above cited, but to contain a strong intimation to the contrary. It was held that a beneficiary in a certificate of insurance in a fraternal order had not a vested interest in the sense that a change in the beneficiary by the husband (who was a member) from the wife to some one else will of itself constitute a fraud on her marital rights. The opinion contains this statement (page 829 of 136 Ky., and page 261 of 125 S. W.):

"Furthermore, the evidence, if any, which was heard in the court below, is not now before us. There is therefore no proof of actual fraud; and, for aught we know, the conduct of the wife may have been sufficient to justify the husband in making the change. In the absence of a bill of exceptions, the presumption is that the proof heard supports the finding of the chancellor."

The inference is that if there had been proof of actual fraud, and a finding by the chancellor of its existence, the decision might have been otherwise. While the beneficiary named in a certificate of this character has not such a vested interest as will prevent the member from substituting another beneficiary in his stead if the statute, the charter, by-laws, or certificate so authorizes, it would seem to be the sounder rule that this would not prevent the original beneficiary from proceeding by equitable petition to have a trust declared in his favor, if the benefit which would have accrued to him was diverted from him and the fund went into the possession of another by means of fraud. It is not necessary in all cases that there should be a vested right in property or a fund in order to have one who fraudulently diverts it from another, who would have received it, declared to be a trustee *ex maleficio*.

In *Cassels v. Finn*, 122 Ga. 33, 49 S. E. 749, 68 L. R. A. 80, 106 Am. St. Rep. 91, 2 Ann. Cas. 554, note, it was held that the mere failure to perform an oral promise made by the sole heir at law of one desiring to dispose of her estate by will to a third person, that he would dispose of her estate as she desired, did not make the heir at law, in case of an intestacy, a trustee *ex maleficio* as to the property inherited by him, in the absence of actual fraud. It was recognized that, if there had been actual fraud and interference, the heir would be declared a trustee *ex maleficio*.

In *Cason v. Owens*, 100 Ga. 142, 28 S. E. 75, certain children brought suit against their mother, alleging that their father was holding policies in his lifetime in certain insurance, or benefit, or assessment, companies, to the amount of \$7,500, payable to his three children as beneficiaries, one of them, for \$3,000, being in a company called the Golden Chain; that shortly before his death, the policies being in force and valid, the defendant, by undue influence and with intent to defraud the plaintiffs, induced their father to change the beneficiaries of the policies and to name her as the sole beneficiary therein; that at the time he made this change he was without sufficient mind to do business and to understand that particular act, and was influenced to make the change by the fraud of the defendant, wherefore it was alleged that the change of beneficiaries was null and void, and that the plaintiffs in law and fact were the real beneficiaries and entitled to all the proceeds of the policy; and that after his death the defendant collected all the money on the policies, and claimed it, and denied that the plaintiffs had any interest therein. It was held that the petition set out a good cause of action. The opinion shows that the policies or certificates were treated as of a character which authorized the insured or member to change the beneficiary. *Little, J.*, said:

"In the case under review, the petition alleges that the father of the plaintiffs in error procured a contract of insurance upon his life for the sum of \$7,500, and that the plaintiffs, his children, were named as the beneficiaries thereunder. Assuming this to be true, which the demurrer filed to the proceeding admits, then these plaintiffs in error had an interest in such contract, and might under certain circumstances, even during the life of the insured, have protected such interest, while the policy was in force. * * * They were not strangers to the contract."

He further said:

"Undoubtedly this power of substitution exists inherently. But that is not the question in this case."

It will thus be seen that this court has held that, while the beneficiary of such a certificate has not a vested interest so as to prevent a change of the beneficiary by the member, he has such an interest as will authorize him to set up that the member was mentally incapable of making the change when he attempted to do so. There were also allegations of fraud, but they were not discussed. See, also, *A. O. U. W. v. McGrath*, 133 Mich. 626, 95 N. W. 739; *Sovereign Camp Woodmen of the World v. Wood*, 114 Mo. App. 471, 89 S. W. 891; *Owby v. Supreme Lodge Knights of Honor*, 101 Tenn. 16, 46 S. W. 758, impliedly overruled or disregarded in *Alfsen v. Crouch*, supra. In *Moan v. Normile*, 37 App. Div. 614, 56 N. Y. Supp. 339, after holding that there was a right of substitution of a new beneficiary,

under the facts of that case, *Patterson, J.*, added:

"If a certificate were procured by fraud upon the member, the right of the original appointee would not be impaired in a contest between rival claimants."

It will not be controverted that the power of the member to change the beneficiary may be modified by contract or by equitable considerations working an estoppel; and that if the association pays the fund into court, and thus waives defenses which it might have under regulations made for its benefit, the equities of the contestants will be compared. *Royal Arcanum v. Riley*, 143 Ga. 75, 84 S. E. 428; *Supreme Council Catholic Benevolent Legion v. Murphy*, 65 N. J. Eq. 60, 55 Atl. 497.

While there were some allegations in the amendment looking in the direction of equitable relief, the action was begun as one for damages, and in its main features was so dealt with by the court and counsel; and we will consider that aspect of it. Although the beneficiary may have no vested interest which will prevent a change by the member, yet he is not an entire stranger to the transaction. The member has voluntarily caused him to be named in the contract as a beneficiary. If no change is made and the certificate remains of force, the beneficiary named will receive the benefit after the death of the member. The member, by the contract with the association, thus creates a certain status, which, unless lawfully changed, will result in the receipt of a pecuniary benefit by the appointed beneficiary. The fact that this status has not ripened into a vested and irrevocable ownership of the beneficial interest, and that the member has a right to change it, does not authorize a third party to maliciously and fraudulently destroy the status and thus prevent the interest or expectancy of the beneficiary from ripening so that he will receive the fund. The reserved right of the member is one thing; the malicious and fraudulent interposition of a third party to destroy the status is another.

In *Moran v. Dunphy*, 177 Mass. 435, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289, it was held that maliciously and without justifiable cause to induce one to end his employment of another is an actionable tort. This did not depend upon causing a breach of contract for further employment. In the opinion *Holmes, C. J.*, said:

"We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant who has controlled the employer's action to the plaintiff's harm. The notion that the employer's immunity must

be a nonconductor, so far as any remoter liability was concerned, troubled some of the judges in *Allen v. Flood*, [1898] A. C. 1, but is disposed of for this commonwealth by the cases cited. See, also, *May v. Wood*, 172 Mass. 11, 14, 15 [51 N. E. 191]. So again it may be taken to be settled by *Plant v. Woods*, 176 Mass. 492, 501, 502 [57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330], that motives may determine the question of liability; that, while intentional interference of the kind supposed may be privileged if for certain purposes, yet if due only to malevolence it must be answered for."

See Civil Code 1910, § 4511.

In *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30, one S. had contracted, by parol, to sell and deliver to the plaintiffs a quantity of cheese; but being made to believe, by the fraud of the defendant, that the plaintiffs did not want the cheese, he sold it to the defendant. The contract was not binding under the statute of frauds, but would have been performed by S. had it not been for the fraud. It was held that an action was maintainable by the person originally agreeing to purchase against the person committing the fraud. Though the contract was not enforceable against the vendor, nevertheless the purchaser had such a status as could be protected against fraudulent interference by another.

The case of one who fraudulently prevents the making of a devise, and procures the property to be left to himself, has been mentioned. In *May v. Wood*, 172 Mass. 11, 51 N. E. 191, it was alleged that the plaintiff and another woman entered into an agreement to the effect that the plaintiff should continue to reside as before with the other woman, and to receive \$4 as weekly compensation, and that the other woman would provide by will a legacy of \$700 to be paid to the plaintiff upon the death of the testatrix. It was further alleged that the defendants, for the purpose of depriving the plaintiff of the benefit of the agreement, and of the legacy provided for the plaintiff by a codicil to the will of the testatrix (the other woman), conspired together to influence and induce the testatrix, by divers false and malicious statements, and by inducing the testatrix to believe that the plaintiff was a dangerous person and unfit associate, to break the agreement with the plaintiff; and that the testatrix was induced to break the agreement and discharge the plaintiff, and also to revoke the provision in her will for the benefit of the plaintiff. The right of action was recognized, but the majority of the court held that the false and malicious statements should have been set out in the declaration. *Holmes, J.*, in a dissenting opinion, discussed the right of action and the sufficiency of the allegations.

In *Com. Dig. Action on the Case (A)*, it is said:

"In all cases, where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages."

Is it possible that where a will has been made, leaving a devise, a third person can

fraudulently and maliciously cause the testator to revoke the devise, and thus cause a loss to the devisee, without any redress on the part of the latter? Or, if a father should make a deed of gift to his son, but before delivery another should falsely and maliciously represent that the son was a fugitive from justice, or was in penal servitude, or had died without issue, and so cause the father to destroy the deed without delivery, could it be contended that the son would have no redress for the loss occasioned to him, because the deed had not been delivered and the title had not actually vested in him? And likewise, if a member of a benefit society has caused one of his family to be named in a certificate as the beneficiary thereof, can it be successfully contended that a third party can, by malicious and fraudulent representations, cause the member to change the certificate, and thus cut off and divert to himself a benefit which would have arisen to the beneficiary, with no redress to the latter, merely because the member had the power to change the beneficiary? Would not a man have the right to receive gifts or insurance or the like, if they were in process of being perfected, and would have come to him but for malicious and fraudulent interference? A bare possibility may not be within the reason for this position. But where an intending donor, or testator, or member of a benefit society, has actually taken steps toward perfecting the gift, or devise, or benefit, so that if let alone the right of the donee, devisee, or beneficiary will cease to be inchoate and become perfect, we are of the opinion that there is such a status that an action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it. It is true that such an action is not of usual occurrence; but, as was said in *Kujek v. Goldman*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670, that an action is new and without precedent is not conclusive against the plaintiff's right of recovery, if he is shown to have suffered a wrong. *Vann, J.*, quoting from *Winsmore v. Greensbank*, *Willes*, 577, 580, said:

"A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case."

It has been held that an action would lie for damages by reason of frightening wild fowl from the plaintiff's decoy. *Keeble v. Hickeringill*, *Holt*, 14, 17, 18; 11 Mod. 74, 134; *Keeble v. Hickeringill*, cited in a note to *Carlington v. Taylor*, 11 East, 571, 574. From the different reports it is not clear whether the action was maintained on the ground that the wild fowl were frightened out of the plaintiff's pond, or whether they were driven away and prevented from resorting thereto, as would seem to be the fact from the last citation of the case. In *Tarleton*

v. McGrawley, 1 Peake, 270, 274, it was declared that an action would lie for frightening the natives upon the coast of Africa, and thus preventing them from coming to the plaintiff's vessel to trade, whereby he lost the profits of such trade. In the cases last cited it is apparent that the plaintiff had no property right in the fowl while not on his property, or in the custom of the natives, but that he was entitled to use his decoys, and to attract the natives to trade with him without wrongful interference. These cases may be analogized to interference with one's business, but there was only an anticipation of benefit.

Actions for slander, where the words were not actionable in themselves, and special damages were claimed, furnish illustrations of losses which may be considered as damages proximately arising from a tort. In *Davis v. Gardner*, 4 Rep. 17, it was held that, if a divine is to be presented to a benefice, and one, to defeat him of it, says to the patron that he is a heretic, or a bastard, or that he is excommunicated, by which the patron refuses to present him, and he loses his preferment, he shall have his action on the case for those slanders tending to such end. In *Moore v. Meagher*, 1 Taunton, 39, Smith, 135, it was held that the loss of hospitality of friends gratuitously afforded constituted special damages. So, also, it has been declared, does the loss of any gratuity or present, if it be clear that the slander alone prevented its receipt. *Odgers on Libel and Slander* (5th Ed.) 379; *Hartley v. Herring*, 8 T. R. 130. In *Matthew v. Crass*, Cro. Jac. 323, it was held that an action for defamation, per quod the plaintiff lost his marriage, will lie.

Of course, in the instant case, it will be necessary, in order to recover, to show that a benefit would have accrued to the plaintiff, and that the statements of the defendant were false and fraudulent, and were the proximate cause of loss to the plaintiff. But where the member died soon after the change was fraudulently procured, and the amount of the certificate was paid to the new beneficiary, the case was susceptible of proof.

[2, 3] 2. The remaining rulings are sufficiently stated in the headnotes, and they require no further elaboration.

Judgment affirmed. All the Justices concur.

(144 Ga. 45)

WALTON et al. v. BUSBY. (No. 529.)

(Supreme Court of Georgia. Aug. 13, 1915.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS — 347—
SALES OF LAND—ORDERS.

Where executors petitioned an ordinary to grant an order to sell lands of the testator for the purpose of paying debts, etc., and the petition merely recited that the testator at the time of his death owned "a large body of land lying

in Lincoln county, whereon the deceased resided at the time of his death, * * * and that it will be to the benefit of heirs and creditors that a portion of it should be sold for the payment of said debts," etc., and the ordinary granted an order "to sell the said portions of land belonging to said estate, lying in Lincoln county, as they may deem best," such order was void on account of insufficiency in the description of the property.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1445; Dec. Dig. § 347.]

2. EXECUTORS AND ADMINISTRATORS — 350—
TRIAL — 261 — SALES — VOID SALES — DEFENSES—RULINGS—LAW OF CASE.

A suit was brought by certain legatees and heirs to recover the lands sold under the void order. One of the pleas of the defendant was as follows: "The proceeds of said land sold, moreover, were received by said executors, who used the same for the benefit of said estate, in paying debts against said estate, improving the remaining lands, and for the support of the petitioners. Were said sales in any respect deficient in law, in equity, by said payment and use of the proceeds, said Busby acquired a good equitable title; and petitioners, being still in possession of said improvements, and having the benefit of the other expenditures aforesaid, so made out of the proceeds, are estopped to recover said land." The court charged the jury as follows: "Now I charge you, gentlemen, on another contention of the defendants in this case. If you find from the evidence, facts, and circumstances of the case that the defendants did not get a good prescriptive title, as before explained to you, and, under the rules of law given you in charge, that the defendants did not have a good prescriptive title to this land, if you find from the evidence, facts, and circumstances of the case that they bought this land in good faith, and that the executors acted in good faith in selling the land; and you further find from the evidence, facts, and circumstances of the case that at the time of the sale it was necessary for them to have the money that was paid for the land; and you find that the price paid by Mr. Busby was the value of the land, and that the executors received this money in good faith and properly administered it, took it in charge, and accounted for it to the estate of Leonard Sims; and you further find from the evidence, facts, and circumstances of the case that they paid debts against the estate of Leonard Sims, or that they paid other debts in the way of costs to the ordinary, or any other expenditures that were chargeable to the estate of Leonard Sims, and that they so used this money that they received from Mrs. Busby, and that the estate got the full benefit of the entire amount of the price that was paid for the land, and that was the full value of the land, and that the estate got the full benefit of it through these executors, and it was accounted for to the estate by these executors—then I charge you if you find that state of facts, that Mr. Busby, and the defendant Mrs. Busby, who holds under him, got a good title to this land, provided you find this money was entirely used for the estate. I charge you if this money came into the hands of the executors and was received by them, but that it was applied to the payment of any debts that were not chargeable to the estate of Leonard Sims, then I charge you that Mr. Busby, and the defendant Mrs. Busby, claiming under him, would not, under that finding, get a good title, even though they might have acted in good faith in selling it, that is, that the parties believed that they had a right to sell it and to buy it under the order of the court of ordinary; it would all have had to have gone to the benefit of the estate, in the payment of such debts and claims as were charge-

able by law to the estate of Leonard Sims." This charge was erroneous, for the reason that it did not correctly state the law applicable to the case; furthermore, the charge cannot be sustained as authorized by the defense set up in the plea above quoted, on the theory that, inasmuch as objections to the sufficiency of the allegation of that plea had been overruled by the court and exception taken thereto, that ruling became the law of the case, because it does not appear whether the objections went to the form or substance of the allegations; and, moreover, the charge is not in all respects adjusted to the plea and the evidence.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1553, 1555-1564, 1567; Dec. Dig. § 380; Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.]

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Action between Mrs. J. W. Busby and P. A. Walton, executor, and others. There was a judgment for the former, and the latter brings error. Reversed.

Colley & Colley and J. M. Pitner, all of Washington, Ga., Jno. T. West, of Thomson, and Thomas H. Remsen, of Lincolnton, for plaintiffs in error. Samuel H. Sibley, of Union Point, and C. J. Perryman, of Lincolnton, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(144 Ga. 48)

JEENS v. WRIGHTSVILLE & T. R. CO.
(No. 536.)

(Supreme Court of Georgia. Aug. 14, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR § 1048 — WITNESSES
§ 321, 380 — IMPEACHMENT — REVERSIBLE
ERROR.

A party cannot impeach his own witness voluntarily called by him, unless he can show to the court that he has been entrapped by the witness by a previous contradictory statement.

(a) And where, on the trial of a case, a party thus offering a witness did so upon faith of testimony delivered by the witness on another trial and in another case, which was reduced to writing, in which the witness made statements contradictory to his present testimony, the party offering him in the last trial will not, on this basis, be permitted to attack the witness in an effort to impeach him.

(b) And where in such a case a party was allowed to offer witnesses for the purpose of impeachment, over objection of the opposite party on the ground that proper foundation had not been laid, and the testimony of the impeaching witnesses detailed statements made by the witness whom it was sought to impeach, different from his present testimony and relating to material things, the error in allowing such impeaching testimony is cause for a reversal.

(c) Nor is the proper foundation laid for the impeachment of one's own witness, where the basis is the testimony of third persons who heard the testimony of that witness given in another case relating to the same transaction, and contradictory to the testimony of the witness in the cause on trial; it not appearing that the witness by himself or through others had commu-

nicated to the party offering him what the witness had testified on the former trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048; *Witnesses*, Cent. Dig. §§ 1094, 1099, 1100, 1210-1219; Dec. Dig. § 321, 380.]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"ENTRAP."

The expression "entrap," used in Civ. Code 1910, § 5879, declaring that a party may not impeach a witness voluntarily called except where he can show to the court that he has been entrapped by the witness by a previous contradictory statement, is equivalent to inveigle and ensnare, and a witness entraps a party where he makes contradictory statements directly to the party calling him, or has them communicated to such party.

Error from Superior Court, Washington County; A. R. Wright, Judge pro hac.

Action by Jennie Jeens against the Wrightsville & Tennille Railroad Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

E. W. Jordan, of Sandersville, and Hines & Jordan, of Atlanta, for plaintiff in error. Daley & Daley, of Wrightsville, and J. E. Hyman, of Sandersville, for defendant in error.

HILL, J. Jennie Jeens sued the Wrightsville & Tennille Railroad Company for damages from the alleged tortious killing of her husband, Jim Jeens, at the intersection of a public road crossing with the track of the defendant company while the deceased was attempting to drive his horse and buggy across the railroad track. The jury found for the defendant. A motion for new trial was overruled, and the plaintiff excepted.

The sixth ground of the plaintiff's amended motion for a new trial was as follows:

"Because the court erred in permitting the defendant to impeach Will Daniel, a witness sworn in its behalf, under the facts herein stated. Judge Daley, the attorney for the defendant, stated that he had been entrapped by the witness on account of the testimony which was reported at the coroner's inquest, and asked to be allowed to impeach him, which the court permitted, over objection of plaintiff's counsel that the plaintiff could not impeach said witness, he being the witness of the defendant, under the facts stated by counsel for the defendant. The court permitted the defendant to impeach said witness on the following statement of Judge Daley, the attorney for the defendant, to wit: 'I also made the statement that I have been entrapped, and I make this statement in my place that I had his sworn testimony at the inquest, and I relied on him giving that same testimony; in addition to that, I had the other statement that he delivered here to these witnesses.' For the purpose of laying the foundation for this impeachment, the court permitted Will Daniel to swear as follows: 'I was sworn at the coroner's inquest. I did not swear at the coroner's inquest that Jim Jeens was about 60 yards from the crossing when the engine blew for the crossing. I swore that he was making for the railroad when the engine blew for the crossing, and I swore that I was about 60 yards from the crossing at the time he got hit. I swore that I was about 60 yards from the crossing, and that I was running

to him, waving my hand at him that way. He did not see me waving my hand, I don't suppose. I swore that I saw him driving upon the crossing, and the horse got on the track, and as the horse got on the track the horse stopped and the train struck him. I swore at the coroner's inquest that I went up to the train and found the engineer and fireman out in front of the engine, that the buggy was hung on the pilot, and that the body was partly broken up and partly on the ground. I swore that the engineer blew for the crossing.' For the purpose of laying the foundation for said impeachment, the court permitted Will Daniel, over objection of counsel for the plaintiff, to testify, as a witness for the defendant, as follows: 'I did not state in the presence of Carson Lanier that I told Jim Jeens not to leave until after the train had passed, as I saw the headlight coming, and that Jim said that he could beat it to the crossing and started off, and as soon as I heard the crash I said to the people that Jim had let the train run over him. I did not state in the presence of Mr. Carson Lanier that I told Jim Jeens not to leave. I swear that positively. I did not tell anybody yet, I ain't never said it, and I am at the first of it right now.' Because the court erred in permitting C. E. Lanier, who was sworn as a witness for the defendant, for the purpose of impeaching Will Daniel, a witness for the defendant, to testify as follows: 'I know Will Daniel. Will Daniel was present that night immediately after this accident occurred, and I heard him make some remarks about what he said to Jim Jeens. Immediately after the accident, Will Daniel came up with a little child in his arms, apparently about two years old; and he came around in front of the engine, and he says, "Mr. Lanier, I told him not to come away from that house and not to leave the house until the train went by;" and he says, "He told me, 'I am going to cross that track in front of that train,'" Counsel for the plaintiff objected to all of the foregoing evidence and to the effort of the defendant to impeach its own witness, said Will Daniel, on the ground that the defendant could not impeach said Will Daniel, its own witness, upon the ground that counsel for the defendant had been entrapped, under the facts therein stated; the same being all the facts upon which the court based its ruling permitting the impeachment of said witness by the defendant. Plaintiff alleges this ruling is error, and says that the court should have sustained her objections to all of said impeaching testimony on the ground that the defendant had made no case, under said facts, which authorized the impeachment of its own witness."

[1] The common-law rule with respect to impeaching one's own witness was that it could not be done for the purpose of discrediting his testimony where the party producing him was dissatisfied with it. This rule rested on the theory that one producing a witness vouched for his credibility, and would not be heard to attack the veracity of his own witness and to destroy him if he testified against him, and to make him a good witness if he testified for him. 5 Jones' Com. on Ev. § 853. And the weight of authority is to the effect that, in the absence of statutory authority, a party will not be allowed to offer direct proof by other witnesses that his own witness has previously made statements inconsistent with his present testimony, or by proving general bad character for truth and veracity. *Id.* § 854; *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, and note, 40 Am. St. Rep. 349. But our statute

modifies this rule of the common law, and declares that:

"A party may not impeach a witness voluntarily called by him, except where he can show to the court that he has been entrapped by the witness by a previous contradictory statement." Civil Code, § 5879.

See 40 Cyc. 2694.

[2] This statute, being in derogation of the common law, must be construed strictly. The statute uses the word "entrapped," not "misled," as used in some jurisdictions. A party may be misled, but not entrapped. Under our statute, he must be entrapped. We find no definition of the word "entrapped" by the legal lexicographers, but the New Standard Dictionary thus defines it:

"To take or catch in a trap; entangle or take captive by trick or artifice; ensnare; as to entrap a bird."

We do not incline to the too narrow definition that the witness must have intentionally made statements intended to deceive and entrap in order to testify, though, if he does so, we think this is within the statute; but if a witness makes a statement to a party litigant or his counsel, or to some third person with instruction to communicate such statement to the party or his counsel, which is done, and the party acts on that statement, we think in legal contemplation the party has been entrapped, and the rule laid down in the statute would apply in such a case. But we also think that:

"The information as to the prior inconsistent statement must have come to the party or his counsel directly from the witness." 40 Cyc. 2694, citing *Luke v. Cannon*, 4 Ga. App. 538, 541, 62 S. E. 110.

It is not a sufficient foundation for impeachment that third persons testify that the witness whom it is sought to impeach made contradictory statements on the trial of a former and different case from his present testimony. We do not think that the fact that the witness has testified previously in another case to inconsistent facts, which testimony was reduced to writing, and which defendant's counsel has relied on as a basis for using the witness as his own in another case, without communicating with the witness in order to ascertain what he knows of the facts, is a sufficient basis for impeaching his own witness, where he has offered him as such without any interrogation as to his knowledge of the transaction testified about. The least diligence on this line would have probably discovered whether the defendant would need the witness as its own. But it cannot be the rule that a party can rely on testimony given in another case, though as to the same transaction, unless the witness delivering it has in some way "entrapped" the party offering him. We do not think the proper foundation was laid by the defendant for the impeachment of his own witness; and the court erred in permitting the defendant to thus attack or impeach him.

The issues of the case were fully present-

ed to the jury by the charge of the court, and none of the other assignments of error require a reversal.

Judgment reversed. All the Justices concur, except EVANS, P. J., disqualified.

(16 Ga. App. 680)

SHIELDS v. STATE. (No. 6042.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

1. WITNESSES—§79—COMPETENCY—DETERMINATION—PRESUMPTION.

Where the capacity of a witness is questioned on account of his youth, and a preliminary examination touching his competency is allowed by the trial court, and thereafter his testimony is admitted, it is to be presumed that the trial court exercised the discretion conferred by section 5856 of the Civil Code of 1910, and that the court adjudged the witness to be prima facie competent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 201-204, 216; Dec. Dig. §79.]

2. CRIMINAL LAW—§1172—HARMLESS ERROR—INSTRUCTIONS—COMPETENCY OF WITNESS.

The mere fact that the court sees fit to give to the jury correct instructions as to the law relative to the capacity of a witness to testify, and charges them that they may consider the youth of the witness and the answers elicited from him touching his competency as such, in passing upon his credibility, is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. §1172.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The verdict was fully supported by the evidence, and there was no error in refusing a new trial.

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Joe Shields was convicted of robbery, and brings error. Affirmed.

Thos. B. Brown, of Atlanta, for plaintiff in error. H. M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

RUSSELL, C. J. The plaintiff in error was convicted of robbery. The main witness for the state, and the only witness who testified to the more material allegations of the indictment, was a boy nine years of age. On motion of counsel for the accused this youth was subjected to an examination touching his capacity as a witness. Upon conclusion of this examination the court remarked, "I will leave it to the jury whether he is competent or not," and allowed the witness to proceed to testify. This act of the court in so allowing the testimony of the witness is attacked as erroneous.

[1] While it is true that the competency of a witness to testify is a question for the court (Civil Code, § 5856), we find no error in the remark complained of, or in the charge of the court. It is not insisted that the judge could not, or did not, within his own breast,

consider the capacity of the witness fully up to the standard required by law. The mere fact that he did not expressly declare the witness to be competent or incompetent does not in any wise tend to show that the court did not consider the witness competent. Indeed, the very act of the court in allowing the witness to testify at all after he had been examined as to his competency negatives the idea that the court held the witness to be incompetent. We are constrained to believe that the judge, wise and learned as he is, in making the remark above quoted, merely had in mind the sound legal maxim that "the object of all legal investigation is the discovery of truth." In permitting the witness to testify at all the court exercised its discretion, and adjudged prima facie that the child was a competent witness. In making the remark of which complaint is made the judge perhaps had in mind and expressed the truth that after all the capability, competency, credibility, and veracity of the youthful witness would necessarily have to be passed upon by the jury trying the defendant, and who were the final judges of both the law and the facts. As was said by this same able judge when a member of this court, in *Webb v. State*, 7 Ga. App. 37, 60 S. E. 27, in a case similar to this, in which the competency of a girl eight years of age was questioned:

"At last the jury, who saw the child and heard her answers to the questions relating to her competency, were the judges of whether her testimony was entitled to credit."

The Supreme Court, in *Young v. State*, 122 Ga. 726, 50 S. E. 936, a similar case, held that:

"While the judge may have been satisfied prima facie that she was competent, the jury at last were the judges of whether they would credit her testimony or not."

The judge in the present instance must of necessity have been satisfied prima facie that the witness was competent, else he would not have allowed the witness to testify. It is not insisted that the judge erred in his conclusions as to the competency of the witness, and, indeed, if it were so insisted, we would be constrained to hold that he did not abuse his discretion in holding the witness competent to testify, for there must appear a very flagrant abuse of discretion in such cases to authorize this court to interfere. *Peterson v. State*, 47 Ga. 525; *Young v. State*, supra. No such abuse appears in this case.

[2] 2. It is insisted in the second ground of the amendment to the motion for a new trial that the court erred in giving in charge to the jury the law relative to the capability of witnesses to testify, and in charging them that they might take into consideration, in arriving at their verdict, whether the witness in question was a competent and capable witness. The court went fully into this matter, and we are unable to see wherein the

defendant has any right to complain thereof. Such instructions could not possibly have done the defendant harm. It is for the jury in every case to pass upon the credibility of witnesses, but the court went a step further than the law required, and also gave the defendant the benefit of having the jury say that the court might have misjudged the capacity of the witness to testify. Merely because a judge, in his effort to accord to one charged with crime every essential of a fair and impartial trial, may allow the jury also to pass upon matters of fact already rightly adjudged by him, upon an investigation as to the prima facie competency of a witness, and especially when a conclusion of the issue of competency by the jury different from that reached by the judge could not possibly do the defendant harm, but might, on the contrary, inure to his benefit, should, in our opinion, afford the defendant no cause for complaint.

[3] 3. The verdict was fully supported by the evidence, and there was no error in refusing a new trial.

Judgment affirmed.

BROYLES, J. (concurring specially). I cannot agree that, because the trial judge, after allowing a preliminary examination of the child witness touching his competency, permitted the witness to testify, "it is to be presumed that the court exercised the discretion conferred by section 5856 of the Code, and adjudged the witness to be prima facie competent to testify," when the record further shows that after the examination of the witness the judge remarked:

"I will leave it to the jury whether he is competent or not."

That the judge did, in fact, refer the question of the competency of the witness to the jury is further shown by his charge, when, in referring to the witness in question, he used the following language:

"You saw the little boy. I leave it to you, gentlemen, to decide, along with the other evidence in the case, whether or not, in your opinion, he is old enough to understand the nature of an oath, to understand what he is doing, where he is, and the condition and character of an oath. The law says a witness is not competent at all as a witness if a child is too young to understand the nature of an oath. If you believe in this case that this little boy does not know anything about an oath, does not understand the nature of it, does not understand what he is doing, does not understand what would be the effect of perjury by him, you would be authorized to say he was not competent as a witness."

In my opinion, it is clear that the learned trial judge, instead of deciding upon the competency of the witness, as required by section 5856 of the Code, referred it to the jury. I concur, however, in the affirmance of the judgment of the court, for, under all the facts in the case, I do not think that this error was sufficiently prejudicial to the defendant to require the grant of a new trial.

(16 Ga. App. 684)

SEABOARD AIR LINE RY. v. HALL
(No. 6178.)

(Court of Appeals of Georgia. Aug. 5, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR ¶1010—JUDGMENT—EVIDENCE.

The grounds of the amendment to the motion for a new trial are merely an elaboration of the general grounds that the verdict is contrary to the evidence and without evidence to support it. There being some evidence to support the judgment rendered by the trial court, sitting without the intervention of a jury, under the repeated rulings of this court and of the Supreme Court, a new trial will not be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ¶1010.]

Error from City Court of St. Marys; Emmett McElreath, Judge.

Action between the Seaboard Air Line Railway and Bud Hall. From the judgment the Railway brings error. Affirmed.

Bolling Whitfield, of Brunswick, and S. C. Townsend, of St. Marys, for plaintiff in error. Oliver & Oliver, of Savannah, for defendant in error.

BROYLES, J. Judgment affirmed.

(101 S. C. 436)

SPENCE v. SOUTHERN RY. CO. (No. 9157.)
(Supreme Court of South Carolina. Aug. 12, 1915.)

COMMERCE ¶8—STATE REGULATION—CARRIER'S LIABILITY—CONGRESSIONAL ACTION.

Congress has so far taken over the subject of a carrier's liability for loss or damage to interstate shipments by Act June 18, 1910, c. 309, §§ 1, 14, 36 Stat. 544, 555, and Act June 29, 1906, c. 3591, §§ 1, 7, 34 Stat. 584, 593 (U. S. Comp. St. 1913, § 8563), amending, respectively, sections 1 and 20 of Act Feb. 4, 1887, c. 104, 24 Stat. 379, 386, as to invalidate the provisions of Civ. Code S. C. 1912, § 2573, in so far as they may subject a terminal carrier to the prescribed penalty of \$50 for failure to pay promptly a claim for damages to an interstate shipment, no matter where the loss occurred, unless the carrier proves that the shipment never came into its possession, or succeeds, within the 40 days allowed, in shifting the loss by giving notice as to when, where, and by which carrier the property was damaged, or by showing that it used due diligence, but was unable to discover where the damage occurred; nor is the statute saved by calling it an exercise of the police power, or by the proviso in Act June 29, 1906, saving the rights of holders of bills of lading under existing laws.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ¶8.]

Appeal from Common Pleas Circuit Court of Chester County; Ernest Moore, Judge.

Action by Willie Spence against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed nisi.

J. M. Hemphill, of Chester, and B. L. Abney, of Columbia, for appellant. Marion & Marion, of Chester, for respondent.

HYDRICK, J. Plaintiff recovered judgment in a magistrate's court for \$6.20, an admitted overcharge in the rate on an interstate shipment, and \$50, the penalty provided by statute for failure to pay the claim therefor within the time prescribed. The circuit court affirmed the judgment.

Since the trial on circuit, the Supreme Court of the United States has held that the penalty statute is void as applied to interstate commerce. *Charleston & Western Carolina R. Co. v. Varnille Furniture Co.*, 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. —. The penalty must, therefore, be remitted. If this is done within 20 days after notice of the filing of the remittitur, the judgment will stand affirmed; otherwise a new trial is ordered.

Reversed nisi.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 433)

REEVES v. ATLANTIC COAST LINE RY.
(No. 9155.)

(Supreme Court of South Carolina. Aug. 12, 1915.)

1. TRIAL \Leftrightarrow 143—PROVINCE OF JURY—CONFLICTING EVIDENCE.

Where the evidence on an issue was conflicting, the question is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. \Leftrightarrow 143.]

2. RAILROADS \Leftrightarrow 447—INJURIES TO ANIMALS ON TRACKS—INSTRUCTIONS.

In an action for the killing of plaintiff's horse, which the servants of a railway company drove down the tracks until it ran into a trestle and received injuries which necessitated its being killed, the court charged that, unless plaintiff proved by a preponderance of the evidence that defendant's servants were negligent and that their negligence caused the injury, the jury should find for defendant. It was also charged that, if the horse was frightened by the noise of the train, the company would not be liable for the consequences of such fright. *Held*, that by the portion of the charge instructing them that if the horse was negligently or willfully killed the railroad was liable, and that, in speaking of the killing of the horse, the court meant if the horse was so injured by getting into the trestle, if it went there through natural fright or through the negligence of defendant, that it had to be killed, into believing that if the horse was killed as a result of natural fright the railroad was liable, the jury could not have been misled.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642–1650; Dec. Dig. \Leftrightarrow 447.]

Appeal from Common Pleas Circuit Court of Colleton County; I. W. Bowman, Judge.

Action by J. M. Reeves against the Atlantic Coast Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. B. Peurifoy and L. B. Houck, both of Walterboro, for appellant. Padgett & Moorer, of Walterboro, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant for damages for the

killing of his horse under these circumstances: Defendant's pay train had stopped at Adams Run. While standing there, plaintiff's horse got out of his lot near the station and strayed upon the track. When the train was ready to move, the fireman got off the engine to drive the horse off the track. There was a trestle about 400 yards ahead, and the horse went down the track, until he got to the trestle, when he turned and came back meeting the train, which was slowly approaching. According to plaintiff's testimony, the fireman and conductor, who had joined him in his efforts to drive the horse off the track, frightened him and prevented him from going back towards his lot, which he tried several times to do, and drove him toward the trestle. Finally, frightened by the fireman and conductor and the noise of the approaching engine and train, and being prevented from going back to his lot, he ran down the track and jumped into the trestle, breaking one of his forelegs, so that he had to be killed. Plaintiff testified that the accident could easily have been avoided, if the fireman and conductor had gotten off the track and let the horse pass them, or if they had gotten off and gone around him and gotten between him and the trestle, which they knew was ahead; but they persisted in driving him toward the trestle, thinking, no doubt, that he would leave the track on one side or the other before going upon the trestle. On the other hand, the defendant's testimony tended to show that the fireman did get between the horse and the trestle and tried to drive him back past the train, but that he was frightened, and ran by the fireman, and, in doing so, came near running over him. This, however, was denied by the plaintiff and another witness.

[1] The foregoing statement of the evidence shows that it was conflicting on a material issue. There was therefore no error in refusing defendant's motion for nonsuit and direction of the verdict.

[2] The judge charged the jury clearly and emphatically that, unless plaintiff proved, by the preponderance of the evidence, that defendant's servants were negligent, and that their negligence caused the injury, they must find for defendant. He charged also that, if the horse was frightened by the noise of the train, operated with due care, the company would not be liable for the consequences of such fright. In the first part of the charge, he told the jury, "if they killed it negligently or willfully, then the law says they must pay for it," and, at the last, he said:

"Now, when I speak of the killing of the horse, if the horse was so injured by getting into the trestle, if it went in there through natural fright or through the negligence of the railroad, through its agents, servants, and employes, if it was in such a condition that it had to be killed, then whatever the value of the horse was would be the measure of damages."

Appellant assigns error in this instruction, in that it was equivalent to saying that, if the horse was killed as the result of his "natural fright"—and not the negligence of defendant—defendant would, nevertheless, be liable. The charge, as a whole, shows that such was not the intention of the court, and we are satisfied that the jury did not so understand it. The idea which the court sought to convey was that defendant would be liable, although it did not actually kill the horse, if it had to be killed as the result of defendant's negligence, and the "natural fright" there spoken of was that caused by such negligence. The charge, as a whole, could not have been understood otherwise.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, J.J., concur.

(101 S. C. 429)

J. S. PINKUSSOHN CIGAR CO. v. CLYDE S. S. CO. (No. 9154.)

(Supreme Court of South Carolina. Aug. 12, 1915.)

1. APPEAL AND ERROR ⇐1001—REVIEW—VERDICT.

A verdict will not be reviewed on appeal unless wholly unsupported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. ⇐1001.]

2. CARRIERS ⇐177 — CARRIAGE OF GOODS — INITIAL CARRIER—LIABILITY.

In interstate shipments, the initial carrier is liable for damage to the goods whether or not caused by him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775–789, 791–803; Dec. Dig. ⇐177.]

3. COURTS ⇐190—CHARLESTON CIVIL AND CRIMINAL COURT.

Appeals from the Charleston civil and criminal court to the circuit court are heard by the circuit court on the record, and the verdict should be given the same deference as is given by the Supreme Court to a verdict on appeal from the circuit court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇐190; Appeal and Error, Cent. Dig. § 103.]

4. CARRIERS ⇐132—CARRIAGE OF GOODS—PRESUMPTIONS.

Though the bill of lading provided the carrier should not be liable for damage by breakage, proof that a soda fountain was received by the carrier in good condition and delivered broken casts on it the burden of proving its freedom from negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578–582, 605; Dec. Dig. ⇐132.]

5. COMMERCE ⇐8—CARRIAGE OF GOODS—INTERSTATE CARRIAGE—POWER OF THE STATE.

The act imposing a penalty of \$50 upon carriers for failure to pay claims within a stipulated time is invalid in so far as it applies to interstate carriers.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⇐8.]

Appeal from Common Pleas Circuit Court of Charleston County; H. F. Rice, Judge.

Action by the J. S. Pinkussohn Cigar Com-

pany against the Clyde Steamship Company, begun in the civil and criminal court of Charleston and appealed by defendant to the circuit court. From a judgment there for plaintiff, defendant again appeals. Affirmed on condition of remittitur.

Bryan & Bryan, of Charleston, for appellant. Nathans & Sinkler, of Charleston, for respondent.

HYDRICK, J. Plaintiff recovered judgment in the civil and criminal court of Charleston for \$194.21 damages done to a shipment from Jacksonville, Fla., to Charleston, S. C., and \$50, the penalty prescribed by statute for failure to pay the claim within the time therein specified. This judgment was affirmed on appeal to the circuit court, and defendant appealed to this court. The shipment consisted of a soda fountain and its parts, among which were several crates of marble.

[1] The jury in the trial court found that the damage occurred while the goods were in defendant's possession. It is needless to say that we have no jurisdiction to review the findings of fact, unless they are wholly unsustained by evidence.

It would serve no useful purpose to state the testimony in detail, or to discuss the tendencies of the evidence. It is sufficient to say that there was evidence tending to prove that the goods were delivered to defendant at Jacksonville, in good order, except that a piece was broken out of the back of the fountain, which was noted on the bill of lading, and that, when they were delivered to plaintiff, at Charleston, four pieces of marble, besides the one noted on the bill of lading, were broken, and that the damage amounted to \$194.21.

[2] The contention that the drayman who received the goods from defendant and hauled them to plaintiff's place of business was a common carrier, and therefore, under our decisions, the presumption arose—which, according to the contention, was not rebutted—that the damage was done by him (the last carrier), cannot help the defendant; because, in that view, defendant was the initial carrier, and, this being an interstate shipment, defendant would be liable to plaintiff, under the Carmack amendment of the act to regulate interstate commerce. But we do not concede that either branch of the contention is correct. However, the fact that the goods were not damaged before they were received by defendant, or after they were delivered to the drayman, was found against defendant, and, as we have said, there is evidence to sustain the finding.

[3] In disposing of one of the issues of fact, the circuit court said:

"Now, whether these pieces were broken while in the hands of the defendant or by the careless handling in removal from the wharf to plaintiff's place of business does not clearly appear.

However, as these matters were left for the jury to determine, and as both they and the judge of the said court are much better acquainted with the conditions existing and surrounding the transaction than I am, I cannot hold that there is any reversible error in the verdict."

We do not agree with appellant that the court erred in giving due consideration to the findings of the trial court, and in not deciding the questions of fact anew from the evidence, as if there had been no findings thereon in the trial court. Appeals from the civil and criminal court of Charleston to the circuit court are heard upon the record sent up, just as appeals from magistrates' courts are heard by the circuit court. The trial on appeal is not *de novo*. The circuit judge does not see and hear the witnesses, and, as a rule, he does not know them, or their relative credibility, or the circumstances which might affect it, as well as the trial court and jury. Therefore, where the evidence is conflicting, or susceptible of more than one inference, the appellate court should give due weight to the findings of the triers of facts who had the advantages mentioned. The general rule in appellate courts is that the findings of the court below are *prima facie* correct, and the burden is upon the appellant to show that those excepted to are against the weight of the evidence.

[4] The bill of lading provides that no carrier thereunder shall be liable for loss or damage resulting from a number of causes; among them is "breakage," and it appeared that the damage complained of was caused by "breakage." Appellant contends therefore that, as there was no evidence of negligence, there was no liability.

When plaintiff proved that the goods were delivered to defendant in good order and that they were damaged when delivered to the drayman by defendant, a *prima facie* case was made out against defendant. The burden was then cast upon defendant to prove that it exercised due care and diligence; in other words, that the damage was not caused by its negligence. *Johnstone v. Railroad Co.*, 39 S. C. 55, 17 S. E. 512; *Crawford v. Railroad Co.*, 56 S. C. 136, 34 S. E. 80. This rule of evidence has been established and sanctioned by repeated decisions of this court. The cases cited by appellant show that it is not in accord with the rule established by the decisions of the federal Supreme Court, which is that, when the carrier proves that the loss or damage was the result of one of the excepted causes, the burden is upon the plaintiff to prove that it might have been avoided by the exercise of due skill and diligence; in other words, that the carrier was negligent. But for the reasons stated in *Deaver-Jeter Co. v. Ry.*, 95 S. C. 485, 79 S. E. 709, we feel bound to follow our own decisions.

[5] Since the decision of this case on circuit, the decision of this court in *Varnville Furniture Co. v. Railway*, 98 S. C. 63, 79 S. E.

700, affirming the constitutionality of the statute under which the penalty of \$50 was recovered in this case, has been reversed by the federal Supreme Court, which holds that the statute is unconstitutional and void as applied to interstate commerce. *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. —. The penalty must therefore be remitted.

If the plaintiff shall remit the penalty within 20 days after notice of the filing of the remittitur herein in the circuit court, the judgment below will stand affirmed; otherwise, a new trial is ordered. Reversed nisi.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 437)

WICHMANN v. SCARPA et al. (No. 9158.)
(Supreme Court of South Carolina. Aug. 12, 1915.)

1. APPEAL AND ERROR \Leftrightarrow 90—APPEALABLE ORDERS—ORDER TO MAKE MORE DEFINITE AND CERTAIN.

An order, requiring plaintiff to make his complaint more definite and certain in specified particulars, involves the merits and is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 599–611; Dec. Dig. \Leftrightarrow 90.]

2. ACTION \Leftrightarrow 53—JOINDER OF CAUSES OF ACTION—STATUTE.

Under Code Civ. Proc. 1912, § 216, providing that in cases where two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which suit is brought, the plaintiff need not state such several acts separately, but may submit his whole case to the jury and recover the damages sustained, whether from one or all of the wrongs alleged, plaintiff, whose cause of action for trespass upon realty by interference with the possession and injury thereto involved defendant's acts in erecting a cornice, damage from a leak, the throwing of water on his premises, refusing to allow him to erect a fence, a trespass, and damage from an overhanging cornice, all alleged to constitute a trespass by which the comfort and security of his premises were depreciated and irreparable injury caused, alleged one cause of action, and was not required to split it up into the several causes of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549–551, 553–623; Dec. Dig. \Leftrightarrow 53.]

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by August Wichmann against Mary Scarpa and others. Complaint ordered to be made more definite, and plaintiff appeals. Reversed.

Theo. D. Jervey, of Charleston, for appellant. Paul Macmillan, of Charleston, for respondents.

HYDRICK, J. Plaintiff states his cause of action in 11 paragraphs of his complaint,

which are, in substance, as follows, except the eleventh, which is copied in full. He alleges:

(1) That he is, and since 1889 has been, seised and possessed of a certain lot in the city of Charleston, which is described.

(2) That in 1901, Paul Scarpa, the elder, and Jane Barton erected on their adjoining lot a building whose eaves and gutters overhang his lot.

(3) That in 1911, the gutters leaked and threw the water from their roof upon his lot and fence, causing his fence to rot and become unserviceable.

(4) That the servants of defendants have, from time to time, thrown slops from their kitchen window upon his premises.

(5) That on April 7, 1913, he had the dividing line surveyed, and attempted to erect a fence thereon.

(6) That defendants obstructed the erection of the fence, and, on account thereof and of the illness of Paul Scarpa, the elder, he desisted from his attempts to erect the fence.

(7) That since April 7, 1913, he has endeavored to adjust the differences between himself and defendants, and has demanded the removal of the overhanging eaves and gutters, and that he be allowed to build a fence on the line surveyed by him for the protection of his premises.

(8) That subsequent to April 7, 1913, Paul Scarpa, the elder, died, and his title and interest in said lot and building became vested in the defendants—other than Jane Barton—as his heirs at law.

(9) That defendants have refused to permit a fence to be erected on the line surveyed by him, and have refused to remove the overhanging eaves and gutters.

(10) That on November 5, 1913, defendants willfully and wantonly entered upon his premises through their kitchen window, to his annoyance, injury, and damage.

"(11) That the continuing overhanging and projection over the premises of plaintiff of the cornice eaves and gutter on the building on premises of defendants, and the actings and doings of defendants as aforesaid, constitute a trespass upon plaintiff's premises, by which the value, comfort, and security of his premises have been greatly depreciated, to the great loss and irreparable injury of plaintiff."

The relief prayed for is: (1) That the line surveyed by him is adjudged to be the true dividing line; (2) that defendants be enjoined from interfering with him in the erection of a wall thereon; (3) that the overhanging eaves and gutters be removed; (4) for \$210 damages.

On motion of defendants, the circuit court ordered the complaint made more definite and certain by requiring plaintiff to state

separately the six causes of action therein alleged, to wit:

"(1) For erecting a cornice, in 1901; (2) for damage from leak, in August, 1911; (3) for throwing water and slops on plaintiff's premises; (4) for refusing to allow plaintiff to erect a fence; (5) for trespass alleged on November 5, 1913; and (6) for damage to plaintiff's premises by reason of an overhanging cornice and gutter."

From this order plaintiff appealed.

[1] Defendant's objection to the consideration of the appeal on the ground that the order is not appealable is overruled. *Pickett v. Fidelity Co.*, 52 S. C. 584, 30 S. E. 614; *Hawkins v. Wood*, 60 S. C. 521, 39 S. E. 9; *Bolin v. Railway*, 65 S. C. 222, 43 S. E. 665; *Bell v. Jackson*, 93 S. C. 556, 73 S. E. 679.

[2] Section 216 of the Code of Procedure reads as follows:

"How Two or More Causes of Action for Damages may be Plead.—In all cases where two or more acts of negligence or other wrongs are set forth in the complaint, as causing or contributing to the injury, for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instruction of the court and to recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs alleged in the complaint."

The gist of an action for damages for trespass upon realty is the interference with the possession or injury to the property. Under the old practice, each separate and distinct act of trespass gave rise to a separate cause of action, and, while several of these might be joined in the same action, they had to be stated in separate counts. *Floyd v. Floyd*, 4 Rich. 23. The act of 1898, section 216 of the Code of Procedure above quoted, was intended to remedy this defect in procedure; and now a plaintiff may set out in his complaint two or more acts of negligence, or other wrongs, which cause or contribute to the injury for which his suit is brought, without stating them as separate causes of action.

The gravamen of plaintiff's complaint is the interference with his possession and injury to his property, and the eleventh paragraph of his complaint shows that his intention was to make all the preceding acts of trespass and injury alleged one cause of action. We see no good reason why he should be required to split them up into half a dozen.

Whether these defendants, or any of them, are liable for trespasses committed by Paul Scarpa, the elder, is not before us, and, of course, it is not adjudicated. That issue can be litigated at the trial.

Order reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(101 S. C. 499)

FAIREY v. HAYNES. (No. 9159.)

(Supreme Court of South Carolina. Aug. 14, 1915.)

1. CHATTEL MORTGAGES ⇨172—RECOVERY OF PROPERTY MORTGAGED—EVIDENCE—ADMISSIBILITY.

In claim and delivery for personal property, to which plaintiff claimed title under a past-due chattel mortgage, where defendant alleged payment and the improper application thereof to a real estate mortgage already satisfied, it was error to exclude evidence tending to show payment of the real estate mortgage before the execution of the chattel mortgage; defendant having a right to show that nothing was due under the latter.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 306-308, 310-315; Dec. Dig. ⇨172; Replevin, Cent. Dig. § 83.]

2. CHATTEL MORTGAGES ⇨172—RECOVERY OF PROPERTY MORTGAGED—EVIDENCE—ADMISSIBILITY.

In claim and delivery for personal property to which plaintiff claimed title under a past-due chattel mortgage, where defendant alleged payment and the improper application thereof by plaintiff to a real estate mortgage, it was error to exclude evidence showing such improper application.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 306-308, 310-315; Dec. Dig. ⇨172; Replevin, Cent. Dig. § 83.]

Appeal from Common Pleas Circuit Court, of Orangeburg County; T. J. Mauldin, Judge.

Action by W. C. Fairey against William Haynes. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Jacob Moorer, of Orangeburg, for appellant. John S. Bowman, of Orangeburg, for respondent.

WATTS, J. This was an action for claim and delivery, brought by plaintiff for the recovery of certain personal property. The plea of defendant was a general denial and payment. The case was tried before Judge Mauldin and a jury at Orangeburg, S. C., October term of court, 1914, and resulted in a verdict in favor of the plaintiff for the property sued for, or the value thereof, in case property could not be delivered, \$297. After entry of judgment, defendant appeals, and by seven exceptions seeks reversal.

[1, 2] Exceptions 2 and 3 are as follows:

(2) Because his honor erred in not allowing the defendant to prove, or to introduce evidence to show, that the real estate mortgage referred to by the plaintiff was fully paid before the date of the chattel mortgage.

(3) Because his honor erred in not allowing the defendant to introduce in evidence the receipts which showed that all accounts between plaintiff and defendant up to the date of the said

chattel mortgage were fully paid before the execution of the said chattel mortgage.

These exceptions must be sustained. The allegations of the answer show that there had been for a number of years, commencing in 1893 up to the time this suit was commenced, various business transactions, various payments, and a number of receipts given; the contention of the plaintiff being that at the time the chattel mortgage sued on was executed, February 11, 1913, the defendant was indebted to him in two amounts, one being a balance due on a chattel mortgage for the year 1912, and balance due on a real estate mortgage executed April 12, 1906. Plaintiff contends that the defendant paid up the real estate mortgage on March 3, 1913, and the sum of \$39.82 on the chattel mortgage, leaving a balance due on chattel mortgage of \$275 and interest thereon from October 1, 1913. Defendant contends that the real estate mortgage was paid in full before the chattel mortgage was given, and that he had paid the chattel mortgage in full, and that the check sent by him to plaintiff by mail and applied to real estate mortgage by plaintiff should have been applied to chattel mortgage. When the defendant's counsel attempted to introduce one receipt and informed the court that he had a handful of receipts given the defendant by plaintiff, upon objection of plaintiff's counsel the court refused to admit them and ruled by saying:

"I am bound to rule this as the law: If these receipts antedate the chattel mortgage, they would not have any bearing in this case and would not be competent to affect this chattel mortgage."

The court refused to allow any receipt to be introduced that showed a payment on the real estate mortgage as being incompetent. This ruling was erroneous and prejudicial to the defendant. A receipt can always be explained. Under the pleadings in the case, the defendant had the right to show, if he could, that the condition of the chattel mortgage had not been broken and that there was nothing due thereon. He had a right to explain that the receipt, though applied to the real estate mortgage, was an improper application, as there was nothing due thereon, but was a payment made by him to be applied to the chattel mortgage and was a payment thereon. He was entitled to have this explanation of the receipt to go to the jury for their consideration for what it was worth, and these exceptions are sustained, and judgment reversed, and a new trial granted.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(101 S. C. 441)

WHITNER v. SOUTHERN RY. CO.
(No. 9160.)

(Supreme Court of South Carolina. Aug. 14, 1915.)

RAILROADS \S 355 — **ACCIDENT ON TRACK — CARE REQUIRED.**

Where plaintiff's automobile was injured while he was attempting to cross defendant's railroad track at a point which was not a public road, and which, if ever a private road, had been abandoned as such, he could not recover against the railroad company; it owing him no legal duty at such point other than not to willfully injure him.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1220-1227, 1235; Dec. Dig. \S 355.]

Appeal from Common Pleas Circuit Court of Greenville County; S. W. G. Shipp, Judge.

Action by Charles H. Whitner against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. G. Sirrine, of Greenville, for appellant. Cothran, Dean & Cothran, of Greenville, for respondent.

WATTS, J. This is an action instituted by the plaintiff for \$800 damages sustained by the plaintiff's automobile while attempting to cross the defendant's railroad track at a point near the city of Greenville alleged to be a crossing commonly used by the public and which was in defective condition on November 2, 1913, when alleged damage occurred. The case was tried before Judge Shipp at Greenville, S. C., October term, 1914, and resulted in a nonsuit, from which plaintiff appeals, and by six exceptions seeks reversal.

These exceptions practically raise but one question, and that is that the circuit judge was in error in finding and holding from the testimony that, at the time the plaintiff sustained injury to his car, the road was not such a one as to impose upon the defendant the duty to provide or maintain a crossing at the point in question. The testimony established beyond question that, even if the road ever existed at this point as an attempted private way, it had been abandoned at the time the plaintiff sustained damage, and at no time was it a public road, as no part of the road had been turned over to the county until after the bridge was built. It was not a private road or neighborhood road, for it had not been used by the public adversely, openly, notoriously, and consecutively for 20 years or more, because Henderson says in his testimony that they bought the property in January, 1913, and during the spring of that year they started to improve and sell the property. Then they got permission from Gwynn and built the road. The railroad objected to the crossing being put there, as it was dangerous, and Henderson agreed that it was dangerous, and the railroad would not permit the crossing to be there, but agreed to pay half for an over-

head bridge, which was assented to by Henderson. The crossing as it then existed was torn up by the railroad authorities, and before the overhead bridge was completed at a different place at the joint expense of Henderson and the railroad the damage to plaintiff's car occurred. The plaintiff was where he had no right to be, and at a place that the defendant under no view of the case owed him any legal duty other than not to willfully injure him. Neither under *Moragne v. Railroad Co.*, 77 S. C. 437, 58 S. E. 150, nor *Miller v. Railway*, 94 S. C. 105, 77 S. E. 748, is such a case made out as required the defendant to maintain this crossing. All exceptions are overruled.

Judgment affirmed.

GARY, O. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(103 S. C. 227)

SMITH v. CLINKSCALES et al.
(No. 9158.)

(Supreme Court of South Carolina. Aug. 12, 1915.)

1. CONTRACTS \S 147—**CONSTRUCTION—INTENTION.**

The purpose of construction is to ascertain the intention as gathered from the whole instrument and to give effect, if possible, to every clause and word, if it can be done without violating any settled rule of law.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 730, 743; Dec. Dig. \S 147.]

2. CONTRACTS \S 162 — **CONSTRUCTION — REPUGNANT CLAUSES.**

Of two irreconcilable repugnant clauses, the first shall prevail, though this rule is to be applied only when all reasonable modes of reconciling the apparent repugnancy have failed, and subject to the rule that the intention gathered from the whole instrument shall prevail.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 744; Dec. Dig. \S 162.]

3. DEEDS \S 125 — **ESTATES AND INTERESTS CREATED—DEFEASIBLE FEE.**

A deed conveyed one-half of a plantation to each of the grantor's two sons "in the following way and manner and with the limitations and reservations below expressed," to be held in severalty, with a limitation that, if either should die leaving no issue living at his death, his brothers and sisters should take his share "to them, their heirs and assigns, * * * in fee simple," to be held to the sons respectively and their heirs and assigns respectively, with warranty to them and to their heirs and assigns. At the date of the deed, the grantor had, besides the two sons named therein, two daughters, both of whom predeceased him intestate, each leaving one child as her only heir at law. One of the sons surviving the grantor died without issue and by will devised his share to his brother. *Held*, that the grantor did not intend that the deceased son should take a fee simple absolute, but that if he left no issue the entire estate should go to the grantor's other children and their heirs, so that the deceased son took a defeasible fee, defeated on his death without issue.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 356; Dec. Dig. \S 125.]

4. DEEDS \S 125—**FEE—LIMITATIONS.**

Under such deed, the limitation over was not void as in violation of the rule that a fee

cannot be limited after a fee in a common-law conveyance, since it was not a fee to take effect after the limitation to the deceased son and his heirs, but a fee to take effect in place of, or by substitution for another, which depended upon the contingency of the son's leaving issue.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 356; Dec. Dig. § 125.]

5. DEEDS § 132—DEFEASIBLE FEE—REMAINDER—AFTER-BORN CHILDREN.

Under such deed, the grantor by limiting the estate over, on the death of a son without issue, to his "brothers and sisters, their heirs and assigns," intended to provide for his children then in existence, and their heirs, so that, where his two daughters predeceased him leaving heirs, the grandchildren were excluded, as the use of the plural word "brothers" could not imply an intention to provide for the after-born, not to let them into the distribution, but solely for the purpose of making the existence of the remaindermen constitute the contingency upon which they were to take.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 366, 367, 372, 373; Dec. Dig. § 132.]

Gary, C. J., and Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Abbeville County; Frank B. Gary, Judge.

Action by Fannie Sullivan Smith against J. F. Clinkscales, individually and as executor of John T. Clinkscales, deceased, and Mrs. Ellen Sherard Thomson. Judgment for defendant Clinkscales, and plaintiff and Mrs. Thomson appeal. Reversed.

McCullough, Martin & Blythe, of Greenville, and W. P. Greene, of Abbeville, for appellants. M. P. De Bruhl, of Abbeville, Cothran, Dean & Cothran, of Greenville, and J. Frank Clinkscales, of McCormick, for respondent.

HYDRICK, J. Omitting the description of the land, and the reservation to the grantor, the deed to be construed reads as follows:

"Know all men by these presents that I, Albert J. Clinkscales, of the county of Abbeville, of the state aforesaid, for and in consideration of the natural love and affection I have and bear for my two sons, James F. Clinkscales and John T. Clinkscales of the said state and county, have granted, bargained, sold and released unto the — James F. Clinkscales and John T. Clinkscales, all that plantation or tract of land in said state, and county of Abbeville, containing twenty-four hundred and twenty-six acres, more or less, in the following way and manner, and with the limitations and reservations below expressed, namely, the western half or moiety of the said tract of land to James F. Clinkscales, and the eastern moiety or half to John T. Clinkscales, between whose parts or moieties a division line will be run hereafter through the said land by the said Albert J. Clinkscales, dividing the said tract, and when so divided, the said moieties and part will be held in severalty by the said James F. Clinkscales and John T. Clinkscales, respectively, with this limitation, if either the said James F. Clinkscales or John T. Clinkscales should die leaving no issue living at the time of his death, the brothers and sisters of the said James F. Clinkscales and John T. Clinkscales, who may die without issue aforesaid shall take have and hold such lands, to them, the said brothers and sisters, their heirs and assigns as tenants in common in fee simple, the said Albert J. Clinkscales reserving, etc. (here follows the reserva-

tion to himself). Together with all and singular the rights, members, hereditaments and appurtenances to the premises belonging or in anywise incident or appertaining. To have and to hold all and singular the said premises and the moieties when division is made as aforesaid to the said James F. Clinkscales and John T. Clinkscales, respectively, and their heirs and assigns respectively, subject to the limitation over to their brothers and sisters as aforesaid and reservation of interest and use to Albert J. Clinkscales as aforesaid. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises to the said James F. Clinkscales and John T. Clinkscales, granted and released to them as aforesaid and to their heirs and assigns against me the said Albert J. Clinkscales, my heirs and assigns, and against every person whomsoever lawfully claiming or to claim the same or any part thereof."

At the date of this deed (1876), the grantor had four children—the two sons named therein, and two daughters, Ellen and Elizabeth, both of whom predeceased him, intestate, each leaving one child as her only heir at law. Ellen left the plaintiff, Mrs. Smith, and Elizabeth, the defendant, Mrs. Thomson. One of the sons, John, died, in 1912, without issue, leaving a will wherein he devised his moiety of the land to his brother James. The grantor died, in 1895, and the plaintiff and defendants, James and Mrs. Thomson, are his only heirs at law. James is the only surviving child of the grantor.

The circuit court held that, under the deed, John took a fee simple absolute in his moiety, and therefore his devise to James was good; and, further, that, even if the limitation over, on the death of John without issue, should be held to be good, the same result would follow, because the gift over was to a class, and James was the only member of the class in existence at the time the gift took effect.

[1, 2] The purpose of all rules of construction is to ascertain the intention. When this is done, effect must be given to it, if it can be done without violating any settled rule of law. In ascertaining the intention, "it is necessary that the whole instrument should be considered, and effect must, if practicable, be given to every clause and word in it." *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161. Another rule applied in the construction of deeds is that, of two irreconcilably repugnant clauses, the first shall prevail. But this is a rule of last resort to be applied only "when all reasonable modes of reconciling the apparent repugnancy have failed." *Bowman v. Lobe*, 14 Rich. Eq. 271. It is subject, too, to the paramount rule that the intention, as gathered from the whole instrument, shall prevail. 1 Dev. on Deeds, § 213 et seq.; *Carlee v. Ellsberry*, 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, and note, 118 Am. St. Rep. 60. These principles are elementary and are recognized and applied in all our decisions.

[3] Let us, then, examine this deed, in the light of these principles, to ascertain the intention of the grantor. In the premises, he

declares that the grant is made "in the following way and manner, and with the limitations and reservations below expressed." Then, he declares that, after division, the sons shall hold their moieties in severalty, but "with this limitation, if either * * * should die leaving no issue living at the time of his death," his brothers and sisters shall take his moiety, "to them their heirs and assigns * * * in fee simple." Thus far, as no words of inheritance are used in the grant to the sons, under our decisions, they would take only a life estate. But the deed must be construed as a whole, and, if possible, effect must be given to every word and clause in it. Therefore, looking to the habendum, we find that it is to James and John, respectively, "and their heirs and assigns, respectively," not absolutely, but "subject to the limitation over to their brothers and sisters, as aforesaid." We cannot take this habendum in part, and use it to enlarge the estate previously given, without giving full effect, if practicable, to the condition therein expressly referred to upon which alone that estate may be enlarged. Therefore the words "heirs" there found cannot be used to enlarge John's estate, except in so far as it may be done consistently with the previous limitation over, to which its enlargement is expressly made subject; that is, it must yield to the contingency therein expressed. If we couple the word "heirs" in the habendum to the granting clause so as to give John a fee simple absolute, we completely ignore both the limitation over in the granting clause, and also the express reference to that limitation in the habendum itself, wherein the use of the word "heirs" is expressly qualified. This would violate the rule that the limitation over, being in the first part of the deed, should have preference, and also the rule that effect must be given, if practicable, to every word and clause in the deed, and it would defeat the clearly expressed intention of the grantor. Note, also, that even the warranty is not to James and John and their "heirs," without qualification, but it is of the estate granted, "as aforesaid."

Giving effect to all parts of the deed, the conclusion is irresistible that the grantor did not intend that John should take a fee simple absolute. It is equally clear that he did intend that he should take the entire estate, if he left issue; but, if not, that it should go to the grantor's other children and "their heirs and assigns, as tenants in common, in fee simple." Therefore John took a defeasible fee, which was defeated on his death without issue.

[4] The limitation over is not void, as supposed, because it violates the rule that a fee cannot be limited after a fee in a common-law conveyance. This is not a fee mounted upon a fee, but a fee to take effect in place of, or by substitution for, another which depended upon a contingency. In *Bowman v. Lobe*, 14 Rich. Eq. 271, similar limitations in

a deed were construed. There, the grantor gave to his six sons certain lands, "during their natural life," and added, in the granting clause:

"If any of my sons die without an issue of the body, the lands mentioned above to be equally divided among my sons above mentioned that are then living."

Then, after reserving a life estate to himself, he said:

"At my death, it (meaning the land) shall be immediately transferred to my sons. * * * as above mentioned, to their heirs and assigns."

After the death of the grantor, B., one of the sons, died without issue, leaving two brothers surviving him. Held, that B.'s estate did not descend to his heirs; that he took a fee, defeasible on his death without issue; and, that contingency having happened, the estate went over to the surviving brothers, under the limitation in the deed. The court said:

"There was not a fee mounted upon a fee, but a fee made subject to a contingency, whereby it was defeated. * * * That such contingent or conditional limitation may be made by deed, the authorities cited in the standard works, to which reference has just been made, will show."

The court referred to 4 Kent, 210, where the author says:

"The rule (in *Shelley's Case*) does not operate so as absolutely to merge the particular estate of freehold, where the limitations intervening between the preceding freehold and the subsequent limitation to the heirs are contingent, because that would destroy such intervening limitations. The two limitations are united, and executed in the ancestor, only until such time as the intervening limitations become vested, and then they open and become separate, in order to admit such limitations as there arise."

Fearne says, at page 273 of 14 Rich. Eq.:

"However, we are to remember that although a fee cannot, in conveyance at common law, be mounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere; but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect. Thus in the above-cited case of *Loddington v. Kime*, it was held that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. For if A. had issue male, the remainder was to vest in that issue in fee; but if A. had no issue male, then it was to vest in B. in fee; and these were limitations of which the one was not expectant upon, and to take effect after the other, but were contemporary; to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed."

These authorities are directly in point and show that the limitation over in this deed does not violate the rule, for it was not to take effect after the limitation to John and his heirs, but in lieu of it, if it failed.

[5] The limitation over being good, who shall take under it? That question is answered by the court in *McMeekin v. Brum-*

met, 2 Hill's Eq. 638. There, the gift was by deed to the use of C. P. and, if she died without issue, then, "to the sons of S. B. and D. B. and their heirs forever." C. P. died without issue. At date of the deed, S. B. and D. B. (the donors) had each one son living, and afterwards S. B. had other sons who died, and the son of D. B. died before C. P., at whose death the only living son of either of the donors was the son of S. B., who was living at the time of the gift. Held, that the limitation over was good; that it was to the sons of S. B. and D. B. living at the time of the gift, as if it had been to them by name, and the representative of the deceased son of D. B. was entitled to one-half of the property, but the representatives of the deceased sons of S. B. who were born after the gift were excluded. It was argued there, as here, that, the gift being to a class, none could take, except those who answered the description at the time the gift over took effect, and therefore, as the son of S. B. was the only son of either of the donors in existence at the death of C. P., he alone could take under the limitation. But the court said:

"A deed or gift inter vivos speaks at the time of its execution, and the grantee or beneficiary under it must be such as answers the description at that time. I do not mean to say that a contingent future interest may not be given by deed, to a person not in existence, but that intention must be plainly expressed in the instrument; and, if there be a person to answer the description at the time, it will never be applied to another coming afterwards into existence who may come within the terms of the description." (Italics added.)

Again, after considering the difference between wills and deeds, the court said:

"In a conveyance, the words are taken to apply only to those living at the time of execution; and the court will not extend it to others, unless it is absolutely impracticable to give it any other construction. An exception is made to the general rule in the case of a will; there is no such exception in the case of a deed." (Italics added.)

Answering the question whether, the interest being contingent, the representative of the deceased son of D. B. could take, it was held that he could, notwithstanding the remainder was contingent. The court said: There is no doubt that such a remainder is transmissible, when the existence of the remainderman himself at the time of the event does not constitute the contingency; and, further, supposing the entire estate to be given to C. P., subject only to be divested in the event of her dying without issue, "the rule is * * * that a possibility coupled with an interest is assignable, descendible, or devisable." To the same effect is *Fritchett v. Cannon*, 10 Rich. Eq. 394, and numerous other cases in our reports.

We must conclude therefore that when the grantor limited the estate over, on the death of John without issue, to his "brothers and sisters, their heirs and assigns," his intention was to provide for his children then in existence and their heirs. The fact that the

plural word "brothers" is used, when there was only one brother, does not warrant the inference that he intended to include after-born children. In the limitation over, he was speaking of his children collectively, and the use of the plural is not unnatural. The intention to provide for after-born children cannot, in a deed, under the rule stated in *McMeekin v. Brummet*, be predicated upon so slight a circumstance. If such intention had existed, surely it would not have been left to such a doubtful inference, when it could have been so easily expressed.

In *Holeman v. Fort*, 3 Strob. Eq. 66, 51 Am. Dec. 685, the deed of gift was to the "joint heirs" of the daughter and son-in-law of donor. They had two children living at date of the deed. Others were born afterwards. It was held that those living at the date of the deed took and the after-born were excluded.

In *Kitchens v. Craig*, 1 Bailey, 119, there was a deed of gift to the "heirs" of Frances Kitchens, who was then alive and had three children. Others were born afterwards. It was held that those in existence at date of the deed took the exclusion of the after-born. As we have seen, the same rule was applied in *McMeekin v. Brummet*. Here, there are no after-born; but the use of the plural word "brothers" is laid hold of to raise by implication an intention to provide for the after-born, not to let them into the distribution, but solely for the purpose of making the existence of the remaindermen constitute the contingency upon which they are to take, and thereby destroy the transmissibility of the interests vested in them under the deed, and so defeat the clear intention of the grantor.

Having concluded that there was no intention to include the after-born, it is unnecessary to inquire what would have been the result, had they been included. It is not conceded, however, that it would have destroyed the transmissibility of their interests. For, in the case supposed, in the absence of words importing survivorship, could it be said that the existence of the remaindermen at the time of the event constituted the contingency upon which they were to take?

The foregoing construction of the deed and its limitations harmonizes and gives effect to all parts of it, and gives effect to the intention of the grantor, without violating any rule of law, and it is not at variance with any of the decisions of this court which are relied upon to sustain the circuit decree, as examination of the cases will show.

Adams v. Chaplin, 1 Hill, Eq. 265, is not in point, for that was the construction of a will in which the limitation over was held to be void, because it was too remote, being after an indefinite failure of issue. *Moore v. Sanders*, 15 S. C. 440, 40 Am. Rep. 708, was also a devise of a fee simple absolute, "to dispose of as he may think fit," but, if he should die without leaving a will, over. The limitation over was held to depend upon a

condition subsequent which was void, because repugnant to the estate devised. It was like the devise in *McAllister v. Tate*, 11 Rich. 509, 73 Am. Dec. 119, which was "in fee simple for life." *Edwards v. Edwards*, 2 Strob. Eq. 101, was a deed to W. and T., their heirs and assigns forever, under and subject to this proviso: That, if the said W. or T. should die without lawful issue of their bodies, over. The proviso was clearly and irreconcilably repugnant to the absolute estate first granted, and therefore void. Besides, the limitation over was after an indefinite failure of issue, and void for remoteness. *Allen v. Fogler*, 6 Rich. 54, was a deed to A. "and the heirs of her body, and in case of her death before she has an heir," over. The limitation over was void as an attempt to limit a fee upon a fee conditional. *Ex parte Yown*, 17 S. C. 532, was a deed to S. her heirs and assigns (for and during her natural life, should she die without issue). Habendum unto "S. her heirs and assigns, for and during her natural life, as aforesaid. Should she die without bodily issue the said tract of land to revert to the children of D. But should she have a child or children, then the said land to rest (vest?) in them absolutely forever." Held, that the estate first conveyed was a fee simple absolute, and that the subsequent words were repugnant to that estate, and that the limitation over was an attempt to create an executory devise which could not be done by deed. *Glenn v. Jamison*, 48 S. C. 316, 26 S. E. 677, was a deed to H. "her heirs and assigns forever * * * provided, nevertheless, these presents are upon the condition that should H. die leaving no lawful issue of her body, over. Habendum to H. her heirs and assigns forever, subject to the conditions and limitations hereinbefore expressed," followed by a general warranty to H. her heirs and assigns. Held, that H. took a fee simple absolute. The proviso was clearly and irreconcilably repugnant to the absolute estate first granted, and therefore void. *Clinkscales v. Clinkscales*, 91 S. C. 59, 74 S. E. 121, and *Egan v. Touchberry*, 93 S. C. 569, 77 S. E. 706, are both cases in which the grant of a fee simple absolute is followed by words imposing conditions and limitations clearly and irreconcilably repugnant to the grant. *Chavis v. Chavis*, 57 S. C. 173, 35 S. E. 507, was a deed to S. upon condition that she hold and enjoy it for life, and, "after her death, to go to all her children." Other conditions not pertinent to the construction followed. Habendum, unto S. "her heirs and assigns forever." Held that, by the granting clause, S. took a life estate, and her children took a life estate after her; that the habendum enlarged her life estate into a fee simple, the main intention, as gathered from the whole deed, being to vest a fee simple in her; that the life estate to the children was a secondary intention and was repugnant to the main intention and to the fee thereby creat-

ed. It will be seen at once that this deed is more nearly like the deed in this case than any of the others—especially in that resort was had to the habendum to enlarge the estate previously given, and thereby destroy an estate intermediately given. But it is materially different, in that there is no qualification of the use of the words "heirs and assigns" in the habendum, which are to "S. her heirs and assigns forever"; while here those words are expressly made "subject to the limitation over as aforesaid." Another radical difference is that, upon consideration of the whole deed in that case, the intention appeared to give S. a fee simple absolute, while a like consideration of the deed in this case shows no such intention, but, as has been shown, the intention that John's estate should determine on his death without issue. Judgment reversed.

WATTS and GAGE, JJ., concur.

FRASER, J. (dissenting). This deed is very unusual in form, and therefore the general statement of rules in the various authorities are not in my judgment applicable. As a general rule, the office of the premises is to designate the grantor, the grantee, the consideration, and the thing granted. In the habendum we look for the estate granted. In the premises the grant being made to the grantee and nothing more, there is conveyed a life estate only, and the remainder after the life estate remains in the grantor, and may be by him conveyed to the grantee. It is manifest that, while the grantor may enlarge the estate in the grantee by all or a portion of the estate that remains in him, he cannot dispose of any interest that has already been granted. It is manifest that in this deed Albert has not only granted an estate to John, but had given some sort of an estate to his (John's) "brothers and sisters." The entire residue of the estate, after John's life estate, did not belong to the grantor, and he could not grant to John the entire residue, because the remainder had already passed out of him. In other words, the estate had already been made defeasible and a contingent interest in favor of the brothers and sisters granted that the grantor could not revoke, and was not his to release.

In *Chavis v. Chavis*, 57 S. C. 173, 35 S. E. 507, words were transferred from the premises to the habendum in order that the purpose of the deed might not be defeated and the intention carried out. In this deed, it is as clear to me, as can be, that Albert intended that, if James or John died without issue, the portion of the one "so dying without issue" should go to his "brothers and sisters." The reiterated statement "in season and out of season" makes certain the intention.

The next question is: What interest did the "brothers and sisters" take? The answer to that question depends upon whether the

gift was to individuals or to a class. The grant was to the "brothers and sisters." The court frequently looks to the circumstances to determine the meaning of the words used. John had but one brother, and the individuals did not fit the class.

In *McMeekin v. Brummet*, 2 Hill, Eq. 638, there were individuals in being who composed the entire class, and it was as if they had been named. In *Brown v. McCall*, 44 S. C. 503, 22 S. E. 823, the grant was to children by a predeceased husband. The individuals of that class were complete and the interest transmissible. It is claimed that there is a distinction between a deed and a will. There is a distinction. The "deed" speaks from its date, a "will" from the death of the testator. More latitude is allowed in wills, but a contingent interest may be created by either.

If the grantor had said "brother and sisters," then it would have been clear that the gift over was to individuals, and they would have taken subject to the contingency that John should die without issue.

It may seem strange that a single letter should change the disposition of so valuable an estate; but, when the change of a letter will change the idea, there is no power in the court to disregard the letter. There is here a double contingency, to wit, the death of John without issue, and the survival of the contingency. There is no word substituting any one for deceased members of the class.

I think James takes as the sole survivor of the class.

GARY, C. J. (dissenting). The following statement appears in the record:

"This action was brought by the plaintiff, in 1913, for the partition of about 1,240 acres of land, being half of a tract of land formerly owned by Albert J. Clinkscales. On February 29, 1876, the said A. J. Clinkscales made a deed of the entire tract, and it is the construction of this deed that is involved in this case. At that time A. J. Clinkscales had a wife, Sarah, two sons, John T. and Jas. F. Clinkscales, and two daughters, Ellen Clinkscales who married Sullivan, and Elizabeth Clinkscales who married Sherard. The said A. J. Clinkscales died in 1895. His wife, the said Sarah Clinkscales, never married again, and died in 1910. The two daughters of the said A. J. Clinkscales predeceased him, each leaving as her only heir at law a daughter; the plaintiff Florence Sullivan Smith being the daughter of the said Ellen, and the defendant Ellen Sherard Thomson being the daughter of Elizabeth."

The following is a copy of the deed hereinbefore mentioned (omitting the covenant of warranty, which is in the usual form):

"Know all men by these presents that I, Albert J. Clinkscales, of the county of Abbeville, of the state aforesaid, for and in consideration of the natural love and affection I have and bear for my two sons, James F. Clinkscales and John T. Clinkscales of the said state and county, have granted, bargained, sold and released unto the — James F. Clinkscales and John T. Clinkscales, all that plantation or tract of land in said state, and county of Abbeville, containing twenty-four hundred and twenty-six acres, more or less, in the following

way and manner, and with the limitations and reservations below expressed, namely, the western half or moiety of the said tract of land to James F. Clinkscales, and the eastern moiety or half to John T. Clinkscales, between whose parts or moieties a division line will be run hereafter through the said land by the said Albert J. Clinkscales, dividing the said tract, and when so divided, the said moieties and part will be held in severalty by the said James F. Clinkscales and John T. Clinkscales, respectively, with this limitation, if either the said James F. Clinkscales or John T. Clinkscales should die leaving no issue living at the time of his death, the brothers and sisters of the said James F. Clinkscales and John T. Clinkscales, who may die without issue aforesaid shall take, have and hold such lands, to them, the said brothers and sisters, their heirs and assigns as tenants in common in fee simple, the said Albert J. Clinkscales reserving, retaining and allowing to himself notwithstanding these presents, the right to use, possess, and enjoy the said tract and moieties thereof, without rent or return until the said James F. Clinkscales and John T. Clinkscales shall respectively attain the age of twenty-one years, and also the said Albert J. Clinkscales reserving, retaining and allowing for himself, a life interest of a moiety or half, in each of the moieties or parts when divided between James F. Clinkscales and John T. Clinkscales, as aforesaid. * * * Together with all and singular the rights, members, hereditaments and appurtenances to the premises belonging or in anywise incident or appertaining. To have and to hold, all and singular, the said premises and the moieties when division is made as aforesaid to the said James F. Clinkscales and John T. Clinkscales, respectively, and their heirs and assigns respectively, subject to the limitation over to their brothers and sisters, as aforesaid, and reservation of interest and use to Albert J. Clinkscales as aforesaid."

If this had been a will instead of a deed, it would not admit of controversy that the words therein used would have created an executory devise. An executory devise cannot, however, be created by deed. *Rutledge v. Fishburne*, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757. The deed contemplated that A. J. Clinkscales should enjoy the use of all the lands until James F. Clinkscales and John T. Clinkscales attained the age of 21 years; and that, after the land was divided, A. J. Clinkscales should have the use of a moiety during his lifetime, in each of the shares allotted by him to his respective sons. The deed also provided that, when the provision was made, the shares of the said sons should be held in severalty. When A. J. Clinkscales died in 1895, no other persons than James F. Clinkscales and John T. Clinkscales any longer had a life estate in the whole or any part of the moieties assigned to them in said lands. They therefore at that time were vested with the fee in the lands assigned to each of them. If it was intended that the conditional limitation mentioned in the deed was to become effective during the lifetime of A. J. Clinkscales, then that no longer presents an open question; for the reason that John T. Clinkscales did not die without issue living at the time of his death, as he did not die until 1912, whereas his father died in 1895. But, on the other hand, if the contingency upon which the sisters were to become entitled to the share of the

brother dying without leaving issue living at the time of his death was intended to take effect after the fee had become vested, then the conditional limitation which had the characteristics of an executory devise was inoperative and invalid.

"An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the deviser, but only on some future contingency. It differs from a remainder in three very material points: (1) That it needs not any particular estate to support it. (2) That by it a fee simple, or other less estate, may be limited after a fee simple. * * *" 2 Bl. Com. 173.

In the present case, the conditional limitation upon which the sisters were intended to become entitled to an interest in the lands was not supported by a precedent particular estate, nor could it be given effect without mounting a fee upon a fee, as the sons became vested with the entire fee as soon as A. J. Clinkscales died in 1895, whereas the rights of the sisters could not accrue until the death of John T. Clinkscales in 1912, during which time, as we have shown, the conditional limitation was not supported by a precedent particular estate. There was never any time, from the execution of the deed until the death of John T. Clinkscales, when the sisters were vested with any estate whatever.

The main case relied upon to show error on the part of his honor the circuit judge in construing said deed is *Bowman v. Lobe*, 14 Rich. Eq. 271. The syllabus of that case is as follows:

"A., by deed, assumed to be valid as a covenant to stand seized to uses, conveyed certain tracts of land to his six sons by name 'during their natural life,' and 'if any of my sons die without an issue of the body,' remainder to the sons then living. He then by the same deed conveyed other lands to his four daughters for life, with remainder to the survivors, on the same contingency. And, further, after reserving to himself a life estate in all the lands, he directed that 'at my death it,' meaning all the lands, 'shall be immediately transferred to my sons and daughters as above mentioned, to their heirs or assigns.' B., one of the sons, survived A., and then died, without issue, leaving two of his brothers surviving him. Held, that B.'s estate in the lands did not descend to his heirs, and therefore that his share could not be subjected to the claims of his creditors."

We are content to call attention to the following facts:

(1) That the question now before the court was not considered in that case, is shown by the conclusion of the court which was as follows:

"This case does not involve any question between brothers and the children of a predeceased brother, nor any concerning accruing shares, and no limitation of opinion upon any of those questions is intended to be made."

(2) The brother who died without issue of his body had a life estate in the property, and that was a sufficient precedent estate to support the contingency upon which the property was to go to others, who were also vested with life estates.

(3) The court in that case recognized the characteristics of an executory devise, and sustains the doctrine that an executory devise is inapplicable to a deed.

For these additional reasons, to those assigned by his honor the circuit judge, I dissent.

BANK OF JOHNSTON v. FRIPP et al. (No. 9107.)

(Supreme Court of South Carolina. May 17, 1915.)

Appeal from Common Pleas Circuit Court of Edgefield County; J. W. De Vore, Judge.

Action by the Bank of Johnston against W. C. Fripp, William Weston, E. C. L. Adams, and J. H. White. From a judgment for plaintiff, defendants W. C. Fripp, William Weston, and E. C. L. Adams appeal. Dismissed.

Weston & Aycock and Frank G. Tompkins, all of Columbia, for appellants. Sheppard Bros., of Edgefield, for respondent.

GARY, C. J. This is an appeal from an order striking out certain allegations of the answers on the ground that they were sham, and in allowing the plaintiff to apply for judgment by default.

The ruling of his honor the presiding judge is fully sustained by the cases of *Germofert Co. v. Castles*, 97 S. C. 389, 81 S. E. 665, and *Interstate Ch. Cor. v. Farmington Cor.*, 84 S. E. 710.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

SETZER v. PLONK et al. (No. 488.)
(Supreme Court of North Carolina. May 12, 1915.)

Appeal from Superior Court, Cleveland County; Adams, Judge.

Action by John Setzer against M. L. Plonk and another. Judgment for plaintiff, and defendants appeal. No error.

This is a civil action, upon these issues:

(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

(3) Did the plaintiff assume the risk of being injured in the manner in which he was injured, as alleged in the answer? Answer: No.

(4) What damage, if any, is plaintiff entitled to recover? Answer: \$100.

The defendants appeal.

Ryburn & Hoey, of Shelby, for appellants.

PER CURIAM. We have examined the record in this case, and the several exceptions. We find them to be without merit. His honor followed the well-settled principles of the law of negligence in his instructions to the jury in this case.

No error.

ROBINSON v. HUFFSTETLER. (No. 442.)
(Supreme Court of North Carolina. May 5, 1915.)

Appeal from Superior Court, Gaston County; Shaw, Judge.

Action by I. S. Robinson against Ed. S. Huffstetler. Judgment for plaintiff, and defendant appeals. Affirmed.

The action was to recover two mules alleged to have been wrongfully detained by the defendant, and damages alleged to have been sustained by the plaintiff.

The following are the issues submitted, and the answers thereto:

(1) Is the plaintiff the owner and entitled to the possession of the two black mare mules, as alleged in the complaint? Answer: Yes.

(2) What is the value of said mules? Answer: \$450.

(3) What damage, if any, is the plaintiff entitled to recover of the defendant by reason of the wrongful detention of the said mules? Answer: None.

Mangum & Wolts and A. C. Jones, all of Gastonia, for appellant. Mason & Mason and Geo. W. Wilson, all of Gastonia, for appellee.

PER CURIAM. This case was before this court at spring term, 1914, and is reported in 165 N. C. 459, 81 S. E. 753. In the opinion of Mr. Justice Allen, the law applicable to the facts of this case is fully discussed, and in the last trial the court below has carefully followed the opinion of this court. The matters submitted to the jury were largely questions of fact and have been determined by the jury under a charge free from error.

We have examined the several assignments of error, and find them to be without merit.

No error.

McLEMORE v. RANDOLPH & C. RY. CO.
(No. 409.)

(Supreme Court of North Carolina. April 28, 1915.)

Appeal from Superior Court, Moore County; Rountree, Judge.

Action by W. J. McLemore against the Randolph & Cumberland Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages caused, as the plaintiff alleges, by the negligence of the defendant in setting out fire upon its right of way which was communicated to the land of the plaintiff. There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Geo. H. Humber, of Carthage, for appellant. G. W. McNeill and H. F. Seawell, both of Carthage, for appellee.

PER CURIAM. This appeal is controlled by the case of McRainey v. Railroad, 84 S. E. 851, decided at this term, and upon that authority the judgment is affirmed.

No error.

